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**The Commission for Equality
and Human Rights and the
Enforcement of Discrimination
Legislation: an Effective
Balance between Individual
Litigant Support and the Use of
Strategic Regulatory
Mechanisms?**

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Abstract

This thesis will consider current domestic anti-discrimination legislation and its associated institutional support structure in the light of the Government's creation of a Commission for Equality and Human Rights (CEHR). The CEHR incorporates and merges the existing equality Commissions, namely, the Commission for Racial Equality, Equal Opportunities Commission and the Disability Rights Commission, and will also have responsibility for the promotion of Human Rights. In addition, the CEHR has been given a wide remit that encompasses the recent Employment Equality Regulations concerning discrimination on the grounds of religion or belief, sexual orientation, and age.

This thesis seeks to analyse the enforcement mechanisms bestowed upon the CEHR by the Equality Act 2006, against the backdrop of current anti-discrimination legislation and the enforcement provisions available to the existing equality Commissions. Such a consideration is of particular importance given the widespread prevalence of discrimination in modern society and the CEHR's ambitious remit. The issue is far from straightforward: there exists a particular tension between the use of the CEHR's strategic regulatory mechanisms and the provision of individual litigant support. It will be argued that, for example, emphasising positive duties, and the adoption of contract compliance, will provide a more effective platform from which to satisfy the CEHR's general duties, especially when considering the strict budgetary constraints it will be required to operate within.

Such considerations are to be measured not only against the intentions of the current and proposed legislation but also against the intended outcomes and aims of the CEHR itself, taking into account the experiences of the existing Commissions, particularly in recent years, during which the use of enforcement procedures have decreased substantially. Proposals will be put forward outlining possible alternate or additional approaches, and amendments to the CEHR's enforcement procedures.

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- Allonby v Accrington & Rossendale College* [2001] IRLR 364 (CA)
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Equality Act 2006
Equal Pay Act 1970
Human Rights Act 1998
Local Government Act 1988
Local Government Act 1999
Race Relations Act 1965
Race Relations Act 1968
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Rent Act 1977
Sex Discrimination Act 1975
Sexual Offences (Amendment Act) 2000

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Disability Discrimination Act (Amendment) Regulations 2003 (SI 2003/1673)
Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005/2966)
Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/752)
Employment Equality (Age) (Amendment No. 2) Regulations 2006 (SI 2006/2931)
Employment Equality (Age) Regulations 2006 (SI 2006/1031)
Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660)
Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661)
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Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001 (SI 2001/909)

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Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001/2660)

The Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263)

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Council Directive 2000/43/EC (Race Equality) OJ L 180/22, 19.7.2000

Table of Abbreviations

ACAS - Advisory Conciliatory and Arbitration Service
BVPI - Best Value Performance Indicator
CEHR - Commission for Equality and Human Rights
CIC - Commission for Integration and Cohesion
CRC - Community Relations Commission
CRE - Commission for Racial Equality
DCLG - Department for Communities and Local Government
DDA - Disability Discrimination Act 1995
DED - Disability Equality Duty
DRC - Disability Rights Commission
EA - Equality Act 2006
ECHR - European Convention on Human Rights
ECtHR - European Court of Human Rights
EOC - Equal Opportunities Commission
EqPA - Equal Pay Act 1970
ESLG - Equality Standard for Local Government
FFA - Fairness For All
FFF – Framework for Fairness
GED - Gender Equality Duty
IdeA - Improvement and Development Agency
MOU – Memorandum of Understanding
NDC - National Disability Council
NDN – Non Discrimination Notice
NDPB - Non Departmental Public Bodies
NICHR – Northern Ireland Commission for Human Rights
RB - Religion and Belief
REC – Race Equality Council
RED - Race Equality Duty
RRA - Race Relations Act 1976
RRAA - Race Relations (Amendment) Act 2000
RRB - Race Relations Board
SDA - Sex Discrimination Act 1975
SEA - Single Equality Act
SO - Sexual Orientation
WMCS - West Midlands Common Standard
WMF - West Midlands Forum

Chapter One

1. Introduction

The Commission for Equality and Human Rights (CEHR) established by the Equality Act 2006 (EA) will be an independent champion for equality across the grounds currently protected under existing discrimination legislation, while also seeking to strengthen good relations between people and encouraging compliance with the Human Rights Act 1998 (HRA). There is an important balance to strike between the promotional activities of the CEHR and the use of its enforcement mechanisms. It is argued within this thesis, that there is also a need to balance the use of strategic regulatory mechanisms against the provision of individual litigant support. After considering the existing anti-discrimination legislation and the CEHR's human rights remit in Chapter 2, by way of background, this thesis proceeds to consider the CEHR's enforcement powers in depth.

Chapter 3 examines the enforcement powers of the existing equality Commissions. Chapter 4 analyses the consultation process leading to the introduction of the EA. Chapter 5 critically considers the CEHR's enforcement powers. Chapter 6 suggests appropriate amendments to strike a more effective balance between strategic enforcement and individual litigant support, and to avoid regression in accordance with the Government's commitment. Chapter 7 concludes by considering the proposed Single Equality Act (SEA) in light of the arguments made within the thesis.

Chapter Two

2. Anti-Discrimination Legislation in the UK and Europe

The current anti-discrimination legislation, which the CEHR will seek to enforce, provides the 'skeleton' to be 'fleshed out' by existing and innovative methods of tackling discrimination, such as the introduction of positive duties. As the following discussion shows, domestic discrimination law has developed in a piecemeal fashion, with numerous supplementary provisions created over the years by way of Acts of Parliament and (more recently) Statutory Instruments. The Hepple Report criticises the legislative framework, illustrating the fact that there is "too much law"¹ with a complete analysis of all relevant legislation: a list which has subsequently been updated as an effective way of demonstrating the sheer complexity and scale of anti-discrimination legislation (with over 70 Acts and Statutory Instruments and over a dozen Statutory Codes of Practice, not including numerous EC Directives directly concerning discrimination). The interplay between discrimination law and human rights is also examined, to demonstrate that the lack of a consistent and comprehensive legislative framework makes the CEHR's human rights role particularly important, in order to stretch the boundaries of existing legislation and to resolve potential conflict between the various grounds.

2.1. Domestic Anti-Discrimination Legislation

Prohibitions against discrimination have historically had a strong presence in international law. The original Universal Declaration of Human Rights,² adopted and proclaimed by the General Assembly of the United Nations in 1948, recognised the importance of equality rights, making these principles particularly prominent within the Declaration itself, not only the preamble. Although most international provisions concerning discrimination are not directly applicable or enforceable in UK courts, they have been influential. The courts have been keen to adopt an interpretation of domestic law consistent with international standards, in cases of ambiguity. Before the HRA made it directly applicable in the domestic context,

¹ Hepple, B, QC, Coussey, M and Choudhury, T, 'Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation' (2000) Oxford: Hart Publishing, p.21.

² General Assembly of the United Nations, Universal Declaration of Human Rights, 10 December 1948.



the European Convention of Human Rights (ECHR) had been particularly influential.³ However, it was 25 years before the HRA that the first legislative provisions to tackle discrimination, which have their origins in labour law, were introduced.

The Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA), despite extensive amendment, remain the cornerstones of UK anti-discrimination legislation. The Disability Discrimination Act 1995 (DDA) may also be associated with these acts, notwithstanding its exceptions and differences, for it introduced similar restrictions on discrimination affecting those with disabilities. These Acts established, respectively, the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC), which provide institutional support for the grounds of discrimination covered by the respective aforesaid Acts.

2.1.1. Sex Discrimination Act

The SDA prohibits discrimination against both women⁴ and men⁵ in relation to employment, education, housing and the provision of goods, facilities and services. The SDA also protects against direct discrimination on the grounds of gender reassignment,⁶ although only in the fields of employment and vocational training. Likewise, discrimination based on an individual's marital status⁷ is prohibited, but only in relation to employment.

Alongside the SDA, the Equal Pay Act 1970 (EqPA) exists to eliminate discrimination based on sex. However, the EqPA is concerned with "terms...of a contract",⁸ the most obvious example of its remit being the elimination of discrimination in pay. It also applies to discrimination in other areas such as holiday entitlement, working hours or 'fringe benefits'.

The SDA is concerned with issues not directly regulated by the contract of employment such

³ Lord Bridge (in *R. v Secretary of State for the Home Department Ex p. Brind* [1991] 1 AC 696 (HL) at p.747-748) affirmed the principle, specifically in relation to the ECHR, that the interpretation most consistent with the UK's international obligations would be adopted: "it is already well settled that in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it". Earlier, in *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 (HL) at p.771, Lord Diplock had affirmed that this principle of interpretation applies to international obligations in general.

⁴ SDA 1975, s.1.

⁵ *ibid.* s.2.

⁶ Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102) inserting s.2A into the SDA 1975.

⁷ SDA 1975, s.3.

⁸ EqPA 1970, s.1(2).

as job offers and dismissals. If the EqPA is deemed not to apply then a claim may be brought under the SDA, except where the benefit concerns an issue of pay.⁹ This is an important distinction because under the SDA a claim may be permitted alleging discrimination based on how a man *was or would* have been treated, whereas the EqPA calls for an *actual* male ‘comparator’. The remit of the EOC nonetheless extends into areas covered by the EqPA, as illustrated by the EOC’s Code of Practice on equal pay.¹⁰

Women have been historically discriminated against and the resulting disadvantage can have a profound detrimental effect on their lives. Despite the SDA seemingly providing a level of protection which might alleviate such discrimination, there exist many factors which serve to perpetuate the disadvantage women might face (such as economic dependency on a partner, or childcare responsibilities), especially in the workplace, and which consequentially have a significant impact on pay.¹¹ Many other disadvantaging factors such as domestic violence and sexual assault remain untouched by the SDA, and a major advance in this respect is the introduction of the Gender Equality Duty,¹² bringing the SDA into line with the RRA as regards the imposition of positive obligations upon public authorities.

2.1.2. Race Relations Act

Like women, people from ethnic minority groups have historically suffered discrimination and disadvantage.¹³ This is particularly apparent in (but in no way confined to) the criminal justice system, as demonstrated by the racially motivated murder of Stephen Lawrence and the subsequent findings of the Macpherson Inquiry¹⁴ highlighting the existence of widespread ‘institutional racism’ within the police force. Race discrimination is also located in the armed services, education and throughout the employment sphere despite the efforts of

⁹ See Lester, A and Rose, D, ‘Equal value claims and sex bias in collective bargaining’ (1991) 20 ILJ 163 for consideration of the two Acts in relation to collective bargaining, whereby it is proposed that collective bargaining is covered by the SDA irrespective of the position under the EqPA.

¹⁰ EOC, ‘Code of Practice on Equal Pay’ (December 2003) <<http://www.eoc.org.uk/default.aspx?page=16997>>.

¹¹ For a further consideration of pay, with particular reference to work which has been rated as equivalent under s.1(2)(b) of the EqPA, see McCrudden, C, ‘Equal Pay for work of equal value: the Equal Pay (Amendment) Regulations 1983’ [1983] 12 ILJ 197.

¹² See below, section 3.6. - Gender Equality Duty.

¹³ As most recently illustrated by the commemoration, which attracted national attention, of the Abolition of the Slave Trade Act, adopted on 25 March 1807.

¹⁴ Sir William Macpherson of Cluny, ‘The Stephen Lawrence Inquiry’ (Cm 4262-I, 1999).

the CRE, which has conducted high profile investigations into named bodies¹⁵ in the hope of highlighting the existence of and eradicating such discriminatory behaviour.

The RRA has been amended by the Race Relations (Amendment) Act 2000 (RRAA) and the Race Relations Act 1976 (Amendment) Regulations 2003. It now places a general positive duty¹⁶ (known as the Race Equality Duty (RED)) upon specific public authorities not only to eliminate unlawful discrimination, but also to promote equality of opportunity and good relations.¹⁷ Additionally, it is unlawful for public authorities to discriminate against an individual on the grounds of race when carrying out any of their functions.¹⁸ When coupled with the extension of vicarious liability to chief police officers for any discriminatory acts occurring within their jurisdiction,¹⁹ this considerably improves the scope of race discrimination legislation. In consequence, this legislation is much more adept at dealing with discriminatory practices exposed by the Macpherson Inquiry. Like the SDA, the RRA prohibits discrimination in the areas of employment, education, housing and the provision of goods and services.²⁰

2.1.3. Disability Discrimination Act²¹

The DDA covers discrimination relating to employment, education, premises and transport, and the provision of goods, facilities and services. Its starkest distinction, by comparison to the SDA and RRA, is its lack of an explicit provision concerning indirect discrimination. In place of such a provision is a duty to make 'reasonable adjustments' which applies to employment,²² providers of further and higher education,²³ and the provision of goods, facilities and services.²⁴ The duty has had a far-reaching effect since its introduction (in

¹⁵ A recent example being the Formal Investigation into the Police Service in England and Wales, launched publicly on 1 March 2004, with the findings being published a year later. See http://www.crc.gov.uk/downloads/policefi_final.pdf.

¹⁶ RRA 1976, s.71.

¹⁷ See below, section 3.5. - Race Equality Duty.

¹⁸ RRA 1976, s.19B.

¹⁹ RRA 1976, ss.76A and B as inserted by s.4 of the RRAA 2000.

²⁰ For a further discussion of race discrimination legislation see Monaghan, K, 'Challenging Race Discrimination in the Private Sector: Strengths and Weaknesses of the Present Legislative Model' (2005) Policy Studies Institute <<http://www.psi.org.uk/eeps/presentations/seminar2/monaghan-paper.pdf>>.

²¹ For a critical analysis of the DDA 1995 see Doyle, B, 'Enabling legislation or disassembling law? The Disability Discrimination Act 1995' (1997) 60 MLR 64.

²² DDA 1995, Part 2, s.6.

²³ *ibid.* Part 4, s.28T.

²⁴ *ibid.* Part 3, s.21.

stages), as it affects not only public authorities but also all those providing goods, facilities or services to the public. This effect is even more apparent since the Disability Discrimination Act (Amendment) Regulations 2003²⁵ (implementing the Equal Treatment at Work Directive²⁶) removed the exemption previously given to employers of less than 15 workers (known as the 'small firms exemption'). The Disability Regulations bring the DDA somewhat more into line with the SDA with regards to direct discrimination, as it is no longer possible to justify less favourable treatment that amounts to direct discrimination.²⁷ In addition, it is no longer possible to use the defence of justification²⁸ in an employment context for a failure to make reasonable adjustments.²⁹ In line with the Employment Directive, the Disability Regulations also provide a freestanding right of protection from harassment³⁰ similar to that of the other protected grounds.

The disability discrimination legislation was the first to break free from some of the constraints and weaknesses of the SDA and RRA. Although the 'affirmative action' contained within the DDA may be considered objectionable in principle, given that it involves the conscious decision to exercise preferential treatment, potentially leading to 'positive discrimination', this may be defended given that the majority of disabled people will be unable to access services or effectively perform employment roles until specific accommodation is made for their needs.³¹ A change to the legislative approach of the SDA and RRA was needed primarily because of the unique issues arising in the area of disability, that cannot be effectively dealt with through a traditional 'formal' approach to equality employing exactly the same principles as sex and race discrimination legislation. Under the DDA, it is recognised that 'reasonable adjustments' are required to deliver equal opportunities for those with disabilities, by accommodating their needs. Specifically, as

²⁵ Disability Discrimination Act (Amendment) Regulations 2003 (SI 2003/1673).

²⁶ Council Directive 2000/78/EC (Employment Equality) OJ L 303, 2.12.2000 pp.16-22.

²⁷ DDA 1995, s.3A(4) as introduced by the Disability Discrimination Act (Amendment) Regulations 2003 (SI 2003/1673).

²⁸ For a critical analysis of the interpretation of the justification defence in the DDA 1995 see Davies, J, 'A Cuckoo in the Nest? A "Range of Reasonable Responses", Justification and the Disability Act 1995' (2003) 32 ILJ 164.

²⁹ DDA 1995, s.3A(6) as introduced by SI 2003/1673.

³⁰ DDA 1995, s.3B as introduced by SI 2003/1673.

³¹ The use of positive measures sits much more comfortably with a substantive as opposed to a formal approach to equality, although weaknesses have been identified in both approaches. See Fredman, S, 'The Future of Equality in Britain' (2002) EOC Working Paper Series No. 5, pp.3-7
<<http://www.eoc.org.uk/Default.aspx?page=16089&lang=en>>.

regards disability, direct discrimination exists if a claimant has been subject to a detriment as a result of his or her disability. Accordingly “the aim of neutrality has clearly been replaced by a focus on the disadvantaged group”³² which is a welcome move. However, despite the duty to make ‘reasonable adjustments’ signalling an acceptance of the use of positive duties, this duty is perhaps more limited than the concept of indirect discrimination it replaces, because “it provides individual solutions to individual problems rather than identifying and removing barriers in advance”.³³ As Fredman suggested in 2002, even if this duty were supplemented with a prohibition against indirect discrimination, this would still not provide effective protection given that such barriers could in many instances be justified and will therefore not require removal.³⁴ It is noted however that Fredman’s concern seems to have been largely met by the removal of the justification defence in the employment context (as discussed above) and in relation to post-16 education providers (below), which would suggest that a supplementary prohibition against indirect discrimination would now be useful.

Additional amendments to disability discrimination legislation have primarily focused upon implementing the Employment Directives³⁵ insofar as they relate to further and higher education institutions (Part 4, DDA 1995). As of September 2005, all post-16 education providers were required to make reasonable adjustments to their premises, where physical features put disabled people at a substantial disadvantage. The Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006, as of September 2006, similarly removed the justification defence for a failure to make such reasonable adjustments (as they relate to post-16 education providers).³⁶

³² *ibid.* p.5.

³³ *ibid.* p.7.

³⁴ *ibid.* p.7.

³⁵ Council Directive 2000/78/EC (Employment Equality) OJ L 303, 2.12.2000 pp.16-22.

³⁶ For a further consideration of the effects of the Framework Employment Directive on domestic disability discrimination law see Wells, K, ‘The Impact of the Framework Employment Directive on UK Disability Discrimination Law’ (2003) 32 ILJ 253, which focuses specifically upon the definition of disability and the duty to make reasonable adjustments.

2.2. Introduction of the Employment Equality Regulations³⁷ and subsequent extension under the Equality Act 2006

The Employment Equality Regulations 2003, implementing the Framework Directive on Equal Treatment,³⁸ deal exclusively with discrimination on the grounds of sexual orientation, religion or belief, and age. The EA provides for additional legislative amendments extending the scope of discrimination on those grounds, as well as establishing, defining and outlining the purpose, function, duties and powers of the CEHR. The EA also introduced the Gender Equality Duty, which will be discussed in the next chapter.³⁹

2.2.1. Sexual Orientation⁴⁰

The Sexual Orientation Regulations⁴¹ came into force on 1 December 2003 and represented the first move towards prohibiting discrimination on the basis of sexual orientation, overcoming a major gap in the protection for homosexual and bisexual individuals who had previously argued, unsuccessfully, that ss.1 and 2 (defining, respectively, direct and indirect discrimination against men and women)⁴² and s.5(3) (defining a 'comparator') of the SDA should be interpreted as protecting them against discrimination in the context of employment.⁴³

The Sexual Orientation Regulations were originally limited to the area of employment and vocational training, making them far more restrictive than the provisions concerning sex, race and disability, despite providing similar protection against direct and indirect discrimination (Regulation 3), victimisation (Regulation 4) and harassment (Regulation 5). Although this may have been seen to create a hierarchy of protection, the Government, through s.81 of the EA, empowered the Secretary of State to introduce Regulations to extend

³⁷ See Ball, M, 'Article 13: The European Commission's Anti-Discrimination Proposals' (2000) 29 ILJ 79 for a brief discussion of EU anti-discrimination law proposals prior to their incorporation into domestic law.

³⁸ Council Directive 2000/78/EC (Employment Equality) OJ L 303, 2.12.2000 pp.16-22.

³⁹ See below, section 3.6. - Gender Equality Duty.

⁴⁰ For a critical analysis of the Sexual Orientation Regulations see, Oliver, H, 'Sexual Orientation Discrimination: Perceptions, Definitions and Genuine Occupational Requirements' (2004) 33 ILJ 1 who argues that the regulations have not recognised some of the unique and aspects of sexual orientation as a protected characteristic, which is attributed in part to the uniform approach that is being adopted towards the different strands of protection.

⁴¹ Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661).

⁴² See *R. v Ministry of Defence, Ex p. Smith* [1996] QB 517 (CA), *Grant v South West Trains* [1998] ECR I-621 (C249/96) and *Smith v Gardner Merchant Ltd* [1999] ICR 134 (CA).

⁴³ See *MacDonald v Ministry of Defence* [2003] ICR 937 (HL).

the prohibition against sexual orientation discrimination to cover the provision of goods, facilities and services, the exercise of public functions, education, the disposal and management of premises, the prohibition of discriminatory advertisements, and instructing or causing discrimination. This power was exercised in December 2006. The extension followed the publication of the consultation document 'Getting Equal'⁴⁴ on 13 March 2006, seeking views on the range of activities that should be covered and the exceptions (if any) that should be provided to ensure that the proposed Regulations would be effective and appropriately targeted.⁴⁵

The amended Regulations⁴⁶ came into force on 30 April 2007 and closely replicate the extension of the Religion or Belief Regulations under Part II of the EA. In relation to extending measures to protect against harassment outside the workplace, however, the Government has indicated its intention to consider how this should be addressed as part of the Discrimination Law Review, and has not included it as a separate instance of unlawful discrimination. Despite an initial lack of protection against harassment, the extension of the Sexual Orientation Regulations is to be warmly welcomed for it further enhances the protection provided, to a level comparable with the SDA.

The Regulations specify four general exceptions: where an individual's sexual orientation is a 'genuine occupational requirement' (Regulation 7); for acts done to safeguard national security (Regulation 24); for positive action (Regulation 26); and for benefits dependent on marital status (Regulation 25). Fortunately, as regards the latter exception, the Government has sought to create parity of treatment on a wide array of legal matters, between same-sex couples and opposite-sex couples who enter into marriage, via the Civil Partnership Act 2004, which came into force on 5 December 2005. Same-sex couples entering into civil partnerships are provided with similar rights and responsibilities to opposite-sex married couples, in important areas such as employment and pension benefits. The extension of these

⁴⁴ Women & Equality Unit, 'Getting Equal: Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods & Services' (13 March 2006) <http://www.stonewall.org.uk/documents/getting_equal_march_2006.pdf>. The consultation period ran until 5 June 2006.

⁴⁵ The extension of the Sexual Orientation Regulations came into effect across the UK on the 6 April 2007 and came into effect in Northern Ireland on the 1 January 2007. The extended Regulations have come under considerable attack from religious and faith groups and despite calls for them to be annulled, the House of Lords upheld the Regulations on the 9 January 2007 by a majority of 199 to 68 votes.

⁴⁶ The Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263).

rights is to be welcomed, as they strengthen the rights of lesbian, gay and bisexual people, building upon other areas of recent progression such as the repeal of s.28 in the Local Government Act 2003⁴⁷ and the levelling of the age of consent to intercourse for homosexuals in 2001.⁴⁸

2.2.2. Religion or Belief⁴⁹

Like the Sexual Orientation Regulations, the Government introduced Religion or Belief Regulations,⁵⁰ which came into effect on 2 December 2003, to comply with its European Community obligations.⁵¹ This was a welcome and necessary addition following various attempts to challenge religious discrimination utilising existing anti-discrimination, human rights and employment law. Some religious groups were successful: the House of Lords in *Mandla v Dowell Lee*⁵² held Sikhs to be an 'ethnic group' as well as a religious community, and therefore protected by the provisions of the RRA.⁵³

The Regulations provide protection with regard to any 'religion, religious belief or similar philosophical belief' as detailed in Regulation 2(1). As with the Sexual Orientation Regulations, direct discrimination (Regulation 3(1)(a)), indirect discrimination (Regulation 3(1)(b)), and victimisation (Regulation 4) are covered. Although the original RRA did not expressly protect against harassment, case law demonstrated that racial harassment was a detriment capable of amounting to treatment prohibited by the RRA.⁵⁴ Under the Regulations as amended by the EA, however, harassment is specifically defined (Regulation 5), which provides additional clarity. Although protection was initially confined to the areas of employment and vocational training, it has been extended to cover goods, facilities and services (s.46 EA), premises (s.47 EA), education (s.49 EA) and the exercise of public

⁴⁷ This provision prohibited the 'promotion' of homosexuality by teaching or publishing materials, and applied to local authorities.

⁴⁸ This was achieved by way of s.1(1) of the Sexual Offences (Amendment) Act 2000.

⁴⁹ For a consideration of the protection afforded prior to the Religion and Belief Regulations (SI 2003/1660) see Cumper, P, 'The protection of religious rights under section 13 of the Human Rights Act 1998' [2000] PL 254.

⁵⁰ Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660).

⁵¹ Council Directive 2000/78/EC (Employment Equality) OJ L 303, 2.12.2000 pp.16-22.

⁵² *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548 (HL). Benyon, H and Love, N, 'Mandla and the Meaning of "Racial Group"' (1984) 100 LQR 120 provides a detailed consideration of this case and its implications.

⁵³ For a further consideration of case law concerning the application of the RRA on religious grounds see McKenna, I, 'Racial Discrimination' (1983) 46 MLR 759.

⁵⁴ See for example *Tower Boot Co Ltd v Jones* [1997] ICR 254 (CA) and *Burton v De Vere Hotels Ltd* [1997] ICR 1 (EAT) which, while primarily concerned with the employers' vicarious liability, both recognised the presence of racial harassment.

functions (s.52 EA), subject to exceptions, by way of Part II of the EA, which is a welcome extension providing protection for groups such as Muslims and Jews unable to satisfy the *Mandla v Dowell Lee*⁵⁵ test so as to claim comparable protection via the RRA.⁵⁶

The EA also contains a new, extended definition of religion and belief, (s.44 EA) removing the requirement that a philosophical belief must be 'similar' to a religious belief, and bringing the definition more into line with the Framework Employment Directive⁵⁷ the Regulations are intended to implement. Importantly, the new definition expressly protects those who are discriminated against because they lack a belief or religion: although the explanatory notes to the original Religion or Belief Regulations confirmed that a lack of religion and belief was covered, this amendment makes it explicit.

The definition of direct discrimination in Regulation 3(1) of the Religion or Belief Regulations has also been altered. The amendment now means that direct discrimination may be found even if it is not the *victim's* religion or belief that constitutes the grounds for discrimination. The new definition clarifies that an individual may still have unlawfully discriminated against another, even if they subscribe to the same religion or belief as,⁵⁸ or if they are mistaken as to the religion or belief of,⁵⁹ the victim. As stated in the explanatory notes accompanying the EA, protection against discrimination will not apply when the less favourable treatment in question has been motivated by, and is a requirement of, the religion or belief of the discriminator. The extension of protection against discrimination on grounds of religion or belief is to be welcomed not only for the consistency that this brings by comparison to the strands of sex, race and disability, but also for the fact that this somewhat remedies a long-standing anomaly whereby only members of certain religious groups have received protection.⁶⁰

⁵⁵ *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548 (HL).

⁵⁶ For a further consideration of the Religion or Belief Regulations see Vickers, L, 'The Employment Equality (Religion or Belief) Regulations 2003' (2003) 32 ILJ 188.

⁵⁷ Council Directive 2000/78/EC (Employment Equality) OJ L 303/16, 2.12.2000.

⁵⁸ EA 2006, s.45(1).

⁵⁹ EA 2006, s.45(2).

⁶⁰ Muslims did not receive protection under s.3(1) of the RRA covering discrimination on 'racial grounds' following the test laid down by Lord Fraser in *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548 (HL) as discussed above. Muslims were seen as a religious rather than ethnic group; the extension of the Religion or Belief Regulations will therefore substantially benefit Muslims and those who do not belong to any conventional religious group, given that their philosophical belief may fall within the scope of protection.

2.2.3. Age⁶¹

Since 1 October 2006 age discrimination has also been prohibited,⁶² in order to comply with the Employment Equality Directive.⁶³ The new Regulations prohibit both direct and indirect age discrimination,⁶⁴ harassment,⁶⁵ instructions to discriminate⁶⁶ and victimisation,⁶⁷ but only in the areas of employment and vocational training, which again is highly restrictive. In addition, as well as applying directly to retirement, the Regulations also remove the upper age limit for unfair dismissal and redundancy rights, which gives older workers the same rights to claim unfair dismissal or receive a redundancy payment as younger workers. With regard to retirement, the age is set at 65 unless the employer can show that having a lower retirement age is appropriate and necessary. An employer must inform the employee in writing, at least six months in advance of the intended retirement date, whereupon the employee may request to work beyond the compulsory retirement age; the employer has a corresponding duty to consider such a request.⁶⁸

2.3. European Convention on Human Rights

The ECHR was incorporated into domestic law by the HRA on 2 October 2000. Although the ECHR provides no freestanding right against discrimination (unlike the prescribed rights within the domestic context covering specific protected grounds) it does provide, within Article 14, that rights guaranteed under the Convention must be secured without discrimination 'on any ground *such as* (my emphasis) sex, race colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. This covers a far wider spectrum than the protected grounds under the current domestic anti-discrimination legislation. This is even more so given that

⁶¹ See Adamson, L, 'Age Discrimination - the New Regime' (2006) 6 Legal Information Management 302, which highlights the main provisions tackling discrimination on the grounds of age and the potential legal challenges to the Regulations themselves, which fall outside the scope of this thesis.

⁶² The Employment Equality (Age) Regulations 2006 (SI 2006/1031). These were closely followed by the Pension provisions in the Employment Equality (Age) (Amendment No.2) Regulations 2006 (SI 2006/2931), which came into force on 1 December 2006.

⁶³ Council Directive 2000/78/EC (Employment Equality) OJ L 303/16, 2.12.2000.

⁶⁴ SI 2006/1031, Regulation 3.

⁶⁵ *ibid.* Regulation 6.

⁶⁶ *ibid.* Regulation 5.

⁶⁷ *ibid.* Regulation 4.

⁶⁸ *ibid.* Schedule 6 - Duty to consider working beyond retirement.

the phrase ‘such as’ allows the European Court of Human Rights (ECtHR) to conclude that other grounds might contravene the Article. The remit of Article 14 could therefore be extended considerably.⁶⁹ Despite the overlap between human rights and equality, made obvious by the Universal Declaration and emphasised in academic writings (particularly the Joint Committee on Human Rights (JCHR) Reports⁷⁰), there was little concerted effort to “build bridges between the two jurisdictions”,⁷¹ until the White Paper ‘*Fairness for All*’ was introduced.

2.3.1. Importance and Drawbacks of the Protection Afforded Under the ECHR⁷²

The importance of the ECHR in the domestic context may be appreciated where a case of discrimination falls outside the scope of current legislation. Instead such cases could fall within the remit of the ECHR, giving an avenue of protection which would have been much more difficult to obtain prior to the implementation of the HRA. To seek redress for any UK legislation in breach of the ECHR, a victim would have been required to go to Strasbourg, win the case, and consequently get the ECtHR to require the UK to amend the legislation in question. Currently, under the ECHR, the applicant must show that he or she has suffered less favourable treatment than that of another person in a corresponding situation, and the defendant State has the opportunity to justify such *prima facie* discriminatory behaviour. Direct discrimination is therefore potentially justifiable, which contrasts starkly with the approach adopted in the UK. In order to justify discriminatory behaviour, the State must

⁶⁹ See Harris, D, O’Boyle, M, Warbrick, C, ‘Law of the European Convention on Human Rights’ (1995), Chapter 9, p. 470, fn. 43. “The Strasbourg authorities have characterised a large number of ‘other statuses’, including sexual orientation, marital status, illegitimacy, status as a trade union, military status, conscientious objection, professional status and imprisonment as falling within this residual category.” The first two of these are now covered within the UK, but the others emphasise the potential scope of Article 14.

⁷⁰ JCHR, ‘The Case for a Human Rights Commission’ Sixth Report of Session 2002–03’ (19 March 2003) HL 67-I/HC 489-I; JCHR, ‘Commission for Equality and Human Rights: Structure, Functions and Powers, Eleventh Report of Session 2003–04’ (5 May 2004) HL 78/HC 536; JCHR, ‘Commission for Equality and Human Rights: The Government’s White Paper, Sixteenth Report of Session 2003–04’ (4 August 2004) HL 156/HC 998; and the JCHR, ‘Equality Bill, Sixteenth Report of Session 2004–05’ (31 March 2005) HL 98/HC 497.

⁷¹ See Fredman, S, above at n.31, p.35.

⁷² For a consideration of equality in comparison to the constitution for the European Union proposed in June 2004, see Bell, M, ‘Equality and the EU Constitution’ (2004) 33 ILJ 242. See also, Barbera, M, ‘Not the Same? The Judicial Role in the New Community Anti-Discrimination Law Context’ (2002) 31 ILJ 82, which considers the role the courts will be required to perform in the protection of rights as a result of the recent changes to European Community anti-discrimination law.

identify a legitimate objective for such treatment and show that its method(s) of achieving that objective were proportionate and appropriate. The concept of equality adopted in the ECHR, which centres upon proportionality, differs distinctly from domestic anti-discrimination legislation, which has at its heart the well-established concepts of direct and indirect discrimination.

The proportionality test is a rather elastic concept as may be seen from its differential application across the various protected grounds, with discrimination on grounds of sex receiving the strictest application.⁷³ Unfortunately, the issue of its application signifies one of the main areas of weakness under the ECHR, because while the theoretical basis for the proportionality test may seem rigorous, its application has not been so.⁷⁴ States can in most instances identify a rational objective underlying their conduct towards the claimant, and the ECtHR will often take into account a State's discretion as to the appropriate manner in which to achieve that objective.⁷⁵ A wide 'margin of appreciation'⁷⁶ may be justified on the basis that there may be little common ground among States Party to the ECHR concerning many issues. This may ultimately be seen to have the effect of making it more difficult for claimants to prove discrimination. Although the principle adopted under the ECHR and upheld by the ECtHR, that 'likes should be treated alike', is generally accepted and defended despite its limitations, the fact that the approach adopted permits defendant States to provide a justification for their discriminatory behaviour, however overt, provides far weaker protection than that afforded by the prohibition against direct discrimination adopted within

⁷³ *Abdulaziz, Cabales and Balkandali v United Kingdom* (App no. 9214/80, 9473/81, 9474/81) (1985) 7 EHRR 471, para.78: "it can be said that the advancement of the equality of the sexes is today a major goal in the member-States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention."

⁷⁴ *The Belgian Linguistic Case (A/6)* (1979-80) 1 EHRR 252, para.254, "the principle of equality of treatment was considered to be violated only if the particular distinction had no objective and reasonable justification. The existence of a reasonable justification was to be assessed in relation to the aim and effects of the measure under consideration": therefore while the criteria itself may seem stringent its interpretation and application has not been so.

⁷⁵ Moreover, many cases decided before UK courts taking into consideration the HRA and ECHR have seen the judiciary adopt a 'hard line' approach, which may be seen to weaken the HRA's potential effectiveness and deter individuals from bringing human rights cases against the Government. See *Wandsworth LBC v Michalak* [2002] 1 WLR 617 (CA) and *Carson v Secretary of State for Work and Pensions* [2006] 1 AC 173 (HL).

⁷⁶ For a recent consideration of the margin of appreciation doctrine and the duties of the ECtHR, see Letsas, G, 'Two Concepts of the Margin of Appreciation' (2006) 26 OJLS 705.

the UK.⁷⁷ Although the concept of indirect discrimination is not protected under Article 14, the ECtHR in *Thlimmenos v Greece*⁷⁸ indicated its willingness to embrace a wider concept of discrimination that would protect individuals when there has been a failure “to treat differently persons whose situations are significantly different”,⁷⁹ however as yet there has been no clarification from the ECtHR as to when Article 14 would be engaged in this context.

A further criticism of the protection afforded under the ECHR, is that the Convention is concerned with the rights of the individual as opposed to group rights, which apparently limits its effectiveness in dealing with institutional and widespread discrimination. Nevertheless, if an individual’s rights have been violated the State will be obliged not to repeat the discriminatory treatment in question, which will often result in a change to domestic law and thus indirectly benefit groups.

Under s.4 of the HRA, if primary legislation cannot be interpreted in accordance with the ECHR, the only remedy that may be achieved is a ‘declaration of incompatibility’ between a Convention right and UK domestic legislation. Although a declaration of incompatibility may create sufficient public interest to pressurise the Government to change the law in question, perhaps by remedial order (s.10 HRA), it does not affect the validity, continuing operation or enforcement of the legislation in question (s.4(6)(a)) and it does not bind the parties to which such proceedings are made (s.4(6)(b)). This provides a disincentive for individuals to challenge UK legislation in a UK court in the first instance given that they may not receive an individual remedy.

As mentioned, the fact that Article 14 does not provide a freestanding right of equality, has served to significantly circumscribe the development of this Article as a method of providing comprehensive protection against discrimination.⁸⁰ However, importantly, Article 14 may still be engaged despite there being no actual breach of another substantive right. For

⁷⁷ See Bowers, J and Moran, E, ‘Justification in direct discrimination law: breaking the taboo’ (2002) 31 ILJ 307 and the response by Gill, T and Monaghan, K, ‘Justification in direct sex discrimination law: taboo upheld’ (2003) 32 ILJ 115 for a discussion of the justification defence in relation to sex discrimination.

⁷⁸ *Thlimmenos v Greece* (App no. 34369/97) (2001) 31 EHRR 15.

⁷⁹ *ibid.* para.44.

⁸⁰ See Ewing, K, ‘The Human Rights Act and Labour Law’ (1998) 27 ILJ 275, pp.288-289 where additional restrictions are identified relating to the “very narrow approach to the construction of the Convention adopted by the Strasbourg authorities” and the fact that “rights in the Convention are by no means unqualified”.

example, if a right secured under the Convention had been justifiably restricted, so that there was no actual breach of that right, such a finding would not prohibit a further finding under Article 14 that the justifiable restriction had been applied in a discriminatory way. In addition, it is possible to use other freestanding Articles to succeed in an equality claim either independently or in alliance with Article 14. Article 8, for example, containing the right to respect for private and family life, has been effective in advancing the rights of individuals on the grounds of sexual orientation such as in the case of *Smith and Grady v UK*,⁸¹ where the exclusion of homosexuals from the military service was found to be in violation of this Article. Although the Sexual Orientation Regulations now provide protection in such instances there is ongoing potential to use the ECHR to provide a basis for challenging grounds of discrimination that fall outside the existing scope of UK legislation.⁸²

2.3.2. Protocol 12

In November 2000 the Council of Europe agreed a new Protocol to the ECHR to strengthen the protection afforded against discrimination. Protocol 12 introduces a freestanding provision to protect individuals from discrimination whilst enjoying “any right set forth by law” on the exact same grounds as those contained within Article 14. This overcomes the major limitation of Article 14, which as noted only offers protection in relation to the enjoyment of rights within the Convention itself. Protocol 12 therefore protects individuals against discrimination with regard to all legal rights under national law. In addition, s.2 of the Protocol expressly states that “no one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1”, which takes s.6 of the HRA one step further by specifically imposing anti-discrimination obligations upon public authorities, which further extends the protection applied.

Despite the potential benefits of this Protocol, the UK has yet to sign or ratify it⁸³ and has no immediate plans to do so. The CEHR therefore will be working with existing legal tools to

⁸¹ *Smith and Grady v UK* (App no. 33985/96, 33986/96) (2000) 29 EHRR 493.

⁸² See for example *Belgian Linguistic Case (A/6)* (1979-80) 1 EHRR 252.

⁸³ Protocol 12 entered into force on 1 April 2005 and has (as at 20 June 2007) been ratified by 15 States: Albania, Armenia, Bosnia and Herzegovina; Croatia; Cyprus; Finland; Georgia; Luxembourg; Macedonia; Montenegro;

combat discrimination, at least in the short term, and one area in which the Commission could focus its efforts would be to put pressure upon the Government to ratify the Protocol to further enhance its commitment to prevent unlawful discrimination. As highlighted in the JCHR's Seventeenth Report, the UK Government gives three primary reasons for not doing so.⁸⁴ The first centres upon the belief that the potential application of the Protocol is too wide, since it applies to all 'rights set forth by law' and could therefore lead to an explosion of litigation. The concern is that this passage may be construed in such a way that it extends to obligations under other international human rights instruments to which the UK is a party, but which are not directly incorporated into UK law. As Fredman notes, however, this Protocol does not create rights, "it merely requires that those rights which are set forth by law be secured without discrimination".⁸⁵ Fredman's interpretation would imply that Protocol 12 would not extend protection into rights that are not incorporated into national law, as they would be unenforceable before the domestic courts. Instead, these rights may only be used as a guide to interpretation. It follows therefore that "since no one can enforce such rights, everyone is in the same position, and no one is discriminated against".⁸⁶

The second reason given is that it is unclear whether the Protocol permits a defence of reasonable and objective justification, as does Article 14 of the ECHR. The justification defence is not explicitly included in the wording of the Protocol; given that the ECtHR is not bound by its own interpretations, the defence itself may also evolve over time. The explanatory notes accompanying the Protocol, however, expressly link the concept of discrimination in Article 14 with Protocol 12.⁸⁷ Justification has been an essential and established part of the definition of discrimination under Article 14 since the case of *Abdulaziz v UK*,⁸⁸ therefore Protocol 12 should also be associated with this definition. Article 3 of the Protocol also affirms the complementary relationship between the ECHR and

Netherlands; Romania; San Marino; Serbia and the Ukraine. As of this date, a total of 22 signatures were not followed by ratifications.

See <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=6/20/2007&CL=ENG>.

⁸⁴ JCHR, 'Review of International Human Rights Instruments, Seventeenth Report of Session 2004–05' (March 2005) HL 99/HC 264, para.31. <<http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/99.pdf>>.

⁸⁵ Fredman, S, 'Why the UK government should sign and ratify Protocol 12' (2002) EOR No.105, p.21.

⁸⁶ *ibid.*

⁸⁷ Explanatory Report to Protocol 12, para.18

<<http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm>>.

⁸⁸ *Abdulaziz, Cabales and Balkandali v United Kingdom* (App no. 9214/80, 9473/81, 9474/81) (1985) 7 EHRR 471.

the Protocol. As Fredman states, it would be “awkward and illogical if a wider definition of discrimination, without a justification defence, applied to Protocol 12 than to Article 14.”⁸⁹ The JCHR report also concludes “there is every reason to expect that both the UK courts and the ECtHR would apply the new Protocol in accordance with the settled principles of Strasbourg jurisprudence...by which differences in treatment may be found not to amount to discriminatory treatment.”⁹⁰ Finally, as regards the Government’s view that the definition may evolve, this is a weak argument given that any development would automatically apply to the UK in any event by way of Article 14. Moreover, case law to date has been “remarkably stable” with the Court “simply reiterating the principle”⁹¹ when deciding on discrimination cases.

The third and last reason put forward proposes that Protocol 12 does not make any express textual provision for the use of positive measures, which at first seems an unlikely argument given the UK’s general resistance to positive discrimination. Again, however, reference to the preamble and explanatory notes of the Protocol shows that the principle of non-discrimination does not prevent a State from adopting measures designed to promote equality which may include positive actions, provided they satisfy the test of objective and reasonable justification.⁹² The fact that this reference is contained in the preamble should not be used to weaken its effect, given that general principles of statutory interpretation would allow the preamble to be taken into account in order to deduce the aims and objectives of the provisions in question.⁹³

2.4. Interaction between the Human Rights Act and Equality

The core principle that all individuals should be respected for their diversity and autonomy is an entrenched, integral element of human rights, which underpin the notion of equality. Conversely and at the most elementary level it is clear that equality is a fundamental human

⁸⁹ Fredman, S, above at n.85, p.22.

⁹⁰ JCHR, ‘Review of International Human Rights Instruments, Seventeenth Report of Session 2004–05’ (March 2005) HL 99/HC 264, para.34 <<http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/99.pdf>>.

⁹¹ *ibid.*

⁹² Explanatory Report to Protocol 12, para.16

<<http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm>>.

⁹³ See Fredman, S, above at n.85, p.22, fn.8.

right in itself. This is emphasised in the EU Charter of Fundamental Human Rights: Articles 20 and 21, respectively, refer to the requirement of equality before the law and the right to be free from discrimination. Article 23 also specifically covers equality between men and women. Despite its present non-binding status, the EU Charter could be used as a guide to interpretation of EU law by the courts and is useful to demonstrate the importance of equality as a fundamental human right given that it is a compilation of many existing rights, derived from a wide array of international sources, including Council of Europe, United Nations and International Labour Organisation agreements, and, in particular, the ECHR.

Domestically, the HRA at s.6(1) states it is “unlawful for a public authority to act in a way which is incompatible with a Convention Right”, which may be used to enforce the rights contained within the Convention, although as indicated, such protection extends only to public authorities. A possible application of the ECHR would be to try and extend the list of contexts in which domestic anti-discrimination might be invoked by adopting a broad interpretation of the relevant statute in line with the protection afforded by the Convention. This may go some way towards compensating for the narrow protection afforded by the new Regulations especially as regards age, which provides protection against discrimination but only within the limited sphere of employment and vocational training. The potential use of Article 14 in this way has already been demonstrated. In relation to sexual orientation, the House of Lords ruled in *Mendoza*,⁹⁴ that discriminatory provisions in the Rent Act 1977 against same-sex partners infringed the individuals’ rights under of Article 8 and 14 of the ECHR. Section 3 of the HRA was used in this case to interpret paragraph 2(2) of Schedule 1 of the Rent Act so as to provide identical benefits to both homosexual and heterosexual couples, which highlights the importance and potential benefits of “infusing human rights litigation with the principles of equality”.⁹⁵

Section 3 of the HRA provides that a court or tribunal must read and give effect to domestic legislation in a way that is compatible with Convention rights, which necessarily involves taking into account the relevant jurisprudence of the ECtHR. In this respect and in contrast to

⁹⁴ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (HL).

⁹⁵ See Fredman, S, above at n.31, p.37.

s.6, whereby only public authorities can be challenged directly, the HRA is given a degree of 'indirect horizontal effect' as s.3 will apply regardless of whether the parties are public or private, as may be witnessed in *Mendoza*.⁹⁶ This is further reinforced through s.6(3), which states that domestic courts and tribunals are 'public authorities' themselves, and are therefore obliged to act in a way that is compatible with the Convention rights, which as may be seen from the case of *X v Y*,⁹⁷ gives the courts and tribunals significant scope to broaden the boundaries within which discrimination is regulated.

2.5. Conclusion

From the above analysis there is a clear link between equality and human rights; this interplay should be encouraged in order to provide the most effective level of protection against discrimination and to help minimise and overcome existing distinctions and hierarchies between the different equality 'strands', that may well become more apparent upon the creation of the CEHR. Human rights may bolster equality rights, and resolve potential conflict between protected grounds. There may, however, be a danger of a detrimental loss of focus on equality in favour of human rights, perhaps influenced by the political climate.⁹⁸ When forging links between human rights and equality, it is important to prevent one from hindering the progress of the other: the relationship between the two should be mutually beneficial. The CEHR should strive to seek the ratification of Protocol 12, which will greatly strengthen the rights of individuals not to be discriminated against, especially given the limitations contained within the current piecemeal legislative framework, and the potential use of the ECHR as discussed above. The CEHR will be a major voice in the development of anti-discrimination legislation; it is hoped that it will

⁹⁶ *ibid.* See also Leigh, I, 'Horizontal Rights, The Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) 48 International Comparative Law Quarterly 57, which focuses specifically upon 'horizontality' and the ECHR and HRA.

⁹⁷ In *X v Y (Employment: Sex Offender)* [2004] ICR 1634 (CA), the strong interpretative obligation placed upon the court by s.3 of the HRA, found the court accepting that dismissals that breach a Convention right would be unlawful despite the employer being a private body.

⁹⁸ An example of an instance in which human rights may be seen to overshadow competing interests is the debate surrounding the detaining of terrorist suspects, such as the foreign prisoners detained in London's Belmarsh Prison for almost three years without charge or trial. See the House of Lords decision in *A and others v Secretary of State for the Home Department* [2005] 2 AC 68 (HL). Such an instance demonstrates the potential influence of human rights arguments (particularly since the introduction of anti-terrorism provisions). In such circumstances, it is important that the CEHR does not negate its duties and functions as regards equality and is able to balance such competing interests without external interference.

make itself heard on the domestic and international scene and not shirk from pursuing possible developments that do not align with the Government's view.

It is also apparent, from the foregoing discussion, that discrimination legislation has developed in a piecemeal fashion and is somewhat fragmented in its scope and application, having been largely reactive in the way that it has sought to overcome discrimination despite recent amendments which have sought to counter this. This has led to an overly complex and incoherent legislative framework whereby a hierarchy of protection may be seen to exist, in that certain areas of discrimination law offer protection that is more extensive and far-reaching than others. The complex legislative framework also has further implications for those who are victims of multiple discrimination,⁹⁹ although this will hopefully be eased by the creation of the CEHR, being a more effective source of advice and support across all the protected grounds. In the absence of a SEA, the present legislative framework will remain, although the CEHR should be better equipped to deal with cases through the provision of advice, guidance and support which span across all the grounds of discrimination law.

As will be seen, a criticism of the CEHR is that it is largely "moulded" in the image of the existing Commissions and has therefore "inherited some of their inherent defects".¹⁰⁰ The same logic may also be applied to the legislative landscape upon which the CEHR is to function. With the exception of sex, race and disability, however, the equality strands to be protected (age, religious belief and sexual orientation) have been without institutional support since their introduction, suggesting the CEHR will have a blank canvas on which to determine the most effective ways to address these strands and create innovative ways to tackle discrimination, given that it will not be tied to any prior agenda created by existing Commissions. In any event, an important function of the CEHR will be to use its powers to review relevant legislation (including the proposed new SEA), and suggest amendments to

⁹⁹ See Hannett, S, 'Equality At The Intersections: The Legislative and Judicial Failure To Tackle Multiple Discrimination' (2003) 23 OJLS 65. Current legislation dictates that a victim of multiple discrimination must choose the characteristic upon which to base his or her litigation, which may not only reduce the chance of success in a claim, but perhaps more importantly ignores other acts of discrimination which may be just as important to the victim as the specific act forming the basis of the claim. If the victim does decide to challenge discriminatory behaviour under two or more headings, then he or she will face the difficulties of, firstly, distinguishing which acts specifically relate to each protected ground, and then of pursuing each claim independently.

¹⁰⁰ O'Conneide, C, 'The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times' (2007) 36 ILJ 141, p.162.

overcome any inherited defects.¹⁰¹ Until such time, however, the effectiveness of the CEHR in utilising its enforcement powers will be limited given the reliance upon the existing largely out-dated legislative framework, making the issue of achieving an effective balance concerning those powers even more important.

¹⁰¹ The Government has published a Green Paper entitled 'A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain – a consultation paper' (12 June 2007) which has been developed as a result of the Discrimination Law Review (see Chapter 7 for further information).

Chapter Three

3. Enforcement Powers of the Existing UK Equality Commissions

This chapter looks at the effectiveness of the existing equality Commissions, to see what lessons can be learnt by the CEHR, paying particular attention to existing litigation and strategic enforcement provisions. The EOC and CRE will be considered together, because these Commissions were established only one year apart, were founded upon very similar legislation and have comparable vast experience. The DRC, being the ‘younger sibling’ introduced some 25 years later, will be considered afterwards to help demonstrate the extent to which the DRC benefited from the experiences of the earlier Commissions. The current balance between the use of the strategic regulatory mechanisms and individual enforcement is considered, as are recent amendments to anti-discrimination legislation (including the ‘equality duties’ concerning race, disability and sex). Lastly, the effectiveness of these duties is evaluated, and the role of the individual in enforcing discrimination legislation will be discussed, to demonstrate the importance of effectively balancing the CEHR’s various enforcement powers both for the advancement of equality and in order to satisfy its general duties.

3.1. Equal Opportunities Commission and the Commission for Racial Equality

3.1.1. Creation

These two Commissions share many commonalities with regards to their duties and functions, being founded upon legislation that shares concepts and confers similar powers. The White Paper preceding the SDA, *‘Equality for Women’* (Cmnd. 5724) introduced in September 1974, outlined the Government’s intention to introduce a Bill dealing with sex discrimination in the area of employment, education, housing, the provision of goods and services to the public, and advertising. In this White Paper, the Government underlined the need for an enforcement agency, namely the EOC, which would have wide-ranging powers to deal with individual cases and to identify and combat discrimination by organisations. The RRA 1976 was preceded by the White Paper *‘Racial Discrimination’* (Cmnd. 6234) introduced in September 1975. The language and structure of this Act was closely modelled

on the SDA: in both Acts, much of the wording of Part II concerning discrimination in the employment field, including the sections that deal with discrimination against applicants and employees, is identical. Both statutory bodies, the EOC and CRE, were intended to overcome the historic reliance upon individual complaints to combat discrimination, by providing adequate and effective powers to investigate and deal with suspected discriminatory practices.

The CRE replaced the Race Relations Board (RRB) established in 1966 under the Race Relations Act 1965, and the Community Relations Commission (CRC) established in 1968 by the Race Relations Act 1968. The 1965 Act made discrimination on the “grounds of colour, race, or ethnic or national origins” in “places of public resort” unlawful, which included hotels and restaurants but excluded private boarding houses and shops. Under the terms of the 1965 Act, the RRB was created primarily to ensure compliance with the provisions of the Act. A series of committees were appointed under the RRB to consider any complaints of discrimination. These ‘local conciliation committees’ were encouraged to negotiate with the parties involved in discriminatory practices or behaviour and seek to persuade them against further such action. In cases where discrimination continued, the RRB would then be obliged to refer the matter to the Attorney General who could apply for a court injunction. The 1965 Act was superseded and strengthened in the 1968 Act, which made it illegal to refuse housing, employment or public services to people because of their ethnic background, and extended the RRB’s powers to deal with complaints of discrimination while creating the CRC, which was charged with the duty to promote ‘harmonious community relations’. Although the RRA 1976 amalgamated the CRC and the RRB to form the CRE, the primary functions of the CRC were generally carried forward by way of s.43(1)(b) of the RRA 1976, which contains a duty to promote good relations between persons of different racial groups.

3.1.2. Status of the Commissions

The Commissions themselves are Non Departmental Public Bodies (NDPBs) and as such are essentially independent of Government despite being state funded, with their individual

budgets being allocated by the respective affiliated Government departments. The CRE has previously received its funding from the Home Office whilst the EOC has in recent history been associated with the Department for Trade and Industry (DTI). However, for the financial year 2006/2007 and beyond (until their amalgamation into the CEHR), both Commissions will receive funding from the newly created Department for Communities and Local Government (DCLG) that replaces the Office for the Deputy Prime Minister. Specifically, the Women and Equality Unit has moved to the DCLG from the DTI and will remain the sponsoring body for the EOC (and the Women's National Commission).

The DCLG was created on the 5 May 2006 and is currently headed by the Rt. Hon Ruth Kelly MP, Secretary of State for Communities and Local Government and Cabinet Minister for Women. The DCLG has a powerful new remit including the promotion of community cohesion and equality, and brings together responsibilities for equality policy, including policy on race, faith, gender and sexual orientation, which were previously split between several Government departments. The Race, Cohesion and Faiths Directorate has also moved to the DCLG from the Home Office. From a logistical viewpoint these changes are to be welcomed. The DCLG will be the sponsoring department for the CEHR upon its creation, which again is logistically beneficial: the EOC, CRE and the DCLG will have had at least one year's experience of each other, therefore both the DCLG and CEHR will be able to draw upon those experiences. As will be seen from the consultation response to the White Paper concerning the CEHR, these developments may help to negate many of the criticisms of the current approach that have dogged the equality Commissions for many years: that they are founded upon and operate under piecemeal legislative provisions with little overlap and interplay, which exacerbates the inequality of protection between the various grounds of discrimination. There will be a unified body, affiliated with one particular government department, responsible for the whole equality remit, and ultimately operating under a SEA.

Although NDPBs, the issue of funding and direct affiliation with the Government calls into question the true independence of each Commission. This is also evident when considering that the Government is responsible for appointing Commissioners; provides approval on

internal decision-making arrangements;¹ and has occasionally used review teams to monitor the Commissions' internal workings. Also, both Commissions are obliged (by their respective establishing Acts) to produce an Annual Report for the Secretary of State, who will then lay it before Parliament and seek publication.² Independence was also a major concern surrounding the proposals for the CEHR.³ However, this concern has not prevented the existing Commissions from challenging Government departments, either directly or in support of individual litigants.⁴

3.1.3. General Duties of the Commissions

Both the EOC and CRE share three primary general duties:⁵ to work towards the elimination of discrimination; to promote equality of opportunity; and to keep under review the operation of their parent legislation. As a result of subsequent statutory amendment, each body has received additional specific duties.⁶ They have the power to undertake or assist (financially or otherwise) any research or educational activities that appear necessary or expedient for the furtherment of their general duties.⁷ This has led each Commission to publish an array of material concerning issues within their respective remits, which has helped to inform the development of UK discrimination legislation.⁸ In addition, the Commissions are empowered to issue Codes of Practice,⁹ which in essence constitute practical guidance rather than definitive statements of law. They are primarily designed to instruct individuals and organisations on measures that can be taken to achieve equality, and to advise on steps to

¹ See for example SDA 1975, Schedule 3, and Part VI in particular, which highlight the extensive role played by the Secretary of State.

² SDA 1976, s.56; RRA 1976, s.46.

³ See below section 4.2.7. - Governance and Independence.

⁴ See for example *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission* [1995] 1 AC 1 (HL) and *R. (on the application of Elias) v Secretary of State for Defence* [2005] IRLR 788 (QBD).

⁵ SDA 1975, s.53; RRA 1976, s.43.

⁶ See below, sections 3.5., 3.6. and 3.8. for details on the Race Equality Duty, Gender Equality Duty and Disability Equality Duty respectively.

⁷ SDA 1975, s.54; RRA 1976, s.45.

⁸ The Commissions may commission external research projects and consider speculative research proposals, which help to inform their policy proposals and strategic priorities. The CRE has recently commissioned three research studies into 'Britishness' aimed at informing its work on integration (see http://www.cre.gov.uk/research/britishness_index.html). The EOC is also very active with regard to research concerning its corporate priorities and has published a total of 72 research and statistical reports between 2003 and March 2007 (see <http://www.eoc.org.uk/Default.aspx?page=18078>). Additionally, between 2002 and March 2007, the EOC has published 53 Working Paper Series research reports (see <http://www.eoc.org.uk/Default.aspx?page=20082>).

⁹ SDA 1975, s.58(A)(1); RRA 1976, s.47.

take to avoid the occurrence of discrimination by consistently implementing ‘best practice’ initiatives.¹⁰ An individual’s failure to observe the provisions of a Code of Practice will not in itself render them liable to any proceedings; however, it will be admissible as evidence in court or tribunal proceedings brought under the SDA or RRA. Alternatively, if any provision of a Code appears to the court or tribunal to be relevant to any question arising during proceedings, it may be taken into account in determining that question.¹¹

A power for which there is no EOC parallel is that under s.44 of the RRA 1976,¹² enabling the CRE to give financial or other assistance to organisations concerned with the promotion of equality of opportunity and good relations between persons of different racial groups, albeit subject to the approval of the Home Secretary.¹³ Conversely, the EOC is singularly charged with the duty to review discriminatory provisions as they relate to men and women with regard to Health and Safety legislation, which may involve submitting proposals for amendment to the Secretary of State, who has the power to request the submission of a report on any matter specified that concerns the relevant Health and Safety statutory provisions.¹⁴

3.2. Enforcement Powers of the Commissions

Both the CRE and EOC have law enforcement roles that can be exercised in various ways in pursuit of their general statutory duties. However, as will be seen, particularly with regard to the use of formal investigations, these powers have been significantly judicially circumscribed, which may go some way to explain the increasingly infrequent use of these provisions despite the continuing rise in the number of discrimination claims brought before employment tribunals and registered with the Commissions.¹⁵

¹⁰ See, McCrudden, C, ‘Codes in a Cold Climate: Administrative Rule-Making by the Commission for Racial Equality’ (1988) 51 MLR 409 for a critical consideration of the use of Codes of Practice.

¹¹ SDA 1975, s.56A(10).

¹² RRA 1976, s.44 and Schedule 1, para.13.

¹³ See Appendix A highlighting the money allocated to Race Equality Councils, which currently stands at over 20% of the CRE’s total budget.

¹⁴ SDA 1975, s.55.

¹⁵ See Appendix B highlighting the Employment Tribunal claims registered by the nature of the claim as they concern discrimination.

3.2.1. Legal Assistance

Both Commissions may assist individuals in bringing claims of discrimination before a court or tribunal. However, this is largely reliant upon the will and inclination of individuals to bring such claims in the first instance, and as such is severely limited in its effectiveness.¹⁶

The CRE imposes a time limit of two months (extendable, by notice, to three) by which it must respond to a request for assistance,¹⁷ whereas the EOC operates under no such restriction. Decisions to provide assistance to individuals are not taken lightly and are often delayed until the relevant Commission is in receipt of all the facts to allow it to make informed decisions. Often, the Commissions will seek to provide continued support and assistance until their enquiries have determined whether or not assistance will indeed be granted. The relevant Acts provide set criteria¹⁸ upon which each Commission can base its decision to grant assistance. These include: whether the case raises a question of principle; whether it would be unreasonable to expect an applicant to deal with the case unaided; or whether there is any other special consideration, giving the Commissions a broad discretionary platform. Given the finite resources with which to provide assistance, both Commissions seek to exercise their discretion carefully, in the most strategic manner. It is standard practice for them to issue a written explanation to each applicant outlining the factors and priorities they take into account when making decisions concerning assistance.

There is an important balance to strike in exercising such discretion, between the relevant Commission's strategic position and its desire to help individuals in pursuit of the criteria outlined above. The Home Office-commissioned report, *Racial Justice at Work*,¹⁹ criticised the CRE for its lack of strategic direction when granting assistance to individuals. In order to make progress in combating discrimination, a clear strategy is necessary. In light of the reliance upon individuals requesting assistance from the Commissions and presenting potentially worthy cases satisfying one or more of the required criteria, however, it is important that any refusal of assistance is based primarily upon the merits of the case *as they*

¹⁶ See below, section 3.9. - Evaluation.

¹⁷ RRA 1976, ss.66(3) and (4).

¹⁸ SDA 1975, s.75(1); RRA 1976, s.66(1).

¹⁹ McCrudden, C and Brown, C, 'Racial Justice at Work, Enforcement of the Race Relations Act 1976 in Employment' (1991) Policy Studies Institute.

relate to those criteria rather than to any strategic considerations. If potential claimants were to perceive that a refusal might be based on strategic considerations, that perception may dissuade them from requesting assistance in the first place. Moreover, even if a current strategic priority were to be the main determining factor in taking on a case, it might be particularly important for the new CEHR to recall that alternate, better reasons for supporting a claim might emerge later. For example, if a woman applied for assistance basing her claim upon the EqPA, subsequent enquiries might determine that a more worthwhile case could be brought under the RRA, which could be neglected if the Commission had adopted a strategy focusing upon equal pay claims. A blanket application of any particular strategic criteria might divert attention from potentially successful claims based upon other grounds.

It is also important that any refusal for assistance communicated to the applicant does not concern the merits of the applicant's case against the respondent, but rather shows that the case falls short of satisfying the statutory criteria for eligibility for assistance. Cases that do not receive assistance might still be successful if pursued, so the Commissions should not deter any potential successful discriminatory claim from reaching the courts or tribunals.

The methods of assistance available to each Commission vary greatly in terms of the resources required and include the giving of advice; seeking a settlement of the matter in dispute; arranging for the provision of expert advice or assistance; and arranging for the provision of representation.²⁰ It goes without saying that financial restraints act to curb the number of cases that the Commissions can support in any one year: the legislation expressly states that expenses incurred under the power to assist constitute a first charge on any costs or expenses recovered.²¹

3.2.2. Proceedings Undertaken by the Commissions

Each Commission may bring proceedings in its own name for law enforcement purposes, although the ability of each Commission to do so is limited, given that the power is restricted

²⁰ SDA 1975, s.75(2); RRA 1976, s.66(2).

²¹ SDA 1975, s.75(3); RRA 1976, s.66(3). This is subject to any change concerning the Legal Aid provisions as contained in subsection 4.

to areas of discriminatory advertisements, instructions, pressure to discriminate and persistent discrimination. As regards discriminatory advertisements, which are broadly defined,²² the Commissions have exclusive jurisdiction to bring proceedings.²³ There is however a slight difference between the two Acts, as the SDA only protects against advertisements that indicate an intention to contravene Part 2 or 3 of the SDA; as such this provision does not apply to an advertisement if the intended act is not in fact unlawful.²⁴ Under the RRA, an intention to discriminate is sufficient regardless of whether the advertisement is unlawful under Part 2 or 3 of the RRA,²⁵ although there is a list of exceptions within the Act to qualify this provision.²⁶

In relation to issuing unlawful instructions,²⁷ it is unlawful for an instructor having authority over the person subject to the instructions, to instruct that person to do any act that is unlawful according to Part 2 or 3 of the respective Acts. Alternatively, if the instructor is not in a position of authority, then it will suffice if the recipient of the instructions is accustomed to act in accordance with the instructor's wishes. It is similarly unlawful to apply pressure to an individual to discriminate²⁸ whether by the provision or offer of a benefit, or the imposition of a threat or detriment. An individual subject to such pressure or instructions is not entitled, however, to bring an action. As with unlawful advertisements, the power to bring proceedings lies with the relevant Commission. Due to the presence of direct evidence in most instances against the person giving the instructions or applying pressure, this type of case is usually not dependent upon the courts drawing an inference of discrimination, thus avoiding the evidential problems that often surround a case of direct discrimination.²⁹ Each Commission has the power to bring proceedings against a respondent in order to obtain a

²² SDA 1975, s.82(1); RRA 1976, s.78.

²³ SDA 1975, s.72; RRA 1976, s.63. See also *Cardiff Women's Aid v Hartup* [1994] IRLR 390 (EAT), where Smith J in the EAT reiterated: "it is only the Commission for Racial Equality which can bring...proceedings": the overall similarity between the SDA and the RRA would, by implication, extend this to the EOC.

²⁴ SDA 1975, s.38(1).

²⁵ RRA 1976, s.29(1).

²⁶ RRA 1976, s.29(2).

²⁷ SDA 1975, s.39; RRA 1976, s.30.

²⁸ SDA 1975, s.40; RRA 1976, s.31. The RRA differs slightly from the SDA in that it does not provide an equivalent provision concerning what constitutes inducement (unlike the SDA 1975, ss.40(1)(a) and (b)). *Commission for Racial Equality v Imperial Society of Teachers of Dancing* [1983] IRLR 315 (EAT) clarified this issue insofar as it relates to the RRA.

²⁹ See *Commission for Racial Equality v Imperial Society of Teachers of Dancing* [1983] IRLR 315 (EAT) where a conversation over the telephone was sufficient for a finding of inducement to commit an unlawful act under s.31 of the RRA.

restraining order or injunction, if it believes that unless restrained, a person is likely to commit further unlawful discrimination, apply a discriminatory condition, or engage in discriminatory practices.³⁰ This power will only apply if, within the preceding five years, a Non Discrimination Notice has been served or a court or tribunal has already made a finding of unlawful discrimination.

3.2.3. Formal Investigations³¹

Formal investigations³² are a particularly useful enforcement tool given that the subsequent remedies available extend beyond the individual complainant to embrace other victims and prospective victims: individual enforcement actions will seldom achieve this. The Commissions may delegate the undertaking of a formal investigation to one or more individuals as ‘additional commissioners’ with the approval of the Secretary of State,³³ enabling the Commissions to bring expertise and experience to an investigation, which can have a considerable and positive effect on the outcome. The investigations themselves fall within two categories: ‘general investigations’, which are exploratory in nature, and ‘named person investigations’, which are essentially accusatory. Each Commission is also obliged to carry out an investigation if requested to do so by the Secretary of State.³⁴ Prior to embarking upon a formal investigation the Commissions must draw up terms of reference and give notice of the investigation.³⁵

The protection afforded by Parliament to any prospective respondent is extensive, in order to strike a balance between the elimination of discrimination on one hand and maintaining a fair application of the law on the other. However, the courts have also adopted a particularly restrictive interpretation of the relevant legislation, which has further circumscribed the powers of the Commissions. The Commissions might remove from the courts the arduous task of determining whether discriminatory practices have occurred, especially where such

³⁰ SDA 1975, s.71; RRA 1976, s.62.

³¹ For a consideration of the power to conduct Formal Investigations as identified in the White Papers that preceded the SDA 1975 and RRA 1976, see Sacks, J and Maxwell, J, ‘Unnatural Justice for Discriminators’ (1984) 47 MLR 334 at pp.334-336.

³² SDA 1975, s.57; RRA 1976, s.48.

³³ SDA 1975, ss.57(2) and (3); RRA 1976, ss.48(2) and (3).

³⁴ SDA 1975, s.57(1); RRA 1976, s.48(1).

³⁵ SDA 1975, s.58, RRA 1976, s.49.

practices may be complicated and the ascertainment of the relevant facts may be particularly resource-intensive. However, this idea was rejected in *Commission for Racial Equality v Prestige Group PLC*:³⁶ Lord Diplock, commenting upon the coercive powers of the CRE, was keen to emphasise that it should adopt a merely conciliatory and advisory role. The Court of Appeal rejected the CRE's submission that Parliament had intended it to be the fact-finding body for the purpose of a Non Discrimination Notice and asserted that it was the role of the court to ensure that they had acted fairly.³⁷ Lord Denning also exemplified this judicial hostility when he spoke of the powers of the Commissions as being "immense...you might think we were back in the days of the Inquisition."³⁸

In a named person investigation, the respondent, usually an organisation, must already be suspected of unlawful discriminatory acts or practices. However, as may be seen from *Hillingdon London Borough Council v. CRE*,³⁹ the level of suspicion required is reasonably low. According to Lord Diplock, there should be "material before the Commission sufficient to raise in the minds of reasonable men...a suspicion that there may have been acts by the person named of racial discrimination of the kind which it is proposed to investigate".⁴⁰ There is no legal right available to the Commission to obtain information in order to determine whether adequate grounds exist. The judgment in *Prestige* was subsequently welcomed, when Lord Diplock further amended his earlier passage in *Hillingdon*, stating that "some grounds for so suspecting" racial discrimination may be sufficient, somewhat lowering the standard of suspicion required.

Each Commission is obliged to set out its belief and suspicions in the terms of reference to an investigation and to indicate the general effect of the evidence it has obtained in reaching that belief. It is then required by legislation⁴¹ (as seen in *Hillingdon*⁴²) to hold a 'preliminary inquiry' in order to give the named person the opportunity to make any representations. The

³⁶ *Commission for Racial Equality v Prestige Group Plc* [1984] ICR 473 (HL).

³⁷ For a further discussion (and ultimately criticism) of the implications of the decision in *Prestige*, see Munroe, M, 'The Prestige Case: Putting the lid on the Commission for Racial Equality' (1986) *Anglo-American Law Review* 187. See also Ellis, E and Appleby, G, 'Blackening the Prestige Pot? Formal Investigations and the CRE' (1984) 100 *LQR* 349.

³⁸ *Science Research Council v Nasse* [1979] 1 QB 144 (CA), para.172.

³⁹ *Hillingdon LBC v Commission for Racial Equality* [1982] AC 779 (HL).

⁴⁰ *ibid.* para.791.

⁴¹ SDA 1975, s.58(3)(A); RRA 1976, s.49(4).

⁴² See above, n.39.

investigation cannot go beyond the scope of the terms of reference. In order to address discriminatory practices not covered by the original terms, the Commission must draw up revised terms of reference including the revised allegations, adding to what is already often an expensive and lengthy process. The complexities of these arguments were noted by Lord Denning in *Amari Plastics*; “the machinery is so elaborate and so cumbersome that it is in danger of grinding to a halt...[the Commission] has been caught up in a spider’s web spun by Parliament, from which there is little hope of their escaping.”⁴³

A power that Lord Denning was particularly hostile towards, which he termed “the most presumptuous claim of all”,⁴⁴ is the power to compel the production of information.⁴⁵ As regards a general investigation, the Commissions may only serve a notice (authorised by the Secretary of State) requiring the production of information, whereas during a named person investigation, they maintain exclusive jurisdiction to serve such a notice without authorisation, although both notices must be in a prescribed format and served in a specific manner. Should such a notice be ignored, or if the Commissions have reason to believe that the named person will not comply, they may apply to a county court to compel production of the information requested, although doing so will inevitably delay an investigation. A failure to respond and co-operate may form a finding in the final report, or, in the case of a general investigation, may provide the grounds of suspicion for the Commissions to adopt a named person investigation. The arousal of suspicion from a failure to provide information can often be justified despite Lord Denning’s aforementioned hostility, especially when considering the severe sanctions that can be imposed upon the Commissions in the event that any information they have requested is disclosed in situations not specifically prescribed.⁴⁶ Often therefore, a refusal to provide information will be seen to legitimise such an accusatory investigation.

⁴³ See above, n.36 at para.255.

⁴⁴ See above, n.38 at para.172.

⁴⁵ SDA 1975, s.59; RRA 1976, s.50.

⁴⁶ SDA 1975, s.61; RRA 1976, s.52. These sections require that no information given to the respective Commission concerning a formal investigation can be disclosed except: (a) on the order of a court; (b) with the informant’s consent; (c) if it is the form of a general summary containing no identifying information; (d) in a report of the investigation; (e) when it is required by members of the Commission for proper performance of its functions; or finally (f) for the purpose of any civil or criminal proceedings. Subsection 2 makes disclosure in breach of subsection 1 an offence punishable by way of a fine, whilst subsection 3 demands that in preparing a report the Commissions should, as far as possible, exclude information relating to private affairs or business interests where this may be prejudicial.

Upon completing, or during the course of, an investigation, the Commissions are under a duty to make such recommendations that appear necessary or expedient, which may be directed at any person and relate to any matter with a view to promoting equality of opportunity.⁴⁷ Once the investigation has been finalised the Commissions are obliged to produce a final report detailing their ‘findings’, which may refer to recommendations for change or other matters that may have particular significance,⁴⁸ whilst obeying the specific prohibitions on disclosure.⁴⁹ Should the investigation conclude that an unlawful discriminatory practice has occurred then the Commissions may issue a Non Discrimination Notice (NDN),⁵⁰ which allow any respondent to whom the NDN relates to make representations. The NDN itself, as determined by statute, must be in a particular prescribed form and will require the person to whom it relates to refrain from committing any unlawful discriminatory acts.⁵¹ Although it cannot in itself require an individual to make specific changes to their practices, it may detail areas where change is necessary. It may alternatively request that the person involved details the changes they have made within the timescales set out in the NDN.⁵² Beyond issuing a NDN, the Commissions adopt a monitoring role, whereby they may request that information is provided (for a period of up to five years) to assess whether the NDN has or has not been complied with. If suspicion is further aroused, the Commissions may instigate an additional formal investigation to determine whether the person is in breach of the NDN.⁵³ Additionally, the Commissions may seek a county court order in respect of a breach of a NDN, or, if they perceive that the individual will commit further unlawful acts within five years of the issuing of the notice, they may apply to the county court for an injunction.⁵⁴

Appeals against NDNs must be lodged within six weeks, to the requisite body.⁵⁵ The burden is upon the applicant, having regard to the relevant Commission’s statement of facts

⁴⁷ SDA 1975, s.60; RRA 1976, s.51.

⁴⁸ SDA 1975, s.60(1)(a); RRA 1976, s.51(1)(a).

⁴⁹ SDA 1975, s.61; RRA 1976, s.52 (see above n.46)

⁵⁰ SDA 1975, s.67; RRA 1976, s.58. Each Commission must comply with the statutory notice procedures when issuing a NDN. See Sex Discrimination (Formal Investigations) Regulations 1975 (SI 1975/1999, as amended by SI 1977/843); Race Relations (Formal Investigations) Regulations 1977 (SI 1977/841).

⁵¹ SDA 1975, s.67(2)(a); RRA 1976, s.58(2)(a).

⁵² SDA 1975, s.67(4); RRA 1976, s.58(4).

⁵³ SDA 1975, s.69; RRA 1976, s.60.

⁵⁴ SDA 1975, s.71; RRA 1976, s.62.

⁵⁵ SDA 1975, s.68; RRA 1976, s.59.

accompanying each NDN, to identify the disputed fact(s) and to demonstrate that the true fact(s) differ(s) from that/those relied upon by the Commission. A requirement contained within the NDN may be quashed if it is unreasonable,⁵⁶ in which case, the Commission may substitute that particular requirement with another.⁵⁷ It is also possible to pursue judicial review proceedings through the High Court, whereby a requirement may be quashed following application of the *Wednesbury* unreasonableness test.⁵⁸

3.3. Use and Effectiveness of Enforcement Powers and Strategic Litigation

As the above analysis suggests, the statutory and judicial safeguards associated with formal investigations have limited the usefulness of initiating such investigations. The strict technical legal requirements may prove particularly time-consuming to comply with, which may dilute the potential impact of any investigation should it become a long, drawn-out process. To date the CRE has conducted many more formal investigations than the EOC, especially during the early part of its existence: this discrepancy may perhaps be explained by the prior expertise in the area of racial discrimination gathered from the RRB and CRC,⁵⁹ as the EOC did not have the benefit of any similar experience. As Hazel Carty highlights, the EOC's apparent reluctance to "use formal investigations was, no doubt, compounded by the hostile judicial reaction to the CRE's vigorous campaign to use such investigations".⁶⁰ A major criticism of those initial investigations undertaken concerned the perceived lack of a coherent strategy. However, it would seem that both Commissions have subsequently fine-tuned their investigative practices, in light of both their own increased expertise and experience, and the initial academic, judicial and parliamentary scrutiny and scepticism they

⁵⁶ SDA 1975, s.68(2); RRA 1976, s.59(2).

⁵⁷ SDA 1975, s.68(3); RRA 1976, s.59(3).

⁵⁸ *Wednesbury* unreasonableness refers to the degree of unreasonableness of an administrative decision that the courts may intervene to correct. The test originally derives from *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA). As restated in less circular fashion by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at para.410, a court will intervene to correct an administrative decision on grounds of unreasonableness if that decision was "[s]o outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

⁵⁹ For statistics relating to the CRE see Harwood, R, 'Teeth and Their Use: enforcement action by the three equality commissions' (August 2006) Public Interest Research Unit, Table 13, highlighting the changes in the number of completed CRE formal investigations over a 25 year period. As noted at p.10, the CRE completed over 800% more formal investigations in the first half of the 1980s than in the first half of the current decade.

⁶⁰ Carty, H, 'Formal investigations and the efficacy of anti-discrimination legislation' (1986) *Journal of Social Welfare Law* 207 at p.211.

received.⁶¹ The CRE has more recently conducted high-profile investigations relating to specific organisations, whereas the majority of the EOC's work has centred upon general thematic investigations.⁶² Formal investigations, however, have been largely abandoned as the primary method of enforcing discrimination legislation, with the Commissions increasingly seeking to deal with organisations on a voluntary basis. A drawback of the latter approach, however, is that it is largely dependent upon the goodwill of organisations to cooperate and comply with the Commissions' requests and recommendations.

The following findings emerged from research conducted by the Public Interest Research Unit⁶³ (PIRU) covering a period of approximately seven and a half years until the beginning of June 2006:

- The Commissions conducted a total of seven formal investigations, suspending two and discontinuing one (not including those continuing beyond June 2006).
- Only one discrimination notice was served (by the CRE in 2000).
- Only one persistent discrimination injunction was applied for (by the EOC in 2004).
- No discriminatory advertisement complaints were presented.
- No complaints concerning instructions or pressure to discriminate were presented.
- No notices were served requiring the production of information during a formal investigation.

As regards the power to enforce the Race Equality Duty (RED), available to the CRE since 2000, four compliance notices have been served for a failure to meet one or more of the specific duties. No applications have been made to a court requiring compliance with these duties, nor has the CRE challenged any failure to meet the RED by way of judicial review,

⁶¹ See Appleby, G and Ellis, E, 'Commissions Undone', New Statesman, July 6, 1984 and the House of Commons Affairs Committee, First Report (1981-1982) H.C. 36-I, where the Home Affairs Select Committee criticised the CRE's lack of strategic targeting.

⁶² From 1999 until June 2006 both the CRE and EOC completed three Formal Investigations. The EOC's investigations primarily concerned employment in the areas of discrimination towards new and expectant mothers, occupational segregation in IT, childcare, engineering, construction and plumbing and into part-time and flexible working. The CRE's investigations have focused on employment in the Crime Prosecution Service, HM Prison Service and Police Service. With regard to the DRC, the newest current equality Commission entered into three binding agreements in lieu of enforcement action (which as discussed is a power unique to the DRC by way of s.5 of the DRCA).

⁶³ Harwood, R, 'Teeth and Their Use: enforcement action by the three equality commissions' (August 2006) Public Interest Research Unit.

although it did intervene in one such case.⁶⁴ The empirical evidence would suggest that the Commissions have made little use of their enforcement powers despite there appearing to be frequent and sometimes flagrant breaches of the equality enactments.⁶⁵

	Jan – Dec 2005	Jan – Dec 2004	Jan – Dec 2003	Jan – Dec 2002	Jan – Dec 2001
<u>Total Applications for Assistance</u>	1,028	556	903	1,300	1,197
Full CRE legal representation	3	1	28	81	81
Limited CRE representation	0	3	9	56	41
Full CRE advice and assistance	503	485	774	600	714
Limited CRE advice and assistance	10	12	25	52	79
Representation by RECs	39	27	25	16	33
Representation by trade unions	10	9	55	30	48
Representation by others	21	29	26	26	23
<u>Total</u>	586	566	942	861	1019
Out of scope / out of time	24	31	41	99	120
Withdrawn	52	65	147	123	-

CRE Provision of Legal Assistance (Jan 2001 – Dec 2005)⁶⁶

The table above, illustrating the total applications for assistance made to the CRE over 5 years, despite showing a general decline in the number of cases which the CRE directly supports, suggests that requests for assistance remain moderately consistent. Not every request for assistance is indeed worthy of support and is the result of an actual breach of the RRA. However, of the many hundreds of complaints received, it seems reasonable to conclude that there might have been more instances in which the CRE could have used its enforcement powers. This table, focusing as it does upon *individual* applications, fails to take into account the CRE's own strategic litigation and investigative function: it may be that the CRE has had ample opportunity to make use of its enforcement powers over the past 5 years, yet has chosen not to do so.

⁶⁴ *R. (on the application of Elias) v Secretary of State for Defence* [2005] IRLR 788 (QBD). Mr Justice Elias (no relation) held in this case that the Far Eastern Prisoner of War Ex-Gratia Scheme was unlawful and discriminated against non-British nationals. This was also the first case to consider the Race Equality Duty: the Court found that the Ministry of Defence had not carried out a Race Equality Impact assessment. The judge commented, at para.98, that "given the obvious discriminatory effect of this scheme, I do not see how in this case the Secretary of State could possibly have properly considered the potentially discriminatory nature of this scheme and assumed that there was no issue which needed at least to be addressed." Upon appeal, which was not supported by the CRE, the Court of Appeal dismissed both the appeal and cross-appeal (*R. (on the application of Elias) v Secretary of State for Defence* [2006] IRLR 934 (CA)).

⁶⁵ In relation to the CRE, for example (as may be seen from the table above), requests for assistance remain relatively high, while the CRE's recent Annual Reports reveal several examples of legislative non-compliance.

⁶⁶ The statistics presented are obtained from the CRE's Annual Reports (2001-2005).

An analysis of the financial accounts of the EOC and CRE over recent years indicates that only a relatively small proportion of their overall budget is spent directly upon legal services.⁶⁷ Between 2001 and 2005 the EOC on average dedicated just 5.43% of its total budget to legal services whilst the CRE only allocated 4.29%. However, such a baseline comparison may provide an inaccurate reflection when considering the CRE's unique power under s.44 of the RRA to give financial assistance to other organisations. The CRE's financial commitment to supporting Race Equality Councils (RECs) would explain why a relatively small proportion of its budget is spent directly upon law enforcement. Over the same four-year period, the CRE has on average allocated 23.02% of its budget to Race Equality Grants, a substantial proportion of which will be focused on law enforcement given that RECs may also offer support (of a non-financial nature) in the form of representation and in the provision of information and advice. Interestingly, the CRE makes specific provision for what it calls 'complainant aid'. Although this was not provided during the financial year 2004-05, the three preceding years saw on average 1.89% of its budget being allocated, which is only 2.4% less than it allocated to its legal services over the same period.⁶⁸

Of particular interest is the proportion of money spent upon 'publicity and information services' by both Commissions. This averaged 10.87% for the EOC between 2001 and 2005, and over the same period only 2.71% for the CRE. Again, however, direct comparison between these figures may be misleading since the CRE allocates over 23% or £4 million to the RECs. The RECs may represent potential victims of discrimination and develop a programme of education and policy development with relevant bodies, which will ultimately raise the profile of race discrimination in their locality and thus may negate the need for the CRE to spend vast amounts of money directly on publicity and information services. In addition, the CRE has been particularly effective in instigating high-profile investigations that have boosted its own image and profile, providing free publicity through media

⁶⁷ See Appendix A. The figures given concerning the financial breakdown of the EOC and CRE were calculated using the statistical information presented in this Appendix, as gathered from the Commissions' Annual Reports.

⁶⁸ Unfortunately, a request for clarification and further information concerning 'complainant aid' was received and acknowledged by the CRE's 'Freedom of Information Team', but not satisfied.

coverage.⁶⁹ Statistics concerning actual legal representation⁷⁰ by the CRE show that, increasingly, RECs, Trade Unions and ‘others’ (e.g. solicitors) have begun to bring substantially more cases than the CRE. Indeed, from January 2004 to December 2005, the CRE only offered full legal representation in four cases whereas the RECs, Trade Unions and ‘others’ collectively took forward 135, a sharp contrast to the period between January 2001 and December 2002 in which full CRE representation was provided in 162 cases and the RECs, Trade Unions and ‘others’ only took forward 14 cases.

A further consideration is that of the fiscal resources available to the existing Commissions. Direct enforcement procedures are resource-intensive. However, when set against the other operating charges of the Commissions, they may not seem so, suggesting that there could be a more effective use of funds. The 2004-05 Annual Report of the EOC, for example, states that £370,000 was spent directly on legal services during the year compared to £1,190,000 on publicity and information, whereas it could be argued that an ambitious and determined policy on formal investigations might result in the generation of publicity via the aforementioned media interest, making formal investigations a cost-effective option.⁷¹ Anthony Robinson, the present Director of Legal Services and Enforcement for the CRE, describing the approach of the CRE’s legal department towards its funds, has stated that by spending the budget not just internally but externally, the department can make those funds go much further, by funding external organisations “able to lever in additional resources...£1m becomes £5 or £6m”.⁷² However, despite being able to outsource certain functions (such as advisory roles) to external agencies, the CRE cannot outsource specific enforcement actions such as investigations and must consider all applications for assistance, which can, as stated, be particularly resource-intensive. Annually, the CRE may receive over 12,000 enquiries, and provide assistance with the initial stages of litigation to approximately 1,000. However, of those very few go to court: in 2005 the CRE took just 10 cases that far.

⁶⁹ For example, the media attention surrounding the murder of Zahid Mubarek by his cellmate Robert Stewart in March 2000 prompted the CRE to launch an investigation into the prison service in November of that year. However, publicity is not always favourable, for example the subsequent attack on the CRE by Martin Narey, then Director General of the Prison Service, who accused the CRE of hostility towards the prison service and criticised the length of the investigation, which had dragged on for too long, preventing the Prison Service from discovering the true extent of racism.

⁷⁰ See table at n.66.

⁷¹ As suggested by Carty, H, above at n.60, at p.214, n.34.

⁷² Harris, J, *The Lawyer* (6 February 2006), p.19.

Much of the work undertaken by both Commissions is investigative rather than adversarial. Ultimately, the strategy of adopting formal investigations is only one that the Commissions have at their disposal. Strategic enforcement of the legislation may also be achieved, albeit less directly, via the use of voluntary investigations, research, education and issuing guidance such as Codes of Practice. As discussed at section 3.1.3. above, the latter can have an indirect effect on the outcome of a discrimination case, given their interpretative influence.

3.4. Strategic Litigation in Europe

3.4.1. Equal Opportunities Commission

The EOC has been pioneering⁷³ in its use of EC law, developing a European litigation strategy that “involves references to the Court of Justice, raising points of EC law in the national courts, and to a limited extent lobbying the other institutions of the European Union”.⁷⁴ This strategy is undoubtedly helped by the fact that “equality of treatment between men and women in the workplace has formed one of the pillars of European Social Policy”.⁷⁵ Equality is also emphasised in the EU Charter of Fundamental Rights, in which Articles 20 and 21 refer to the requirement of equality before the law and the right to be free from discrimination respectively, which should directly encompass the issue of gender: the Charter nevertheless specifies the right to equality between men and women in Article 23. Indeed, the victories achieved by the EOC in the domestic context may to a large extent have “depended on the use of European law and the infusion of that law into the UK has led to dynamic change”⁷⁶ as exemplified by the *Bilka-Kaufhaus*⁷⁷ case, which considered discrimination in the sphere of employment and saw the standard of justification

⁷³ See Lord Lester of Herne Hill, QC, ‘Discrimination: What Can Lawyers Learn from History’ (1994) PL 224 for a discussion on the history of reform in the area of gender (and disability), and the unforeseen influence of European Community Law. Indeed Lord Lester at p.230 described the EOC’s support of a European Litigation Strategy as “courageous” given there was “always a real risk that their very modest budget for assistance in test cases would be exhausted with a single costly defeat” and the “legitimacy of the use of Community law in this area was not well established”. Furthermore “it was not clear whether industrial tribunals had jurisdiction to interpret the legislation in accordance with Community Law, or whether the EOC had the power to give legal assistance in cases relying upon Community law”.

⁷⁴ Barnard, C, ‘A European Litigation Strategy: the Case of the Equal Opportunities Commission’ as contained in Shaw, J and More, G (eds.), *New Legal Dynamics of European Union* (Clarendon Press, Oxford 1995) p.253.

⁷⁵ *ibid.* pp.253-4.

⁷⁶ Bahl, K, ‘Equal Opportunities and the Law: Catalyst for Change?’ (1994) 3 Nottingham Law Journal 1 at p.7.

⁷⁷ *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607 (Case 170/84).

strengthened.⁷⁸ In *Bilka*, it was decided that the employer must show that the means chosen to achieve the relevant objective served a real business need, and that they were appropriate and necessary. This three-stage test forms the basis of EU legislative definitions of justification, which domestic courts apply.

In pursuing cases before the Court of Justice of the European Communities (ECJ) the aim is to “procure change by eliciting a favourable interpretation of legislative provisions in order to establish precedents from which a class of claimants will subsequently benefit”.⁷⁹ Even if a case is not successful in terms of its outcome, it may be extremely useful to clarify points of law, which may result in statutory reform. Furthermore, the publicity attracted to such cases may provide an additional means of communicating information to interested parties, to raise awareness of particular issues and to promote the credibility and profile of the Commission itself. Indeed, as Catherine Barnard highlights, a major reason for the EOC’s success is the “respectability” of the organisation in the eyes of the ECJ because of its “statutory status” and “experience”.⁸⁰ The “stable structure and financing” of the EOC has given it a “privileged position” and the ability to “lend the advantages it acquired as a repeat player to the legally impoverished one-shot litigant”.⁸¹

As regards the EOC’s litigation strategy, during the late 1970s and early 1980s, this was primarily reactive, emerging on an ‘ad hoc basis’ and largely dependent upon cases brought forward by individual complainants. This strategy may have been influenced by problems associated with the creation and initial management of the EOC.⁸² During the mid 1980s and early 1990s, the EOC began to focus its efforts upon particular issues, such as the statutory retirement age. Rather than exclusively relying upon references to the ECJ, the EOC

⁷⁸ Although the *Bilka* justification reinforces the principle of indirect discrimination, discriminatory barriers may ultimately remain despite their disparate impact: firstly, given the wide margin of appreciation afforded to Member States, as frequently “equality of opportunity gives way to business needs and State policy decision” (Fredman, S, ‘The Future of Equality in Britain’ (Autumn 2002) EOC Working Paper Series No. 5, p.7) where the objectives in question have legitimate aims; and secondly, due to the weak interpretation of the *Bilka* standard of justification whereby the requirement of the condition being ‘necessary’ has been diluted and qualified with the prefix ‘reasonably’, which gives employers considerable leeway to discriminate. See also *Allonby v Accrington & Rossendale College* [2001] IRLR 364 (CA), para.23, where Sedley LJ considered the ‘balancing test’ (established in *Hampson v Department of Education and Science* [1989] ICR 179 (CA) by Balcombe LJ and subsequently approved by the House of Lords in *Webb v EMO Air Cargo* [1993] ICR 175 (HL)), and the *Bilka* standard of justification.

⁷⁹ See Barnard, C, above at n.74, pp.258-9.

⁸⁰ *ibid.* at p.262.

⁸¹ *ibid.* at p.261.

⁸² See Sacks, V, ‘The Equal Opportunities Commission – Ten Years On’ (1986) 49 MLR 560 for a discussion of these problems.

recognised the importance of judicial review before UK courts, which brought distinct advantages as Catherine Barnard highlights.⁸³ Judicial review enables the Commission to have full control over the case, specifically targeting the issue it wishes to challenge, and as this will inevitably concern a point of law, there is often little dispute about the facts in question. Importantly, judicial review also has the potential to benefit a large number of people,⁸⁴ overcoming a major criticism of current anti-discrimination law, that it is particularly individualistic in its enforcement and available remedies.

Looking ahead, continuing to pursue the European litigation strategy initially pioneered by the EOC will provide the CEHR with an additional avenue for challenging national legislation. Given that the CEHR is an amalgamation of the existing Commissions it is likely that the 'respectability' of the body will be further enhanced and will give the CEHR an authoritative voice within the European Community concerning discrimination law, which may help precipitate changes not only at national, but also European level. In order to make the most of this avenue, however, it is important to proactively find suitable test cases as opposed to relying upon individuals making the initial application, which has tended to be the approach of the EOC.⁸⁵

3.4.2. Commission for Racial Equality

Prior to the introduction of the Race Directive⁸⁶ introduced as a result of the Amsterdam Treaty⁸⁷ (amending the Maastricht Treaty⁸⁸), there was limited scope for the CRE to challenge discrimination at EU level. The Directive, through Article 13, required member states to take specific action, and in the UK compliance was achieved by way of the Race Relations Act 1976 (Amendment) Regulations 2003. The express recognition of racial

⁸³ See Barnard, C, above at n.74. pp.265-6.

⁸⁴ For examples of claims brought by individuals which ultimately benefited many, see *Marshall v Southampton and South West Hampshire AHA* [1986] ECR 723 (Case 152/84), *Marshall v Southampton and South West Hampshire AHA (No. 2)* [1993] ECR I-4367 (Case C-271/91) and *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission* [1995] 1 AC 1 (HL).

⁸⁵ Catherine Barnard (above at n.74) highlights two important cases where this approach has been evident. In *Marshall (No. 2)* (Case C-271/91, *op. cit.*), the EOC refused to support the early stages of the case and in *Webb v EMO Air Cargo UK Ltd* [1994] ECR I-3567 (Case C-32/93) the applicant was also left to take the case on alone.

⁸⁶ Council Directive 2000/43/EC (Race Equality) OJ L 180/22, 19.7.2000

⁸⁷ Signed on 2 October 1997 and entered into force on 1 May 1999.

⁸⁸ Also referred to as the Treaty on European Union, which was signed on 7 February 1992 and came into force on 1 November 1993.

equality enabled the CRE to broaden its interests and adopt an approach to European strategic litigation similar to that of the EOC.

The CRE's European and international strategy, for the period 2004 to 2006,⁸⁹ had similarities to that of the EOC and set out three main objectives. The first was to influence the international agenda, as many decisions adopted at the international level have a direct effect upon equality at national level.⁹⁰ The second focused on sharing knowledge in order to learn from best practices demonstrated abroad. Lastly, and importantly with regard to the CRE's use of enforcement procedures, was the aim to involve European and international dimensions in the Commission's work, including a specific consideration of the human rights standards. However, upon analysing the CRE's approach, in contrast to that adopted by the EOC, the strategy involved very little emphasis upon bringing key cases before the ECJ and ECtHR in order to establish precedents and maximise the impact of the CRE's enforcement powers. The CRE's approach appears largely indirect, seeking to shape the EU's approach to anti-discrimination. Despite this the CRE has created a strategy for its European and international legal work from 2006 to 2007.⁹¹ Importantly, as regards enforcement, this strategy expressly includes reference to conducting strategic litigation which relates to European and international work, possible examples of which include: intervening in domestic human rights cases raising issues of racial discrimination; intervening in ECJ cases considering an issue relating to discrimination; and intervening in cases before the ECtHR that raise a racial discrimination claim. This commitment is welcome, as it has the potential to effect change on a European and national level, and in a more direct manner than would be the case if the CRE were to simply adopt an advisory and contributory role with regard to EU policy.

⁸⁹ See <http://www.cre.gov.uk/policy/eurostrat/index.html>.

⁹⁰ An example of this may be seen in the case of *Marshall v Southampton and South West Hampshire AHA* [1993] ECR I-4367 (Case C-271/91) where the ECJ ruled that the cap on compensation under the SDA contravened the Equal Treatment Directive. Subsequently the limit in the SDA was removed by way of the Sex Discrimination and Equal Pay (Remedies) Regulations 1993 (SI 1993/2798), and the limit was likewise removed from the RRA by way of the Race Relations (Remedies) Act 1994 ss.1(1) and (2).

⁹¹ See <http://www.cre.gov.uk/policy/eurostrat/legal.html>.

3.5. Race Equality Duty

As noted,⁹² the RRA 1976 as amended by the RRAA now places public authorities under a statutory duty to promote race equality. This primarily resulted from the Macpherson Report following the Stephen Lawrence Inquiry,⁹³ which highlighted that many public bodies, particularly the police, were failing to address the problems of racial discrimination and inequality. Section 71 of the RRA had previously placed a general duty upon local authorities: this section was extended by the RRAA for the first time to provide a general duty upon all public authorities listed in Schedule 1A of the RRAA.

The general duty itself, as set out in s.71(1), requires all listed public authorities when carrying out their functions to have due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity and good relations between different racial groups. The aim of the duty is to make the promotion of racial equality central to the work of public authorities, which are expected to consider the implications for racial equality across all of their functions. The guidance provided in the statutory Code of Practice⁹⁴ produced by the CRE, highlights that the weight given to race equality should be proportionate to its relevance to the particular function in question and, importantly, that each aspect of the general duty is complementary. Public authorities must therefore meet all three parts of the duty, and in consequence it is necessary to evaluate how all of their policies and services affect race equality, as action taken to satisfy one part of the duty may conflict with and have an adverse reaction upon another. The Code of Practice sets out suggested steps to be taken in order to satisfy the general duty, and its supporting publications (which are non-statutory) also provide guidance for public authorities.

The specific duties provide steps to be taken by the public authorities listed in Schedule 1, to help them in their performance of the general duty. One of the two main specific duties requires public bodies to prepare and publish a race equality scheme, the purpose of which is to explain how they will meet both their general and specific duties under s.71(1) of the RRA. Such a scheme must cover the functions, policies and proposed policies of the public

⁹² See above, section 2.1.2. - Race Relations Act.

⁹³ Sir William Macpherson of Cluny, 'The Stephen Lawrence Inquiry' (Cm 4262-I, 1999).

⁹⁴ CRE, 'Code of Practice on the Duty to Promote Race Equality' (2002)

<http://www.cre.gov.uk/downloads/duty_code.pdf>.

authority that are relevant towards the performance of its general duty, and must include details of specific arrangements as set out in Articles 2(3) and 2(4) of the Race Relations Act 1976 (Statutory Duties) Order 2001.

The second duty concerns employment, and applies to all public authorities bound by the general duty (unless specifically exempt). This duty dictates that all public authorities must ethnically monitor staff and, in particular, applicants for employment, training and promotion. Where an authority has 150 or more full-time staff, it is also subject to more extensive monitoring requirements, which include grievances, disciplinary action, dismissals, training and performance reviews. The collated information is required to be published annually and is intended to help the authority in question meet its general duty, by using the information gathered to determine whether there are indeed any differences for it to act upon in the way racial groups are treated.

3.5.1. Enforcement

As the Race Equality Duty (RED) is a statutory duty, failure to comply can result in enforcement action. Individuals with an interest in the matter, or the CRE itself, may bring a claim for judicial review before the High Court, whereby the action (or the failure to act) of a public authority can be challenged. The CRE may also use its powers of formal investigation to enforce the general duty. Alternatively, if a public authority does not meet any of its specific duties it can face enforcement action by the CRE under s.71D of the amended RRA, which includes the serving of a compliance notice, underpinned if necessary by a court order. Such a compliance notice will require the authority to comply with the duty in question and provide the CRE, within 28 days of the notice being served, with information outlining the steps it has taken to do so. If the CRE considers that a person has not complied with any requirements under the notice within three months, it may then apply to the county court for an order requiring that person to comply.⁹⁵

⁹⁵ RRA 1976, s.71E(2).

3.5.2. CRE's Stance

The CRE has emphasised its commitment to working in partnership with public authorities to help them fulfil their legal responsibilities under the RRA as amended, while ensuring that it uses the full range of its enforcement powers, especially as the Commission itself is the only body with powers to enforce the specific duties to promote race equality. Following the introduction of the RED, as at April 2005 the CRE had initiated compliance proceedings with over 150 public authorities across various sectors including local and central government, health, education and criminal justice.⁹⁶ In the majority of these cases, the proceedings resulted in positive outcomes and the Commission did not have to issue a compliance notice. In addition, when assessing compliance, the CRE produced several assessment templates,⁹⁷ which can be used by public authorities to assess their own race equality policies and schemes and to make improvements.

The CRE has adopted a proactive approach to monitoring public authorities, employing various methods such as examining information made available under the race equality schemes, adopting or commissioning research into a specific area, or by considering evidence brought forward by external individuals or bodies concerning a possible failure to comply. The latter method is facilitated by the fact that race equality schemes are publicly available documents. The CRE also works with inspectorate bodies, themselves subject to the RED, and has created framework arrangements for these bodies to incorporate within their existing mainstream auditing and inspecting procedures, which gives the inspectorates the role of assessing whether and how public authorities also comply with the RED.⁹⁸ As regards compliance, however, Trevor Phillips, acting as CRE Chair, had been keen to stress that “there are still too many public bodies failing to comply properly with their race equality duty” and “to those organisations who are simply failing to comply the message is simple: watch out”, which signalled the CRE’s intention to place increased pressure upon local

⁹⁶ See <http://www.cre.gov.uk/duty/compliance.html>.

⁹⁷ CRE, ‘Assessment Template for Race Equality Schemes and the Employment Duty’ (February 2005) <http://www.cre.gov.uk/downloads/res_3yr_review_assess_tmpl.doc>.

⁹⁸ The CRE has published a document entitled ‘The Duty to Promote Race Equality, A Framework for Inspectorates’ (July 2002), which encourages inspectorates to look for evidence that public authorities are meeting their duty, and suggests various outcomes that should distinguish successful authorities <http://www.cre.gov.uk/downloads/duty_inspect.pdf>.

authorities to comply with their legal duties.⁹⁹ Additionally, as contained within the CRE's Corporate Plan 2006-2009,¹⁰⁰ there is a desire to work towards leaving the best possible legacy for race equality, for the CRE, its staff and its stakeholders, as it moves towards its absorption into the CEHR, which is indicative that the CRE will try to make the most effective use of enforcement powers.¹⁰¹

3.6. Gender Equality Duty

On 6 April 2007, the EA introduced a Gender Equality Duty (GED), similar to the RED, requiring public authorities, when carrying out their functions,¹⁰² to have due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women, providing protection against sex discrimination in areas such as policy and decision making, administrative functions and service delivery. This prohibition brings the SDA into line with s.71 of the RRA and also s.49A of the DDA (as inserted by the Disability Discrimination Act 2005). The GED, by way of s.76A(2), like the Disability Equality Duty (DED), applies to all public authorities in respect of all of their functions and, by implication, also applies to services and functions 'contracted out' to non-state bodies so long as they are carrying out a public function. The RRA, on the other hand, specifically and exhaustively lists the public authorities subject to the RED under schedule 1A of the RRA, although it is possible to amend this list by statutory instrument, as has been done in recent years.¹⁰³

Like the RED, the concept of 'due regard' in the GED is based on the notion of proportionality and relevance, meaning the weight public authorities attach to it should be directly proportionate to the relevance of that particular function. In support of the GED, as with the RED, there are also specific duties applying to major public authorities, as outlined in s.85 of the EA. These specify the steps the authorities should take to help them meet the

⁹⁹ CRE, 'Speed up progress on race equality or face the penalty, says CRE' (16 November 2004) Press Release <<http://www.cre.gov.uk/Default.aspx?LocID-0hgnew007.RefLocID-0hg00900c001002.Lang-EN.htm>>.

¹⁰⁰ See <http://www.cre.gov.uk/downloads/CRE-Corporate-plan-2006-2009.pdf>.

¹⁰¹ The appointment of Professor Kay Hampton on 1 December 2006 to replace Trevor Phillips may also bring a renewed focus upon strategic litigation, which may be seen to have lost much momentum under Trevor Phillips.

¹⁰² EA 2006, s.84. inserting s.76A into the SDA 1975.

¹⁰³ See statutory instruments SI 2001/3457, SI 2003/3006 and SI 2004/3127.

general duty and include producing and publishing an equality scheme, identifying gender equality goals and the intended actions to meet them, and developing, publishing and regularly reviewing an equal pay policy, including measures to address promotion, development and occupational segregation.

Given the late arrival of the GED, the EOC will have a limited time in which to directly monitor and enforce the duty before it is transferred to the CEHR. Through extensive consultation in advance of its introduction, however, the EOC was able to provide a statutory Code of Practice¹⁰⁴ under the SDA, as amended by the EA, tabled before Parliament in October 2006. This Code provides practical guidance to public authorities concerning how to fulfil their obligations under the GED, and will be admissible evidence in any legal action specifically brought under the SDA, EqPA or EA in criminal or civil proceedings before any court or tribunal. A court or tribunal must also take into account any part of the Code that appears to be relevant to any question arising in proceedings, and, following a failure to comply with recommendations in the Code, may draw an adverse inference.

The EA extends, by way of s.83, the duty of non-discrimination, to specifically cover the provision of public functions, again closely replicating the protection provided for race and disability under (respectively) s.19B of the RRA (which commenced on 2 April 2001) and s.21B of the DDA (which commenced 4 December 2006). Section 21A is inserted into the SDA making it unlawful for a public authority exercising a function of a public nature, to do any act that constitutes discrimination or harassment. The duty of non-discrimination is due to be similarly extended on the grounds of religion or belief by way of s.52 of the EA, although no commencement order has been made at the time of writing.

3.7. Disability Rights Commission

Prior to the creation of the DRC, there existed the National Disability Council (NDC), established under the Disability Discrimination Act (DDA) 1995.¹⁰⁵ This differed vastly from both the CRE and the EOC, operating without a specific law enforcement role. Its role

¹⁰⁴ EOC, 'Gender Equality Duty: Code of Practice, England and Wales' (November 2006) <<http://www.coc.org.uk/Default.aspx?page=19765>>.

¹⁰⁵ DDA 1995, Part VI and VII of Schedule 5.

was advisory, at the request of the Secretary of State or on its own volition (subject to exceptions), and unlike the CRE or EOC it had no investigative power or power to assist individual litigants. During the making of any recommendations the NDC had a duty to seek consultation and was also under an obligation to consider the costs and benefits associated with these recommendations.¹⁰⁶ The Council itself consisted of members appointed by the Secretary of State having relevant knowledge and experience of the needs of disabled people and of trade and industry generally. At least half of the membership of the Council was to consist of individuals having a 'direct affiliation' with disability.¹⁰⁷ Like the Commissions, the NDC had to produce an Annual Report and similarly, albeit subject to approval and commissioning from the Secretary of State, could undertake research into prescribed areas. The NDC had a more direct influence upon the elimination of discrimination through issuing Codes of Practice. These Codes had the same effect as those issued by the Commissions, as they could be taken into account when seeking to determine a question to which they relate¹⁰⁸ and were admissible as evidence.¹⁰⁹ Similarly, the NDC was obliged to engage in consultation when drafting proposals, and upon the publication of a draft, had to take into account any representations made. The NDC was somewhat limited in this function, however, requiring a request from the Secretary of State to prepare or review a Code.¹¹⁰

Given the large disparity of powers between the NDC and the CRE and EOC, it was a welcome development when the NDC was abolished under the Disability Rights Commission Act 1999 (DRCA). The DRCA established the DRC in April 2000 and provided for its functions and powers, which are largely similar to those of the CRE and EOC. The DRC is charged with the same general duties as the CRE and EOC, although the DRCA also includes the duty to "take such steps as it [the DRC] considers appropriate with a view to encouraging good practice in the treatment of disabled persons".¹¹¹ In addition the DRCA specifically provides for the DRC to give advice or make proposals to Government

¹⁰⁶ DDA 1995, ss.50(5) and (6).

¹⁰⁷ They could be disabled persons, persons who had previously had a disability, or the parents/guardians of such persons.

¹⁰⁸ DDA 1995, s.51(5).

¹⁰⁹ DDA 1995, s.51(4).

¹¹⁰ DDA 1995, s.51(1).

¹¹¹ DRCA 1999, s.2(c).

Ministers, agencies or public authorities concerning existing legislation.¹¹² The DRC has been given a major strategic role in enforcing the law protecting people with disabilities: it can provide support for individual cases and can conduct formal investigations for any purpose connected with the performance of its duties, which broadly replicates the powers available to both the CRE and EOC, although there are important differences.

Under s.2 of the DRCA, the DRC must draw up terms of reference and give notice prior to the undertaking of any formal investigation in a prescribed manner, suitable to the type of investigation being undertaken (i.e. a named person or general investigation). Unfortunately, the issue of suspicion, as exposed in *Hillingdon* and *Prestige* as discussed above, was not resolved under the DRCA, which arguably would have been an ideal opportunity to have provided further clarification to this area. The DRCA envisages three types of formal investigation: a general investigation; a named person investigation framed in the same light as that of the CRE and EOC, and a named person investigation with the aim of monitoring the compliance of a NDN or 'agreement in lieu of enforcement'. Although the DRC is empowered to issue NDNs, in line with the corresponding powers of the CRE and EOC, the DRCA gave the DRC an additional power to make an 'agreement in lieu of enforcement action' under s.5. These are legally binding written agreements, which the DRC has the power to enter into with anyone subject to a formal investigation. As part of such an agreement, the DRC undertakes to suspend the investigation and not to take any further enforcement action¹¹³ and the person concerned undertakes not to commit any further discriminatory acts and to take such action as may be specified in the agreement.¹¹⁴ Such an agreement may avoid the need for a NDN, and as such is much quicker and less resource-intensive than a formal investigation. Most importantly, such an agreement is likely to be more effective than an accusatory investigation, which could destroy the goodwill and effective cooperation of the person subject to the investigation. Should such an agreement

¹¹² DRCA 1999, ss.2(2)(a) and (b).

¹¹³ DRCA 1999, s.5(2)(a).

¹¹⁴ DRCA 1999, s.5(2)(b).

break down or fail to be followed, the Commission does have the power to apply to a county court for an order requiring the other party to comply.¹¹⁵

Like the CRE and EOC, the DRC is entitled under s.7 to provide legal assistance to complainants. The DRC can provide the same range of assistance and can decide to give or refuse assistance on the same grounds as the CRE and EOC. In relation to issuing Codes of Practice, the DRCA inserts s.53A into the DDA, whereby the DRC may replace a Code of Practice issued by the NDC under ss.51-53 of the DDA, with its own Code giving practical guidance on how to avoid discrimination, promote equality of opportunity and encourage good practice. As with those issued by the CRE and EOC, DRC Codes of Practice are admissible as evidence in proceedings before a court or tribunal.

The DRC has made steady progress in the disability field, no doubt helped by the NDC's previous experience and the vast experience of the CRE and EOC. From day one, the DRC was able to offer advice and take on casework through its legal service department, therefore it was better equipped than the EOC during that Commission's first few years of operation, which were dogged by internal conflict.¹¹⁶ Although the DRC may deal with cases through discussion and conciliation via the Disability Conciliation Service, it has also sought to support individual cases that will have the greatest impact and set precedents that will benefit a wide number of people. The DRC has been highly successful before the Court of Appeal and House of Lords and has sought clarification and expansion on some important areas such as the legal definition of disability.¹¹⁷ It has actively embraced joint working with the CRE and EOC, particularly during the initial years of its existence and has sought to raise the profile of disability issues using a variety of media including radio and television advertising. Despite this, the DRC has been relatively slow to use its formal investigation powers. It undertook its first investigation in 2003 (into website accessibility), three years after its creation. In 2004 a Strategic Enforcement Unit was created to take on this investigative role, which has seen an increased use of formal investigations (such as the 18-

¹¹⁵ DRCA 1999, s.5(8).

¹¹⁶ See Sacks, V, 'The Equal Opportunities Commission – Ten Years On' (1986) 49 MLR 560, for a discussion of the problems the EOC faced.

¹¹⁷ e.g. *Hewett v Motorola Ltd* [2004] IRLR 545 (EAT), and as reported in the DRC's publication 'Five Years of Progress' (July 2005), where it was ruled that Asperger's Syndrome is covered by the statutory definition of disability <http://www.drc.org.uk/pdf/4008_404_annual2005_DRC_Impact_Report_2005.pdf>.

month formal investigation to test inequalities in health care for disabled people which began in December 2004, and the 12-month general formal investigation into barriers people with impairments and long-term health conditions face in trying to pursue careers in teaching, nursing and social work which began in May 2006). The Strategic Enforcement Unit has been developing guidelines on the use of s.5 agreements under the DRCA, which have been used to great effect, most recently (and for the first time involving a major retailer) against Debenhams plc, whereby the retailer agreed to provide disabled access in all its retail stores in England, at a cost of over £300,000, within three months of the agreement, which began on 3 July 2006.

3.8. Disability Equality Duty

The draft Disability Discrimination Bill published in December 2003 reached the statute book as the DDA 2005 on 7 April 2005. This Act introduced the Disability Equality Duty (DED) in s.49A, which, like the RED and GED, places a general duty upon public authorities to eliminate disability discrimination and harassment, to promote equality of opportunity in the area of disability, to promote positive attitudes towards disabled people, and to take steps to meet disabled peoples needs. Unlike the RED, which specifically lists the public authorities to which it applies, the DED follows the definition of 'public authority' contained in the HRA 1998.¹¹⁸ Specific duties require those public authorities listed in the Regulations¹¹⁹ to produce a Disability Equality Scheme, to be reviewed at least every three years, including an obligation to produce an Action Plan outlining the steps the authorities will take to fulfil their general duty. As with the RED and GED, the notion of 'due regard' is applicable and the DRC is empowered to produce a statutory Code of Practice. The DED came into effect on 4 December 2006, and those public authorities subject to the specific duties were also obliged to publish their Disability Equality Schemes by this date. The 2005 Act also gives the Secretary of State the power to introduce regulations detailing more specific duties that may help public authorities comply with their general duty.¹²⁰

¹¹⁸ HRA 1998, s.6(3).

¹¹⁹ Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005/2966).

¹²⁰ DDA 2005, s.49D.

3.9. Evaluation

The general equality duties of all three Commissions so far mentioned have no significant additional enforcement methods attached to them and will mostly rely upon the individual Commissions utilising their existing enforcement functions. The duties will potentially benefit individual litigants who may request copies of relevant Equality Schemes, and use these to their advantage should there be steps in the schemes that have not been followed and which are relevant to legal proceedings. The impact of these positive duties has recently been seen in relation to the RED, in the case of *Elias v Secretary of State*¹²¹ whereby the Court held that the Secretary of State was in breach of his duties under s.71 of the RRA as amended, for failing to have due regard to the need to eliminate unlawful discrimination. It was also determined that the time to have due regard to the general duty is when the policy is being considered and the relevant function is being exercised. It is not sufficient to do so when a policy has become the subject of challenge. This places increased emphasis on the need for public authorities to assess all their functions for compliance with the duties and to act accordingly. This legal challenge is an initial step, and one that will more than likely extend into the areas of gender and disability once these duties have been fully established.

Despite the enforcement powers available to the existing Commissions as discussed above, the direct enforcement of discrimination law relies primarily upon actions taken by individuals in bringing claims before an Employment Tribunal, which in itself carries a significant financial risk, as legal assistance is generally unavailable.¹²² Although the individual concerned may apply to the relevant Commission for assistance in bringing a claim before an Employment Tribunal, the demand for such help far outstrips the resources available for this purpose. Since July 2001 and the introduction of the Employment

¹²¹ *R. (on the application of Elias) v Secretary of State for Defence* [2005] IRLR 788 (QBD) as discussed above, at n.64.

¹²² The Access to Justice Act 1999 introduced an array of changes to publicly funded legal representation in England Wales. It created the Legal Services Commission, which does not provide financial assistance for representation before an Employment Tribunal. The most an individual can receive is 'legal help' available to those on low disposable incomes and with low savings: however, this generally covers procedural assistance connected with a claim and does not extend to representation. Legal assistance may be sought for appeals to an EAT and beyond. Conversely, in Scotland, legal assistance is available to complainants before an Employment Tribunal in complex cases by way of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2001 (SI 2001/2). The introduction of this provision was thought necessary in order to comply with Article 6(1) of the ECHR, which guarantees the right to a fair trial. See further *Airey v Ireland* (A/32) (1979-80) 2 EHRR 305 and *Granger v UK* (A/174) (1990) 12 EHRR 469.

Tribunals (Constitution and Rules of Procedure) Regulations 2001,¹²³ Employment Tribunals may either award costs up to £10,000 where this is considered appropriate (increased from £500), order the payment of a sum agreed by both parties, or order the costs to be considered in the county court: this generates uncertainty as to the financial risks involved in bringing proceedings, which may act as a significant barrier and deter otherwise arguable claims by non-represented or non-funded claimants. The Tribunal must consider these options once it determines the criteria in Schedule 1, s.14(1) of the 2001 Rules have been met, although it is not obliged to award costs in these circumstances.¹²⁴ The 2001 Rules have been seen to have ultimately “lowered the threshold”¹²⁵ for the award of costs by removing the need to require some degree of fault on behalf of the claimant and by introducing, in s.14(1)(ii), the ability to award costs when bringing ‘misconceived’ cases. Coupled with the fact that only a very small percentage of discrimination claims actually succeed,¹²⁶ this highlights the difficulties faced by individuals who face discrimination and seek some form of retribution. It also highlights the need for a statutory body with the necessary resources and powers to support individuals who might otherwise be prohibited from bringing a claim before a tribunal.

An additional burden is the requirement that, as of 1 October 2004, with the introduction of the Employment Act 2002 (Dispute Resolution) Regulations 2004,¹²⁷ the claimant must set out his or her grievance in writing to the employer before presenting a claim. A three-stage statutory grievance procedure must then be followed (subject to certain exceptions) and, depending on which party is at fault for a failure to follow these procedures, the tribunal may reduce or increase the compensation accordingly. These Regulations may therefore have the ultimate effect of denying an individual access to a tribunal whether through ignorance of the law, lack of awareness of the statutory grievance procedure, or because a claimant may be

¹²³ Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (SI 2001/1171).

¹²⁴ Section 14(1) of Schedule 1 specifies that where, in the opinion of the tribunal, a party has in bringing or conducting the proceedings acted “vexatiously, abusively, disruptively or otherwise unreasonably”, or where the bringing or conducting of the proceedings has been “misconceived”, the tribunal is entitled to consider making “(a) an order containing an award against that party in respect of the costs incurred by another party” or “(b) an order that that party shall pay to the Secretary of State the whole, or any part, of any allowances...paid by the Secretary of State...to any person for the purposes of, or in connection with, his attendance at the tribunal.”

¹²⁵ LJ Scott Baker, *Gee v Shell (UK) Ltd* [2003] IRLR 82 (CA).

¹²⁶ See Appendix C.

¹²⁷ Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/752).

reluctant to further engage with an employer for fear of exacerbating an already tense situation.

Discrimination claims that are not related to employment, primarily those relating to goods, facilities and services, are heard in the county courts. An advantage of registering a claim with the county court is that the time limit is six months from the date of the discriminatory incident (as opposed to three months for claims before an Employment Tribunal), subject to the possibility of extension in limited circumstances if the court believes it is just and equitable to do so. Additionally, public funding in the form of legal assistance is available for representation. A disadvantage, however, is that if a claimant loses a case before a county court the usual outcome will be to pay the defendant's legal costs, whereas costs will normally only be imposed at tribunal level if it is believed that the claimant acted unreasonably in bringing the claim.

A further contentious issue regarding individual enforcement concerns the burden of proof in a discrimination claim, which falls upon the applicant and is satisfied when the case has been proven on a balance of probabilities. Given that direct evidence of discrimination is rarely available, courts and tribunals must often infer the presence of discrimination from the primary facts. According to the Court of Appeal in *King v Great Britain-China Centre*,¹²⁸ once the employee has made out his or her case and the employer cannot supply a good reason for its decision, the tribunal is entitled to reach a finding of discrimination. This was somewhat qualified in *Glasgow City Council v Zafar*¹²⁹ when the House of Lords ruled that a tribunal is not *obliged* to make an inference of discrimination if the employer provides no satisfactory alternative explanation. Despite the introduction of the Burden of Proof Directive,¹³⁰ the approach established in *King* and *Zafar* is still applicable in relation to the SDA¹³¹ and DDA¹³² insofar as they apply beyond the area of employment and to the RRA¹³³

¹²⁸ *King v Great Britain-China Centre* [1991] IRLR 513 (CA).

¹²⁹ *Glasgow City Council v Zafar* [1998] IRLR 36 (HL). Also of note in this case, the tribunal had erred in failing to distinguish 'less favourable' from 'bad' treatment.

¹³⁰ Council Directive 97/80/EC (Burden of Proof) OJ L 14/6, 20.1.1998. See Connolly, M, 'The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001 No 2260)' (2001) 30 ILJ 375 for a further consideration of the implementation of this directive.

¹³¹ Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001/2660), which added s.63A to the SDA 1975.

¹³² Disability Discrimination Act (Amendment) Regulations 2003 (SI 2003/1673), which added s.17A(1C) to the DDA 1995.

as it relates to issues of colour and nationality. The Burden of Proof Directive necessitates a shift of the burden, once the applicant has proven the facts upon which inferences could be drawn of discrimination, which the respondent must then discharge on the balance of probabilities by proving that the treatment was not related, in any manner whatsoever, to a protected ground. Additional clarification was provided as to the timing involved in the shift of the burden of proof in the case of *University of Huddersfield v Wolff*¹³⁴ where the EAT ruled that a difference in treatment and in sex was not sufficient to shift this burden and that the claimant had to establish a 'causal link' between the two in order to create this shift.

Complainants face additional hindrances in the time limits imposed by legislation, which generally dictate that a claim must be presented to a tribunal within three months of the discriminatory act having taken place. Despite this, the legislation provides that tribunals or courts may still consider claims even when they are out of time, where it is considered "just and equitable to do so".¹³⁵ This provides wider discretion to the court or tribunal than that afforded under the Employment Rights Act 1996 s.111(2), according to which they may not consider a claim for unfair dismissal which is out of time unless the additional period is considered 'reasonable' and it was not 'reasonably practicable' for the complaint to be presented on time. It is therefore important to determine when the three-month period is to start from, which involves distinguishing 'continuing acts' from 'continuing consequences': an issue which has been extensively considered in case law¹³⁶ and has the potential to block what would have otherwise been a legitimate and successful claim.

The remedies available to a successful claimant somewhat reflect the individualistic nature of the legislation itself, which has been seen to hinder the effectiveness of anti-discrimination law.¹³⁷ The three available remedies that may be ordered by a tribunal in a

¹³³ Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626), which added s.54A to the RRA 1976.

¹³⁴ *University of Huddersfield v Wolff* [2004] ICR 828 (EAT).

¹³⁵ e.g. SDA 1975 s.65(1).

¹³⁶ See for example *Owusu v London Fire and Civil Defence Authority* [1995] IRLR 574 (EAT), *Cast v Croydon College* [1998] ICR 500 (CA), *Hendricks v Commissioner of Police for the Metropolis* [2003] ICR 530 (CA) and *Preston v Wolverhampton Healthcare NHS Trust* [2001] 2 AC 455 (HL).

¹³⁷ See Lustgarten, L, 'Racial inequality and the limits of the law' (1986) 49 MLR 68 at pp.73-74, highlighting how the law is "hampered in several ways by individuation" and drawing comparisons with the US which has a cost-maximising deterrence. Also see Baker, A, 'Access vs Process in Employment Discrimination: Why ADR Suits the US but not the UK' (2002) 31 ILJ 113, which considers the use of alternative dispute resolution

successful claim are: a recommendation for specific action; a declaration; and an award of compensation. The former two remedies are seldom used in discrimination cases. The effectiveness of the power to make a recommendation is severely limited, as it must relate solely to the complainant in question which may leave others in a similar position untouched. Recommendations therefore fail to take into account that discrimination may still be taking place and affecting other individuals, some of whom may even have offered evidence in support of the complainant. The usefulness of recommendations in discrimination cases concerning recruitment or dismissal is also limited, as individual complainants would not benefit unless the defendant actually employed them. As recommendations are not binding and the courts will not specifically enforce them, the only remedy for a failure to comply with a recommendation is an increase in compensation.

A declaration is an assertion of the claimant's rights, and details the rights of the respondent in relation to whom the discriminatory acts relate. It is often accompanied by one of the other available remedies, primarily that of compensation which is the most commonly used remedy in successful discrimination claims. The monetary award is intended to compensate the individual concerned for all the losses incurred as a result of the discrimination, and at present there is no statutory upper limit. Claimants are able to recover compensation for pecuniary and non-pecuniary losses in the form of injury to feelings, subject to the duty to mitigate their loss. Guidance was laid down in *Vento v Chief Constable of West Yorkshire Police*¹³⁸ concerning compensation for injury to feelings, given the imprecision inherent in making such awards. Mummery LJ's guidance requires tribunals to categorise cases into one of three groups with corresponding awards ranging from £500 to £25,000 although "there is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case".¹³⁹ According to this guidance, there is little point appealing a decision to award compensation unless the "tribunal has acted on a wrong principal of law...has misapprehended the facts or made a wholly erroneous estimate of the loss suffered", given

techniques in employment discrimination claims; it concludes at p.134 that "it is generally accepted that the remedies afforded by the tribunal system aim at compensation, not deterrence".

¹³⁸ *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318 (CA).

¹³⁹ *ibid.* para.66.

that it is “impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury”.¹⁴⁰ Aggravated damages may be awarded in addition to an award for injury to feelings but should not be combined with such an award,¹⁴¹ and are seen more as a way of recompensing the victim for the wrongdoing. Importantly, aggravated damages may take into account the defendant’s behaviour beyond the discriminatory act itself, which may ultimately compensate the victim for behaviour that, although not directly discriminatory, may be derisory or humiliating.

Compensation for indirect discrimination follows a slightly different path. The SDA, by way of s.65(1B), now provides the same test as that applied to a direct discrimination claim: it must be just and equitable to make an award of compensation. However, it is emphasised that the tribunal must first consider whether a declaration or recommendation is not an adequate remedy. This is also the approach adopted under the Sexual Orientation¹⁴² and Religion or Belief¹⁴³ Regulations, and the DDA.¹⁴⁴ Section 57(3) of the RRA carries forward the original restriction that “no award of damages shall be made if the respondent proves that the requirement or condition was not applied with the intention of treating the claimant unfavourably”, although this does not apply to indirect discrimination as defined by the Race Relations Act 1976 s.1(1A).¹⁴⁵ Therefore, those cases which fall within the new definition do not require any discriminatory intent in order for compensation to be awarded, and instead operate on the principle of what is ‘just and equitable’. In addition, a tribunal is not directed to consider a declaration and recommendation in the first instance before considering issuing damages. For those cases operating under the old restriction found in s.57(3), much depends on the interpretation of the word ‘intention’ and the decision in *JH Walker Ltd v Hussain*¹⁴⁶ was a welcome step as it requires the tribunal to consider not the motivation of the defendant, but rather the defendant’s state of mind in relation to the consequences of the acts,

¹⁴⁰ *ibid.* para.51.

¹⁴¹ *Per* the Court of Appeal in *Scott v Commissioners of the Inland Revenue* [2004] ICR 1410 (CA).

¹⁴² Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661), s.30(1).

¹⁴³ Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), s.30(1).

¹⁴⁴ DDA 1995, s.8(2).

¹⁴⁵ As amended by the Race Relations Act 1976 (Amendment Regulations) 2003 (SI 2003/1626), s.3.

¹⁴⁶ *JH Walker Ltd v Hussain* [1996] IRLR 11 (EAT).

thus negating business arguments (in this case efficiency) as a way of avoiding or overcoming discriminatory behaviour. The extension of compensation to indirect discrimination is important given that it is a largely effective deterrent mechanism, and introducing compensation may encourage more individuals to initiate legal action who would previously have had no recourse to any form of financial recompense.

With the volume of individual cases set to increase as the grounds of religion or belief become more established, and following the introduction of age as a ground, the CEHR can expect an increase in requests for assistance. However, as will be further discussed, the CEHR's budget would seem to undermine its ability to provide effective litigant legal support, suggesting that it will have to adopt an increasingly strategic approach to its legal assistance especially as it can be an "uncertain, often expensive and sometimes counter-productive business".¹⁴⁷ Such an approach would enable the CEHR to maximise the return on its investment. It is argued that the CEHR should not just seek to switch its attention to alternative strategies, such as the use of promotion and reliance on positive duties for example. Individual litigant support remains an important function.

3.10. Conclusion

This chapter has considered the existing Commissions, with particular focus on the enforcement procedures of each. Given the individualistic focus of anti-discrimination legislation and the severe limitations of individual enforcement actions to promote equal opportunities and help eradicate discrimination, it is clear that the CEHR's approach to enforcement will be vitally important: particularly given the current political climate in which we are constantly reminded of inequalities still affecting most sections of society, especially in employment.

As seen, the existing Commissions' regulatory mechanisms are arguably under-used yet remain potentially effective at securing change alongside other aspects of enforcement. The current Commissions, it is argued, have not been able to advance equality at a sufficient

¹⁴⁷ O'Connell, C, 'The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times' (2007) 36 ILJ 141, p.150.

pace, while the creation of the CEHR may provide a platform upon which to sustain, promote and advance equality across society as a whole, within all the protected equality strands.

The creation of a set of positive duties is to be welcomed, for they have the potential to tackle systematic discrimination while ensuring that equality in general is built into the core functions of public authorities as service providers, policy makers and employers. In addition, by covering private bodies that conduct a public function, the impact of the GED and DED will be widened. Requiring public authorities to adopt a proactive approach to mainstreaming equality into all relevant decisions and activities is much more likely to drive forward significant change, as opposed to relying on traditional methods of enforcement action which are largely reactive in nature. However, it is to be remembered that such duties, applying as they do to public authorities (as defined by the HRA), will leave the private sector relatively untouched and therefore an effective balance should be maintained between enforcement mechanisms focusing upon the public sector and individual litigant support, in particular, litigant support to private sector employees.

Although the introduction of these duties may be welcomed for the increased consistency they bring by further reducing the disparity between the protected grounds, there remains considerable scope for improvement. It was initially disappointing to see that the additional areas of sexual orientation and religion or belief, which for some time have fallen into the 'poor relations' category in terms of the protection afforded against discrimination, were not extended beyond the employment sector; this was only achieved some three years later with the introduction of the EA. It is hoped that age discrimination will be the next ground to receive similar consideration.¹⁴⁸ It is likewise disappointing that the positive duties aforementioned have not been extended to cover the grounds of sexual orientation, religion or belief and age. This would seemingly widen the disparity of protection again.¹⁴⁹

¹⁴⁸ See Centre for Public Services, 'The Case for a Positive Public Duty on Age Equality' (2004), which considers the reasons for extending positive duties to cover age <<http://www.european-services-strategy.org.uk/publications/essu-reports-briefings/the-case-for-a-positive-public-duty-on-age-equ/public-duty-on-age-equality-draft-final-report.pdf>>. Also see Chapter 7 for a discussion of the Green Paper 'A Framework for Fairness' which proposes the extension of age discrimination beyond the workplace at Chapter 9.

¹⁴⁹ See Chapter 7 for a discussion of the Green Paper 'A Framework for Fairness' which proposed a Single Equality Duty covering all the protected grounds (at Chapter 5).

The introduction and expansion of the positive duties would suggest a transition towards a more strategic use of enforcement procedures. Positive duties are proactive in nature, involving the monitoring and elimination of discrimination or potentially discriminatory practices. This should allow the existing Commissions to adopt a more strategic approach since evidence will be much more readily available, allowing them for example, to more accurately target investigations against public authorities. A consideration of the statistics concerning the CRE's provision of legal assistance,¹⁵⁰ would suggest there is a direct correlation between the RED and the sharp decline in the number of individuals who have received representation and assistance. Despite the DED and GED having been established for a shorter period of time, it may be reasonably contemplated that this trend will be replicated as the respective Commissions focus upon ensuring the duties are fully implemented, to the detriment of individuals seeking litigant support.¹⁵¹ It may therefore be argued that increasingly, the balance between the provision of individual litigant support on the one hand and the strategic regulatory mechanism of the Commissions on the other, is shifting in favour of the latter.

Consideration of the use of existing enforcement powers suggest that the CEHR should focus not only upon regulatory mechanisms, but should equally emphasise its ability to support litigation. Although, as discussed, that ability has potentially limited scope to effect widespread change, it still remains an important element in order to advance equality, particularly in the private sector. It is argued that a minimal focus on individual litigant support, and sporadic use of investigations, broadly replicating the existing Commissions' enforcement of discrimination legislation, will do little to gain the trust and confidence of stakeholders and enable the CEHR to effectively satisfy its specific duties, in particular as regards the advancement of equality.

¹⁵⁰ See table to n.66 above, at section 3.3.

¹⁵¹ A press release from the DRC for example has highlighted that they have issued compliance notices with 9 organisations on 15 May 2007 for a failure to provide evidence of a disability equality scheme. This represents the first formal step towards formal compliance procedures and is further evidence of the increased emphasis that will be given to the new regulatory mechanisms
<http://www.drc.org.uk/newsroom/news_relcases/2007/drc_issues_compliance_notices.aspx>.

Chapter Four

4. Establishing the Commission for Equality and Human Rights

The introduction of the Religion or Belief Regulations and Sexual Orientation Regulations signalled a renewed focus upon discrimination and the methods used to address it. The primary debate has centred on the need to provide institutional support to combat the newly protected grounds of discrimination, just as the CRE, EOC and DRC have supported their respective grounds.

Two consultation Green Papers, namely '*Towards Equality and Diversity*' (published in December 2001) and '*Equality and Diversity: Making it Happen*'¹ (published in October 2002), introduced the idea of a single equality body, charged with providing institutional support to address the whole spectrum of protected grounds contained within the discrimination legislation. This consultation process culminated with the launch of the White Paper '*Fairness for All: A New Commission for Equality and Human Rights*'² on 12 May 2004. This chapter will consider the consultation and drafting process of the White Paper, which attracted widespread responses, both for and against the creation of the CEHR. It will be seen that the sympathetic approach of the Government in making concessions secured the backing of the CRE, initially the CEHR's most fervent opponent. The CRE's opposition, however, has resulted in a delayed amalgamation within the CEHR until 2009. The drafting process and the passage of the Equality Bill through Parliament also resulted in additional amendments, which helped to gain widespread acceptance of the CEHR.

The consultation exercise to the White Paper *Fairness for All* (FFA) involved a large number of stakeholders, and in itself represented a review of the existing anti-discrimination legislation and enforcement, given that it asked people to directly comment on these aspects. A widespread concern both of the existing Commissions and vast majority of respondents during the consultation exercise was the strong focus on promotional activities of the CEHR to the detriment of enforcement. Consideration of the statistics concerning the decreasing use of pre-existing enforcement powers (see Chapter 3) would justify this concern on the part of

¹ DTI, '*Equality and Diversity: Making it Happen*' (2002)

<http://www.womenandequalityunit.gov.uk/equality/project/making_it_happen/making_it_happen.doc>.

² DTI, White Paper, '*Fairness for All: A new Commission for Equality and Human Rights*' (Cm 6185, 2004).

most respondents, although it seems a little ironic on the part of the existing Commissions. The Government's receptiveness to responses collected following the consultation are therefore to be welcomed for the increased focus given to enforcement procedures.

4.1. White Paper 'Fairness for All: A new Commission for Equality and Human Rights'

As the title of the White Paper suggests, the CEHR will be responsible for the promotion of human rights alongside its remit for challenging discrimination and promoting equality of opportunity. This will be achieved by bringing together the work of the three existing Commissions whilst also providing institutional support to the Regulations concerning religion or belief, sexual orientation and age. The White Paper was drafted taking into account the consultation responses to the Green Papers mentioned above and also the Sixth Report of the JCHR, *'The Case for a Human Rights Commission'*.³ In addition, a Task Force was created whose membership comprised key external stakeholders reflecting a broad range of interests, to advise on a number of crucial issues. The discussions of this Task Force helped to shape and inform the development of the White Paper.⁴

The Rt. Hon Patricia Hewitt MP, upon the launch of FFA,⁵ identified three important considerations supporting the introduction of an overarching Commission. The first of these centred upon the notion that people have multiple identities. In this respect, importance was placed upon seeing people as a whole, while refraining from 'pigeonholing' them according to a certain characteristic, which has to date resulted in the responsibility for challenging discrimination being "sectionalised," in the sense that problems are seen as the "responsibility of the groups who experience discrimination to sort out rather than

³ JCHR, 'The Case for a Human Rights Commission, Sixth Report of Session 2002–03' (19 March 2003) HL 67-1/HC 489-I <<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/67/67.pdf>>.

⁴ The Task Force was created in December 2003 to consider and report on the role, functions, priorities, governance arrangements and structure of a new single equality body and to aid the new Commission during the transition period. The Task Force was chaired by Jacqui Smith, then Deputy Minister for Women and Equality, and included representatives from the existing equality bodies; representatives of agencies with an interest in the new equality strands (sexual orientation, religion, belief and age); significant individuals with interests in human rights; business representatives; trade unions; local government; regional representatives and academics (see Appendix E to DTI, White Paper, 'Fairness for All: A new Commission for Equality and Human Rights'). The Task Force was also charged with a duty to undertake a programme of consultation with those within their areas of interest and to feed the collated views into the consultation and drafting process.

⁵ Rt. Hon Patricia Hewitt MP, 'Equality and Human Rights in the 21st Century': Speech made at the Launch of the White Paper on the Commission for Equality and Human Rights (12 May 2004) <http://www.womenandequalityunit.gov.uk/equality/project/cehr_launch_speech%20.doc>.

responsibility of society as a whole”.⁶ The second consideration identified was the need to “move from a perception that equality is about ‘minorities’ to a belief that equality is for everyone”,⁷ which is an increasingly difficult task given the numerous divides that exist and are created between various cultures and communities.⁸ This is closely linked with the first consideration, emphasising that the problems associated with discrimination are the responsibility of society and should not be internalised within particular groups that are experiencing discrimination. Lastly, it was added that a unifying Commission would “be able to deal with conflicting rights”, by being able to take a “comprehensive view” and provide a “broader context”⁹ within which such conflicting rights could be resolved. This approach is difficult to achieve at present because each Commission is largely ‘fighting its own corner’ with little common ground.

Despite the overall focus of this research paper being firmly attached to the enforcement procedures that the CEHR will adopt, it is important to appreciate the broad aims behind the introduction of this body, especially given the fine line between ‘enforcement’ and ‘promotion’, which will ultimately be used to achieve those aims.

4.1.1. Role of the CEHR

FFA was introduced approximately six months after the Government first announced its intention to create a unifying Commission. While praising the “excellent foundations”¹⁰ laid by the existing Commissions, the White Paper was keen to emphasise that more progress was needed at a time when future challenges¹¹ would require “fresh thinking” and “new

⁶ *ibid.* p.4. See Hannett, S, ‘Equality At The Intersections: The Legislative and Judicial Failure To Tackle Multiple Discrimination’ (2003) 23 OJLS 65.

⁷ *ibid.* p.5.

⁸ These divisions are increasingly evident in headlines, whether concerning the violent outbursts witnessed in the race riots in Bradford, Burnley and Oldham during the summer of 2001, or the alleged discrimination towards Shilpa Shetty during ‘Celebrity Big Brother 2007’, which sparked a nationwide debate and minor scenes of protest abroad.

⁹ Rt. Hon Patricia Hewitt MP, above at n.5, p.7.

¹⁰ DTI, White Paper, above at n.2, para.1.3.

¹¹ *ibid.* para.1.7-1.13. The Government outlined the “changing nature of our society poses significant, complex and new challenges to social, economic and political life” (para.1.17) and gave an example of these on each protected ground. Examples include that fact that by 2006 there would be more people aged 55-64 than 16-24, the first time this has occurred; and 70% of ethnic minorities live in the 88 most deprived areas of the UK.

approaches”.¹² The broad benefits of a single Commission as expressed in the White Paper may be summarised as follows:¹³

- A single equality body would have a cross-cutting approach to tackling barriers and inequalities in relation to the protected equality grounds, and consequently would be able to tackle discrimination on multiple grounds. It is also believed this ability will help the Commission promote good relations among different communities.
- It would provide a single access point for information, advice and guidance to benefit individuals and business, as well as providing a single authoritative voice on equality and human rights matters both domestically and on the international scene.
- It would be more effective in promoting improvements in service provision within the public sector through embedding a culture of respect for human rights and equality.
- It will be able to pursue a more coherent approach to enforcing discrimination legislation whilst using its expertise to identify and promote creative responses to the challenges and opportunities that arise.

The Government stated its belief in FFA that the CEHR would provide “the basis for a healthy democracy, economic prosperity and the effective delivery of our public services”.¹⁴ Clearly the CEHR has been given an ambitious remit from the outset, requiring it to be “more than the sum of its parts”¹⁵ in order to provide the “step change” the Government seeks “to promote, enforce and deliver equality and human rights” in a way that meets anticipated future challenges in order to achieve a “prosperous and cohesive society.”¹⁶

4.1.2. Functions of the CEHR

The core functions given to the CEHR replicate many of the functions currently performed by the existing Commissions, although they have been extended to cover the grounds of

¹² *ibid.* para.1.4.

¹³ *ibid.* para.1.16.

¹⁴ *ibid.* para.1.2.

¹⁵ *ibid.* para.1.17.

¹⁶ *ibid.* para.1.4.

religion or belief, sexual orientation and age. The CEHR will seek to carry out the following five core functions:¹⁷

- Encourage awareness and good practice on equality and diversity;
- Promote awareness and understanding of human rights;
- Promote equality of opportunity between people in the different groups protected by discrimination law;
- Work towards the elimination of unlawful discrimination and harassment; and
- Promote good relations amongst and between different communities and wider society.

In addition, whilst acting as a centre for expertise on equality and human rights, it will be assigned the task of keeping anti-discrimination legislation under review, although responsibility for scrutinising proposed legislation for compatibility with the HRA will remain with the JCHR.¹⁸ The JCHR in its Sixth Report¹⁹ identified much common ground between human rights and equality, especially as regards promotion. FFA emphasised the desire for these two values to be at the very “core”²⁰ of society, with human rights being used to “underpin [the Commission’s] work”.²¹ In this respect human rights may be seen as the constant thread, setting the baseline of fundamental values upon which equality issues may be woven.

Of note as regards the CEHR’s function of promoting good relations among different communities is the weight given to the areas of race, religion and belief. It was expressly stated that the CEHR is to maintain the CRE’s programme of supporting local projects, which focus on race and faith communities.²² The CEHR will begin to support local projects focusing upon the other equality strands only at some future unspecified date, which runs the risk of creating tensions between projects and groups with interests in those other equality strands, to which it is supposed to give equal consideration.

¹⁷ *ibid.* para.3.4.

¹⁸ *ibid.* para.3.38.

¹⁹ JCHR, above at n. 3.

²⁰ DTL, White Paper, above at n.2, para.1.27.

²¹ *ibid.* para.1.30.

²² *ibid.* para.3.33.

Building on the current approach of the CRE, it was proposed that the CEHR would be permitted to make grants to support local organisations with a good relations or equality remit²³ given that these “are well placed to undertake important work in response to meeting local needs, and addressing issues of local concern”.²⁴ The importance attached by the Government to promoting good relations is illustrated by the fact that this core function was seen as one of the three ‘pillars’ central to the CEHR’s work, receiving specific attention in Chapter 6 of the White Paper.

4.1.3. Engaging and Working with Stakeholders

Importantly, the duty to consult and engage with key stakeholders was proposed to ensure the CEHR’s effectiveness; a proposal well received by the vast majority of respondents. No precise definition of ‘key stakeholder’ was included, but it is nevertheless clear from the White Paper that ‘key stakeholders’ would include representatives from the existing equality Commissions and agencies/groups with an interest in the new anti-discrimination strands.²⁵ Other ‘stakeholders’ would appear to include voluntary and community sector organisations already engaged in equality and human rights issues, trade unions, employers and various service providers in the public and private sector.²⁶

Through adopting an “inclusive” and “ongoing dialogue”, it was stressed that a “wide awareness, ownership and understanding” of the CEHR’s work can be achieved, in order to ensure it is “valued and credible within all sections of society”.²⁷ Engagement with key stakeholders should indeed help to ensure that it delivers services in the most appropriate and accessible manner whilst ensuring the work undertaken by the existing Commissions will be carried forward in the most effective way. Such engagement could be particularly important in relation to race, otherwise the CEHR might be regarded as being distanced from the very communities it is supposed to support, because of its responsibility for all the other equality strands. The latter argument could also perhaps be echoed with regard to sex (and to a lesser

²³ *ibid.* para.6.6.

²⁴ *ibid.* para.6.7.

²⁵ *ibid.* para.2.5.

²⁶ *ibid.* paras.2.6. and 2.7.

²⁷ *ibid.* para.2.1.

extent disability, given the establishment of the Disability Committee as discussed below). As part of the duty to consult and engage, FFA also highlighted an intention to impose an obligation upon the CEHR to consult upon and produce a “strategic plan”,²⁸ the end result of which will ensure that all stakeholders have an opportunity to be fully involved. The Task Force has been able to “lay the foundations”²⁹ for such an approach, by including representatives from a wide array of stakeholders. It is important not to overlook protected groups,³⁰ in order to ensure that the work of the CEHR remains “grounded in the experiences of discrimination”.³¹

4.1.4. Supporting Key Customers

The CEHR will seek to support individuals, businesses and the public sector in addition to voluntary and community sector organisations, whilst working in “partnership” with some organisations to “maximise the impact of the services it provides”.³² Different services and approaches will be provided for each ‘key customer’. Support for individuals will focus on the provision of information, advice and in providing case support and legal representation in the area of equality.³³

The distinction between enforcement and promotion is a particularly important aspect to address given the relationship the CEHR will hope to achieve with the business sector. Many businesses will be reluctant to approach the CEHR for advice, for fear that enforcement procedures may follow upon disclosure of certain information, emphasising the need for a clear distinction between promotion and enforcement and the effective creation of ‘Chinese walls’.³⁴ Businesses must have confidence in the CEHR if they are to approach it themselves and respond appropriately to its enquiries. To this end the CEHR will take a ‘light touch’

²⁸ *ibid.* para.2.10.

²⁹ *ibid.* para.2.2.

³⁰ See Chouhan, K, ‘A Commish-mash: How moves to set up a Single Equalities Commission Side-Lined a Black Agenda’ (March 2004) p.2: Karen Chouhan highlighted that the “the two people appointed by the government, representing race are two white women...there are no Black-led grass roots organisations despite us asking to be represented. If we request a representative task force and are denied this, what hope is there for a truly representative or effective Commission?” <http://www.blink.org.uk/docs/kc_sec_0304.pdf>.

³¹ DTI, White Paper, above at n.2, para.2.6.

³² *ibid.* para.7.4.

³³ *ibid.* paras.7.7.-7.20.

³⁴ The term ‘Chinese Walls’ is used to refer to the fact that the promotional and enforcement arms of the Commission will be independent of each other in the sense that promotional activities that uncover breaches, and businesses that seek advice and guidance, will not automatically trigger associated enforcement actions.

approach by working in “partnership with business” in order to promote “improved equality awareness and better practice across the private sector”.³⁵ It was stressed that the CEHR would use its formal enforcement actions against businesses “as a last resort”³⁶ and would adhere to the Government’s Enforcement Concordat,³⁷ which sets out the principles of good enforcement, such as openness, proportionality and consistency.

Proposals that provide support for the public sector dealt primarily with the promotion of human rights and compliance with public sector duties, which is one of the few areas where human rights and equality may be seen to receive “dual focus” with the provision of public services being “underpinned by a respect for individual rights under the HRA and compliance with anti discrimination legislation.”³⁸ There is also an express mention of the potential role of inspectorates and standard-setting agencies, with which the CEHR can work in partnership to “promote, encourage and develop performance measures and standards in equality and human rights”.³⁹

4.1.5. Governance of the CEHR

The CEHR will be an executive non-departmental public body and as such will be operationally independent of the Government whilst being accountable to Parliament. Despite this, the Government has significant influence over the composition of the CEHR’s management structure. It will consist of a Chair, to be approved by the Prime Minister and appointed in line with the requirements of the Office of the Commissioner for Public Appointments,⁴⁰ a “primarily non-executive and part-time”⁴¹ Board, whose members will be appointed by the Secretary of State and a Chief Executive, to be appointed by the members

³⁵ DTI, White Paper, above at n.2, para.7.22.

³⁶ *ibid.* para.7.33.

³⁷ Cabinet Office, ‘Enforcement Concordat, The Principles of Good Enforcement’ (March 1998) Regulatory Impact Unit <<http://www.cabinetoffice.gov.uk/regulation/documents/pst/pdf/concord.pdf>>.

³⁸ Jones, J, ‘The Proposals for a Commission for Equality and Human Rights’ (2005) 27 *Journal of Social Welfare and Family Law* 91 at p.100.

³⁹ DTI, White Paper, above at n.2, para.7.48. Direct reference is made to the Equality Standard for Local Government, as discussed below at para.6.2.3. - Delegation to Local Authorities.

⁴⁰ *ibid.* para.5.3.

⁴¹ *ibid.* para.5.4.

of the Board but with the approval of the Secretary of State.⁴² The CEHR's Board will be empowered to establish committees to support or assist with any of its functions.⁴³

In relation to enforcement powers, the independence of the CEHR is significant: other public authorities will attract its attention because of the HRA and equality legislation specifically relating to them. Also of note is the expectation that the CEHR Board will "reflect the communities that it serves, but will not be made up of separate champions".⁴⁴ Collectively, the Board is expected to have direct experience and expertise in prescribed areas and at least three places on the Board should be allocated according to the specific interests of disability⁴⁵ and the devolved nations.⁴⁶ In practice, however, it would seem difficult to create a Board that does not (at least partially) consist of separate champions given that most will be appointed on a strand-specific basis.

4.1.6. Regional Arrangements and the Scottish and Welsh Dimensions

Despite having its own Equality Commission (ECNI) since 1 October 1999, the entire experience gained within Northern Ireland is disposed of within a footnote.⁴⁷ Interestingly, the ECNI's experiences are largely ignored despite the obvious similarities with the CEHR, given that it took over functions previously exercised by separate bodies, namely, the Commission for Racial Equality in Northern Ireland, the Equal Opportunities Commission for Northern Ireland, the Fair Employment Commission and the Northern Ireland Disability Council. In contrast to the CEHR, the ECNI functions alongside the Northern Ireland Human Rights Commission (NIHRC), which has a remit wide enough to encompass general equality issues.⁴⁸ However, there was no mention of the NIHRC either.⁴⁹ Specifically, there was no

⁴² *ibid.* para.5.6.

⁴³ *ibid.* para.5.14.

⁴⁴ *ibid.* para.5.8.

⁴⁵ *ibid.* para.5.10.

⁴⁶ *ibid.* para.5.11.

⁴⁷ *ibid.* para.9.1, fn.26. The establishment of the ECNI is very briefly described in this note, detailing the functions that it took over.

⁴⁸ See O'Connell, C, 'A Single Equality Body: Lessons from abroad' (2002) EOC Working Paper Series No. 4, Appendix A, pp.56-61, for an overview of the development of the ECNI
<<http://www.eoc.org.uk/Default.aspx?page=16088&lang=en>>.

⁴⁹ In NIHRC, 'Response of the Northern Ireland Human Rights Commission to the Consultation on A New Commission for Equality and Human Rights' (August 2004), the NIHRC itself was critical of the Government's complete lack of consideration of the experiences in Northern Ireland stating that "the very areas where we [NIHRC] identified inadequacies of provision in Northern Ireland are precisely those where attention needs to be

mention of the extensive role played by positive duties upon employers in Northern Ireland.⁵⁰ These positive duties have been seen to have a significant impact.⁵¹ Likewise, the positive duty upon public authorities under s.75 of the Northern Ireland Act 1998, which resulted from the Good Friday Agreement 1998, to promote equality of opportunity between Protestant and Roman Catholic communities on the grounds of race, sex, age, marital status, sexual orientation and disability was not discussed. Although it is clear that a large focus of the ECNI will have been upon sectarian issues given the political and religious climate that exists in Northern Ireland, the ECNI's experiences in terms of the transitional arrangements and resource requirements could have provided useful insights into the creation of the CEHR, to learn from past mistakes and build upon examples of good practice.⁵²

Specific arrangements were proposed for both Scotland and Wales reflecting their distinct political contexts,⁵³ bearing in mind that the majority of equality legislation is a reserved issue, dealt with by the UK Parliament. The Government recognised the work undertaken by the Scottish Parliament and National Assembly for Wales to tackle equality issues, and stressed that the "CEHR's structure and operational work must support this approach and enable effective interplay between work at GB-wide and devolved levels".⁵⁴ Key features identified included: establishing offices in Scotland and Wales to maintain close working relationships with the devolved administrations and intermediary organisations delivering local services; appointing to the CEHR Board one member for both Scotland and Wales with specialised knowledge; including a provision for the establishment of Scottish and Welsh Committees to oversee the work of the CEHR in these regions; and the requirement for the

paid in the CEHR legislation if it is not to face the same difficulties as has the NIHR since 1999" at p.7 <<http://www.nihrc.org/documents/landp/128.doc>>.

⁵⁰ As introduced in the Fair Employment Act 1989 and now, subject to amendment, contained within Part VII of the Fair Employment and Treatment (Northern Ireland) Order 1998.

⁵¹ See Hepple, B, QC, Coussey, M and Choudhury, T, 'Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation' (2000) Oxford: Hart Publishing, paras.3.30-3.36.

⁵² This criticism is not simply levelled at a failure to consider the experiences in Northern Ireland. As Colm O'Connell has highlighted in 'A Single Equality Body: Lessons from abroad' (EOC Working Paper Series No. 4 (Autumn 2002), there exist several similar commissions, such as those in New Zealand, Canada, South Africa, Australia, the USA and the Republic of Ireland, which could have provided useful comparative material to support alternative and original arrangements. For a discussion of the benefits associated with the Equality Authority in the Republic of Ireland, see e.g. Foster, C, 'Equality Authority: tackling discrimination in Ireland' (2006) EOR No.154.

⁵³ Specific reference was made in the White Paper (above at n.2) at para.9.2., fn.27. to the Scotland Act 1998, Schedule 5, Part 2, s.L2 and the Government of Wales Act 1998, ss.48 and 120.

⁵⁴ DTI, White Paper, above at n.2, at para.9.3.

CEHR to report on its activities before the Scottish Parliament and Welsh National Assembly.⁵⁵ The White Paper also recognised the importance of addressing regional requirements, which will make the CEHR better equipped to respond to particular needs affecting specific areas.⁵⁶ Despite the proposed introduction of a Scottish Human Rights Commission (SHRC), which similarly limits its enforcement role to the area of inquiries,⁵⁷ the White Paper emphasises the importance of developing an effective working relationship, perhaps underlined and formalised by a Memorandum of Understanding,⁵⁸ whereby the CEHR will act on all non-devolved issues leaving the SHRC free to promote human rights in devolved policy areas. Clearly it would be inappropriate for the SCHR to have wider powers to support human rights cases than the CEHR.

It was proposed that the CEHR would have a presence in each of the nine English regions, to complement and elaborate upon present arrangements. In order to achieve this there will be considerable scope to collaborate closely with existing regional bodies, which will not only ensure that existing efforts are continued but also that the CEHR is “sensitive to regional needs”⁵⁹ rather than imposing what would otherwise be a “one-size-fits-all or overly centralised approach”.⁶⁰ It is stressed however, that there will indeed be constraints imposed by the resources available to the CEHR, which will necessitate the need to explore closely the possibility of “partnerships, contractual arrangements and co-location”⁶¹ consistent with the “strategic added-value approach” the CEHR will be expected to adopt.⁶² Although this approach may be cost-effective and avoid duplicating existing arrangements, it runs the risk of diluting the potential impact of the CEHR should it not be resourced appropriately or established effectively.

⁵⁵ *ibid.* para.9.4.

⁵⁶ See *ibid.* Chapter 8, outlining the Regional arrangements of the CEHR. Particular needs and requirements may be generated by the specific ethnic make-up of a community or area, such as Bradford for example.

⁵⁷ See Scottish Commission for Human Rights Bill (7 October 2005) Session 2 2006 SP Bill 48 <<http://www.scottish.parliament.uk/business/bills/48-scottishCommissioner/b48s2-aspassed.pdf>>.

⁵⁸ DTI, White Paper, above at n.2, at para.9.11. A Memorandum of Understanding (MOU) is a statement of political intent as opposed to a binding agreement, and as such does not create legal obligations between the parties. A MOU between the CEHR and SHRC would clarify the respective roles of both bodies and how they will inter-relate, to ensure that the division of responsibilities is maintained in practice so that they can work effectively together.

⁵⁹ *ibid.* para.8.4.

⁶⁰ *ibid.* para.8.6.

⁶¹ *ibid.* para.8.13.

⁶² *ibid.* para.8.12.

4.1.7. Tools to Promote Change

Enforcement powers proposed in the White Paper broadly replicate those powers available to the existing equality Commissions. Importantly, however, no additional enforcement powers were proposed for the CEHR in relation to human rights,⁶³ with the result that it would not be able to provide support in bringing cases involving human rights to court despite it being able to enforce anti-discrimination legislation in this manner. The explanation offered for this limitation was that human rights issues might already be raised in any court or tribunal. Courts and tribunals are already required to act compatibly with human rights legislation and those who wish to bring a case under the HRA may apply for legal aid. This approach has been viewed as demonstrating a “lack of understanding of what is required of an individual taking a case to court” given that “financial assistance is only one aspect”; equally important is “expertise, understanding and support.”⁶⁴ However, the Government did not believe the CEHR would require powers to support such cases.⁶⁵ This stance has attracted criticism, for it “will inevitably lead to a pecking order between equality strands and human rights.”⁶⁶ As regards human rights, therefore, the proposed primary function of the CEHR is to promote best practice in public authorities.

The enforcement powers outlined in the White Paper as they relate to discrimination include:

- The ability to make general inquiries in respect of discrimination, equal opportunities, human rights and good relations (paras.4.3.-4.6.);
- Third party interventions covering all equality cases and human rights in the public sector (paras.4.11.-4.13);
- Challenging discrimination by providing direct case support under discrimination legislation and to those cases that have a discrimination and human rights element, in a strategic manner (paras.4.14.-4.19.);
- Settling disputes through the use of conciliation services such as ACAS (excluding human rights) (paras.4.20.-4.22.);

⁶³ *ibid* para.4.2.

⁶⁴ Jones, J. ‘The Proposals for a Commission for Equality and Human Rights’ (2005) 27 *Journal of Social Welfare and Family Law* 91 at p.96.

⁶⁵ DTI, White Paper, above at n.2, para.3.16.

⁶⁶ Jones, J. at n.64.

- Investigation and associated enforcement powers (which include investigations of named individuals (paras.4.24.-4.30.); issuing non-discrimination notices (paras.4.31.-4.32.); the ability to apply for court injunctions to tackle persistent discrimination (para.4.33.); the ability to enforce the public sector duties (para.4.34) and issuing binding agreements in lieu of enforcement action (paras.4.35.-4.39)); and
- The creation of statutory Codes of Practice and guidance (to cover several or all areas of discrimination law) either on its own initiative or at the request of the Secretary of State (paras.4.7.-4.10).

The Government also used the White Paper to reject proposals for the extension of enforcement powers put forward during the consultation response to the Green Paper *Equality and Diversity: Making It Happen*, namely that the CEHR should have the power to take class or representative actions,⁶⁷ act as an *amicus curiae* ('friend of the court'),⁶⁸ and to take forward hypothetical cases.⁶⁹

⁶⁷ DTI, White Paper, above at n.2, para.4.42. The Government highlighted that at present, representative or class actions are "not generally used in the courts and tribunals". Upon considering changes to the court and tribunal procedures as regards discrimination to allow for such role, the Government decided that this would go beyond the role of the CEHR and would need to "be considered in that broader context". If changes were indeed instigated by law, to allow for such representative actions, the Government highlighted that the CEHR would then be able to bring such actions without express powers.

⁶⁸ *ibid.* para.4.41. The Government considered that it will have the capacity to undertake this role and therefore would not need the express power to do so. Additionally, the role of *amicus curiae* is sometimes applied to the process by which an individual or organisation can apply to the court for permission to provide an expert view to aid the court in reaching its decision; the Government already intends to give the CEHR the power to act in this way through the use of third part interventions (see paras.4.11.-4.13.).

⁶⁹ *ibid.* para.4.43. The suggestion concerning hypothetical cases was dismissed because "it is very difficult for a court to reach a useful decision in the absence of particular facts" and neither the European Court of Justice, ECtHR or domestic courts consider such cases.

4.2. Criticisms and Concerns Highlighted in the Consultation Response

In total 433 responses were received from various stakeholder groups, as the table below illustrates. Despite a generally broad welcome for the CEHR, the White Paper attracted considerable criticism in specific areas from a wide number of stakeholders, including the existing Commissions.

Stakeholder Group Interest	No. of Responses
Age	8
Business	29
Central Government and Public Bodies	15
Disability	46
Gender	31
Human Right and Law	24
Individuals and Miscellaneous	25
Local Government and other local public bodies	65
Race	52
Religion/Belief	35
Scotland and Wales	34
Sexual Orientation	12
Trade Unions	24
Voluntary and Community Sector	33

Breakdown of Consultation Responses⁷⁰

4.2.1 Commission for Racial Equality

Stakeholders representing the views of black and minority ethnic (BME) groups (including the CRE) were strongly against the establishment of the CEHR as proposed.⁷¹ The general consensus prior to the publication of FFA was that race equality would not be best served through a single body as it would potentially reduce the focus dedicated to combating racial discrimination and thereby “destroy” the “capacity to reduce conflicts within communities...combat the rise of racist sentiment and organisations and...meet the

⁷⁰ Statistics taken from Annex A to DTI, ‘Commission for Equality and Human Rights: The Government response to consultation’ (18 November 2004)
<http://www.womenandequalityunit.gov.uk/equality/project/consultation_govtresponse_nov2004.doc>.

It was noted that “many responses to the consultation were cross-strand in nature...however each response was given only one stakeholder category...if a respondent could be easily identified as coming from a particular equality strand (e.g. race, age etc), then it was designated as such. Other respondents were classed according to sectoral interest (e.g. trade unions, business etc).”

⁷¹ Only the Confederation of Indian Organisations showed support for the creation of the CEHR as proposed whilst other organisations, including The 1990 Trust were keen to see the creation of six separate equality commissions and a human rights commission.

challenging objectives set for us by government itself".⁷² The CRE's response to the White Paper outlined ten instances of downgrading powers or direct legal detriment and named 18 instances of clear detriment to equality, including unclear or unworkable proposals.⁷³ As Trevor Phillips described, "what the FFA [White Paper] is proposing is less a single champion enforcing strong legislation, and more a hopeful chorus of voices, which the FFA speculates can be made to sing in tune".⁷⁴ Trevor Phillips was designated Chair of the CEHR in September 2006.

4.2.2. Equal Opportunities Commission

Overall, the EOC favoured the establishment of a single equality body because, *inter alia*, it afforded the best opportunity for tackling increasingly subtle and complex issues surrounding sex equality that cannot be tackled using a simple model of discrimination and it will be "better able than single strand bodies to deliver effective work across all areas of equality on all the necessary areas".⁷⁵ However, it made a strong case that the effectiveness of the new body would be questionable unless safeguards were enacted, particularly concerning the equality legislation and the new Commission's powers. Whilst welcoming the introduction of the Gender Equality Duty, the EOC expressed its concern that the Government was not going to bring forward plans to modernise the equality legislation in the form of a SEA. The "anti-enforcement tone"⁷⁶ of the White Paper was also questioned whilst regret was expressed for the lack of consistency for the powers of the CEHR concerning its equality and human rights remit. Additionally, the EOC argued that to avoid a hierarchy of rights, adequate resources were essential for a fully functioning CEHR and were also a "critical guarantee of the CEHR's independence".⁷⁷

⁷² CRE, 'Response to Equality and Diversity: Making it Happen' (2003) p.45

<<http://www.cre.gov.uk/downloads/docs/makeithappen.doc>>.

⁷³ CRE, 'Fairness for All: A new Commission for Equality and Human Rights, A response' (23 August 2004) p.9

<http://www.cre.gov.uk/downloads/ffa_cre_response.doc>.

⁷⁴ *ibid.* p.5

⁷⁵ EOC, 'Response to Fairness for All: a new Commission for Equality and Human Rights' (6 August 2004)

para.2 <http://www.eoc.org.uk/pdf/eoc_cehr_response_final.pdf>.

⁷⁶ *ibid.* para.26.

⁷⁷ *ibid.* para.18.

4.2.3. Disability Rights Commission

The DRC welcomed the distinctive arrangements for disability, having expressed its concern that overseas experience had demonstrated that the disability strand suffered in a combined equality body. In the absence of harmonised legislation it stressed “the desirability, and indeed inevitability, of such a strand-specific organisation is all the more apparent”; however, the lack of such legislation was of “critical concern” and a “potential source of division”.⁷⁸ The DRC also supported the adoption of a ‘federal’ arrangement, which would comprise an “umbrella body focusing on cross-cutting and shared issues, together with units and appointed committees with executive powers concerned with the individual strands”,⁷⁹ stressing this would provide the best model to “serve the interests of those especially vulnerable groups who are the beneficiaries of strand-specific legislation”.⁸⁰ In addition, the DRC expressed a number of concerns that, if not addressed, would hamper the effectiveness of the new Commission: as with the EOC, additional concerns focused upon the resources of the CEHR, and the DRC specifically emphasised the desire to see meaningful human rights enforcement powers, which would include the ability to fund stand-alone human rights cases.⁸¹

4.2.4. Equality Legislation

The majority of stakeholders who responded, strongly felt that a single Commission would only avoid a hierarchy of protection if the relevant legislation was harmonised within a SEA. The vast majority felt this was a pre-requisite to the formation of the CEHR given the disparate protection afforded by the current legislative framework. Many respondents were concerned that the variations in the scope of protection afforded by the legislation would in fact jeopardise the CEHR’s chances of success in building a society where “equality and human rights underpin our [the Government’s] vision of a modern, fairer and more

⁷⁸ DRC, ‘Government White Paper, “Fairness for all: A new Commission for Equality and Human Rights”, Response from the Disability Rights Commission’ (5 August 2004), para.1.2
<http://www.drc-gb.org/uploaded_files/documents/107_4_FINALDRCResponsetoCEHRWPAugust604.doc>.

⁷⁹ *ibid.* para.1.1.

⁸⁰ *ibid.* para.1.2.

⁸¹ *ibid.* para.3.8. For a further discussion of the implications of the CEHR for the area of disability and subsequent proposed long term disability rights agenda see Sayec, L and O’Brien, N, ‘The Future of Equality and Human Rights In Britain - opportunities and risks for disabled people’ (2004) 19 *Disability & Society* 663.

prosperous Britain”.⁸² The primary opposition to the creation of a SEA came from those representing the private and business sectors, who were keen to see the harmonisation of legislation in the longer term whilst focusing in the short term upon helping businesses understand and implement the recent (religion and belief and sexual orientation) and the then forthcoming (age) Regulations. This is understandable, since employers within the private and business sectors will obviously feel the effect of any direct enforcement action undertaken by the CEHR and individual claimants.

4.2.5. Timing and Resources

Many of the respondents whose remit covers the new and forthcoming equality strands, were particularly anxious to ensure that there was no unnecessary delay in the introduction of the CEHR, as it would provide them with institutional support which was then lacking. Additionally, since the CEHR would cover all the protected equality grounds alongside human rights, almost all respondents felt it necessary to ensure that the CEHR be more than merely ‘the sum of its parts’ and that adequate resources must be ensured across all grounds and functions, to ensure it can effectively fulfil its duties and core functions whilst avoiding the creation of a hierarchy of protection. The strong consensus was that in order for the Commission to be effective, it would require a significant increase in the levels of funding currently allocated. Certain respondents, such as the Equality and Diversity Forum,⁸³ specifically argued that for reasons of ensuring access to justice for individuals seeking assistance from the CEHR, such assistance alone would require significantly increased levels of investment.

4.2.6. Engaging with Stakeholders

General support existed for the duty to consult with stakeholders, although many respondents were keen to emphasise that this must be done in a meaningful way whilst ensuring less prominent groups were effectively involved. The efficacy of developing and utilising the

⁸² Rt. Hon Tony Blair MP – Prime Minister, Foreword to DTI, White Paper, above at n.2, p.1.

⁸³ See Equality and Diversity Forum, ‘Fairness for All: a new Commission on Equality and Human Rights Equality and Diversity Forum (EDF) response to the White Paper’ (7 August 2004) at p.7 <<http://www.edf.org.uk/publications/EDF%20Fairness%20for%20All%20response%20060804.pdf>>.

relationships with others to facilitate this consultation was highlighted, which would make the most effective use of available resources and allow consultation to take place over a broader platform at local and national level.

4.2.7. Governance and Independence

A common concern from the consultation related to the independence of the CEHR, with many believing that the CEHR should report directly to, and be accountable to, Parliament, as opposed to being associated with a specific government department such as the Department for Trade and Industry (DTI). The JCHR, for example, pointed to the proposed role of the Secretary of State as breaching the Paris Principles⁸⁴ on independence and rejected the Prime Minister's role in appointing the chair of the CEHR, again echoing independence concerns. It was also broadly acknowledged that the area of disability would require specific governance arrangements, including the creation of a Disability Committee, which could be disbanded after a set period. Tied to this was the almost unanimous belief that upon the creation of the CEHR, a commitment to ensuring diversity amongst the board should be adopted, whilst appointing a number of strand-specific champions.

4.2.8. Enforcement Powers

Particularly evident was an almost unanimous desire to ensure the CEHR has effective enforcement powers at its disposal as opposed to overly relying upon the use of promotional tools. Specific sectors, most commonly those representing human rights interests, were also of the view that these enforcement powers should extend into the remit of the CEHR's human rights role. Those representing the business sector in particular, however, were keen to ensure a clear distinction between enforcement and promotion in order to create a relationship based on trust and confidence, which would allow businesses to seek advice

⁸⁴ Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights ["Paris Principles"] A/RES/48/134 (20 December 1993). These principles provide comprehensive recommendations on the role, composition, status and functions of national human rights institutions, having been endorsed by the Commission on Human Rights in March 1992 (resolution 1992/54) and the UN General Assembly (resolution A/RES/48/134) on 20 December 1993.

without the fear of immediate retribution.⁸⁵ The business sector on the whole also supported alternative methods of enforcement such as dispute resolution with direct enforcement methods being used as a last resort, again ultimately reflecting the fact that it is this sector which will inevitably feel the full force of any enforcement powers adopted.

As regards the proposed human rights function of the CEHR, there was broad support for allowing it to take forward ‘combined cases’ (discrimination legislation cases with a human rights dimension) in which the discrimination argument(s) had fallen away. The majority of respondents went even further and suggested that the CEHR should have the power to support freestanding human rights cases,⁸⁶ although some reservations were expressed as to the effect this would have upon the Commission’s resources. Reflecting the positive RED (and the then proposed gender and disability duties), some respondents supported the idea of a public sector duty to ‘promote’ human rights, as opposed to merely ‘encouraging awareness,’ which would help secure individuals’ civil rights. The majority of support for this proposal primarily came from those groups that, prior to the introduction of the new equality Regulations, were only (and inadequately) afforded protection against discrimination by the ECHR, via the HRA. Finally, there was strong support for the CEHR to adopt a more liberal approach to supporting cases, as opposed to being overly restricted by focusing primarily upon strategic cases, which would have the effect of severely limiting an individual’s access to justice. The CEHR is a key body in ensuring that discrimination cases in the area of employment can be supported, either by itself or through supporting external advice and support agencies, given the lack of legal assistance before an employment tribunal.⁸⁷

4.3. Government Response to the Public Consultation

On 18 November 2004, the Government issued its response and was particularly receptive to the issues raised during the consultation period and sought to reiterate that ongoing dialogue

⁸⁵ The response from the Institute of Directors (IoD), for example, pointed towards practices of the existing Commissions that have hindered the development of such a relationship. Reflecting on the communication between the existing Commissions and business, the IoD stress that they would like to receive communication “presented in the language of their audience rather than what can appear to be alien and inaccessible jargon”.

⁸⁶ See DRC response, above at n.78. for example, para.3.8.

⁸⁷ See above, section 3.9. – Evaluation.

would be maintained, in particular with BME communities who were on the whole set against the idea of creating a single Commission. With this came the Government's confirmed commitment to proceed with legislation to establish the CEHR as soon as parliamentary time would allow. However, this was subject to some important modifications, included as a result of the consultation as outlined below.

4.3.1. Duties of the CEHR

The Government proposed to clarify the fundamental duties of the CEHR in the legislation to ensure that these accurately "reflect the CEHR's enforcement and regulatory functions and activities", whilst stressing the "complementary" relationship between enforcement and promotion, both of which are "vital" for the CEHR to become a "modern and effective regulator".⁸⁸ Responding to criticisms of the CEHR's seemingly heavy reliance on promotion, as set out in the White Paper, it was specifically highlighted that enforcement will be seen as an "essential element".⁸⁹ In its response, the Government was also keen to emphasise the fundamental objectives underpinning the work of the CEHR, classifying these as "important 'pillars' of activity, that must be pursued in concert if we are to move successfully towards a fairer and more prosperous Britain".⁹⁰ These include the requirement to: a) promote good relations between and within communities; b) build and nurture respect for human rights, equality and diversity; and c) work towards compliance with equality and human rights legislation.

With regard to the CEHR's human rights function, the Government identified the ability to promote "protection, awareness and understanding" of human rights as the very heart of its role. However, it deferred clarification of its human rights role until the introduction of the Equality Bill, which would indicate the "benefits of bringing discrimination issues and human rights principles together" and would also clarify the "CEHR's human rights duties".⁹¹ Finally, as regards the Commission's role in promoting good relations, the

⁸⁸ DTI, 'Commission for Equality and Human Rights: The Government response to consultation' (18 November 2004) p.8 <http://www.womenandequalityunit.gov.uk/equality/project/consultation_govtresponse_nov2004.doc>.

⁸⁹ *ibid.* p.9.

⁹⁰ *ibid.* p.8.

⁹¹ *ibid.* p.9.

Government identified this as being the mechanism to deliver the change in culture it seeks, which will place equality and human rights values “at the heart of British society”.⁹² The Government stressed its awareness of the good relations work conducted by the CRE to date and the need to prioritise efforts in this area, to maintain any momentum and to consolidate existing efforts to combat prejudice and tackle hate crimes and crimes of incitement to hatred.

4.3.2. Consultation and Stakeholder Engagement

Following the responses to FFA, the Government confirmed that it would place a duty upon the CEHR to create and consult upon a “State of the Nation” report to be published periodically with the aim of tracking the Commission’s progress towards achieving its goals as set against a range of indicators. It was noted that such a report would “aid in the development of the CEHR’s strategic plan”⁹³ by helping it to “identify the equality and human rights goals towards which it will monitor its progress”⁹⁴ whilst ensuring that an “objective evidence-base” underpinned its work, drawing on “its own research and other existing data sources.”⁹⁵ The Government also welcomed support for the proposed duty to consult on its strategic plan and expected the CEHR, once established, to “give consideration to the creative and innovative approaches”⁹⁶ it might adopt to satisfy this duty, whilst reaching out to all marginalized communities.

4.3.3. Enforcement Tools

In response to the consultation, it was stated that the CEHR would be given the freedom to select which cases to support and be able to bring cases in its own name without reference to the Secretary of State. In addition, the Government backtracked over its intention to introduce set criteria that would determine which cases the CEHR could support.⁹⁷ In order to grant the Commission “maximum flexibility”, the need was recognised for it to have

⁹² *ibid.* p.10.

⁹³ *ibid.* p.12.

⁹⁴ *ibid.* p.21.

⁹⁵ *ibid.* p.12.

⁹⁶ *ibid.* p.21.

⁹⁷ *ibid.* p.20.

complete discretion in making such decisions, although the Government was keen to stress that it expects the Commission to “consult widely”, and to clearly publicise the criteria it intends to apply following such consultation.⁹⁸

As regards the issue of support for cases that raise human rights arguments after discrimination issues have fallen away; the Government confirmed that an order-making power would be drafted into the legislation establishing the CEHR, enabling a decision to be made “in the light of experience”⁹⁹ whether the Commission should continue support for such cases. It was felt that information should first be gathered on the number and nature of these cases.¹⁰⁰

Concerning the power to conduct inquiries and investigations, it was proposed that the CEHR would carry forward those set out in the current legislation, allowing it “to undertake inquiries into named persons or organisations, as well as themes and sectors, in *any area within its remit* (my emphasis)”,¹⁰¹ which provides a very useful and flexible tool. An important proposed limitation on such a power, however, was that the outcome was to be restricted to the issue of a report or recommendations.

Responding to concerns raised in the consultation as regards the Commission’s independence, the Government also proposed a power for the CEHR to compel evidence from witnesses to inquiries *without* recourse to the Secretary of State for authorisation; a direct contrast to its initial proposals.¹⁰² The only proviso to this power is that such a request may be set aside by a court upon application should it be deemed unnecessary or unreasonable. In addition, the Government highlighted its intention to introduce a power for the CEHR to assess a public body’s performance of its general and specific duties under the discrimination legislation, such as the duty to promote race equality. This would provide a flexible alternative to compliance action enforceable through the courts by providing the Commission with a range of outcomes following assessment, all with the intention of

⁹⁸ *ibid.* p.20.

⁹⁹ *ibid.* p.20.

¹⁰⁰ *ibid.* p.20.

¹⁰¹ *ibid.* p.16.

¹⁰² *ibid.* p.16.

securing improvement.¹⁰³ Lastly, the Government added the ability for the CEHR to bring proceedings in its own name against persons committing acts of unlawful advertising, instructions or pressure to discriminate, which was not discussed in the White Paper. The CEHR will thus inherit the powers of the existing Commissions in this respect.¹⁰⁴

4.3.4. Structure and Governance of the CEHR

The Government confirmed its intention to create a Disability Committee, to ensure that issues specific to disability are addressed within the work of the CEHR.¹⁰⁵ It was considered that the Committee would run for an initial period of five years, subject to review thereafter. During this time the CEHR would be obliged to ensure that the Committee was properly resourced. In addition the Government outlined its intention to carry forward the order-making power contained in the DRCA 1999 allowing the DRC to give assistance in proceedings that fall outside the scope of the DDA, where the person's disability is a key factor, which intention is to be welcomed. The CEHR would also be empowered to set up its own committees, with the example given of a race equality committee.¹⁰⁶

The response also confirmed measures outlined in the White Paper for there to be Statutory Committees created in the devolved nations, which will have responsibility primarily for the promotional duties of the CEHR in these regions and will take on an advisory capacity with issues that extend beyond their promotional remit.¹⁰⁷ Although no concrete provisions were identified as regards the regional arrangements, it was seen as essential to "enhance and work with existing regional structures across the voluntary, community, public and private sectors".¹⁰⁸ The CEHR would be charged with a duty to consult with the Statutory Committees on issues beyond their remit, and it was concluded that both Scotland and Wales would have one Commissioner each to "ensure a balanced and effective Board".¹⁰⁹ The Government considered that these arrangements will "strike the right balance in providing

¹⁰³ *ibid.* p.18.

¹⁰⁴ *ibid.* p.19.

¹⁰⁵ *ibid.* pp.25 and 26.

¹⁰⁶ *ibid.* p.25.

¹⁰⁷ *ibid.* pp.26 and 27.

¹⁰⁸ *ibid.* p.29.

¹⁰⁹ *ibid.* p.27.

autonomy for the CEHR's work in Scotland and Wales, whilst ensuring that [the CEHR] is set in a Great Britain corporate framework, with benefits both for the CEHR as a whole, and for its Scottish and Welsh stakeholders".¹¹⁰ Lastly, the Government conceded that the CEHR board would need to contain sufficient "lived experience" to "command the confidence of the communities it works with"¹¹¹ and to this end it was proposed that the Secretary of State would be required to have regard to specific criteria when appointing Board members, ensuring the Board is representative of these communities.

4.3.5. Equality Legislation and Extending Protection

With regard to the anti-discrimination legislation itself, the Government was insistent that the timing was not right to harmonise the existing equality framework within a SEA, although it did specifically highlight the role the CEHR would have to play in the review of legislation and its power to recommend changes.¹¹² Instead, the Government was keen to emphasise that it had introduced legislation to extend the protection given to the three new strands and, responding in particular to the BME communities, outlined its intention to extend protection on the grounds of religion or belief to cover the provision of goods, facilities, services and premises as regards both direct and indirect discrimination and victimisation, which would bring this protection into line with the comparable legislation prohibiting discrimination on the grounds of race. It also highlighted that that it would continue to consider whether or not this protection should be extended to cover public functions. Also proposed was the introduction of a general framework (that would become known as the GED) introducing a positive duty upon public bodies to promote equality of opportunity between men and women and to prohibit sex discrimination in the exercise of public functions; broadly replicating the existing duty on public bodies to promote equality of opportunity and good relations with regard to race.¹¹³

¹¹⁰ *ibid.* pp.26 and 27.

¹¹¹ *ibid.* p.24.

¹¹² *ibid.* p.30.

¹¹³ See above section 3.5. - Race Equality Duty.

4.3.6. Timing and Resources

As regards the timescale involved in the creation of the CEHR, the Government outlined its intention to appoint the Chair and Commissioners by the end of 2006, with it becoming operational sometime during 2007. A process of phased entry was planned.¹¹⁴ The strands of sex, disability, religion or belief, sexual orientation and age will benefit immediately upon its creation. The CRE's remit will be absorbed from 2009. Although the Government acknowledged that almost all respondents expressed concern about the level of funding available, it postponed giving a figure until the publication of the Equality Bill.¹¹⁵

4.4. The Equality Act 2006

Following the Government's response, the Queen's Speech on the 23 November 2004 confirmed the introduction of the CEHR. On 2 March 2005 the Government introduced the Equality Bill, which further clarified the proposals laid out in the Government's response. During its passage through Parliament the Bill received significant amendments, and received Royal Assent on the 16 February 2006.

The Second Reading of the Bill took place in the House of Commons on 5 April 2005, attracting cross-party political support. Strong support for the Equality Bill also came from the vast majority of organisations involved in promoting equality and tackling discrimination, in contrast to the response generated towards the White Paper, highlighting that the Government had indeed largely incorporated the views and suggestions of the various stakeholders. Trevor Phillips (as CRE Chair) was keen to "welcome the publication of this much improved Bill"; emphasising that the changes made as a result of the consultation would "bolster" the CEHR.¹¹⁶ Bert Massie (DRC Chair) expressly acknowledged the specific recognition given to disabled people and in particular the commitment to create a "properly resourced Disability Committee with an effective range of delegated powers". Julie Mellor (EOC Chair) expressed "strong support" of the Bill having argued the case for such a body for "several years" and in particular, supported the creation

¹¹⁴ *ibid.* pp.30-31.

¹¹⁵ *ibid.* p.32.

¹¹⁶ CRE, 'CRE statement on the Equality Bill' (3 March 2005) <<http://www.cre.gov.uk/Default.aspx?LocID-0hgnew05a.RefLocID-0hg00900c002.Lang-EN.htm>>.

of the proposed GED.¹¹⁷

4.5. Commission for Equality and Human Rights

The Government's response to consultation and the subsequent EA, it is argued, strikes a balance in favour of enforcement rather than promotion, somewhat reversing the approach adopted in FFA. The next chapter looks exclusively at the enforcement powers given to the CEHR by the EA. Additional aspects concerning the CEHR and wider legislative amendments confirmed through the EA, which will have some effect on the ability of the CEHR to use its enforcement powers, are discussed in this section.

4.5.1. Timing, Resources and Location

It was confirmed in the EA that the CEHR is to be established in October 2007, with the CRE retaining its independent status until 31 March 2009. This has been welcomed by the CRE for it will allow for a smooth and appropriate transition to the CEHR whilst ensuring in the meantime that it maintains a strong focus on its current initiatives. Following an in-depth Location Study,¹¹⁸ the CEHR will be based in two sites in England; it will have a significant presence in London whilst the majority of staff will be based in Manchester. In addition the CEHR will have offices in Glasgow and Cardiff whilst maintaining a strong regional presence throughout the country. The approximate annual budget for the CEHR represents an increase of over 40% of the total existing Commissions budgets and stands at £70m, despite concerns expressed from the DRC and EOC that funding in the region of £120m would be required.

Particularly welcome was the Government's commitment to providing interim support for the Religion or Belief and Sexual Orientation Regulations during the course of 2005-07. The value of this support equates to approximately £2.5m and is intended to further the work undertaken by organisations in the 2 years prior to this period, during which the Government

¹¹⁷ Government News Network, 'Powerful Human Rights and Equality Body to operate from October 2007' (3 March 2005) Press Release P/2005/72
<<http://www.gnn.gov.uk/Content/Detail.asp?ReleaseID=150061&NewsAreaID=2>>.

¹¹⁸ DTI, 'Commission for Equality and Human Rights, Location Study' (November 2005)
<http://www.womenandequalityunit.gov.uk/cehr/location_study.doc>. This was itself subject to a Race Equality and general Equality Impact Assessment.

provided approximately £2m to support activities raising awareness of the Regulations and making individuals and employers aware of their rights and responsibilities. It is anticipated that the projects funded throughout 2005-07 will help develop services the CEHR can build upon to effectively deliver protection for the newly protected areas. Such work is vital, so as to avoid or at least minimise the risk of the newly created grounds receiving weak and ineffective protection in comparison to the well-established grounds of sex, race and disability. It is important that the development of a hierarchy of protection is minimised, as emphasised throughout the consultation responses. The Government's interim financial commitment should help to achieve this goal.

4.5.2. Duties of the CEHR

Section 3 of the EA contains the general duties that apply to the CEHR. It must 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.”

Such general duties are supported by specific duties under s.8 whereby the CEHR shall;

- “(a) promote understanding of the importance of equality and
- (b) encourage good practice in relation to equality and diversity,
- (c) promote equality of opportunity,
- (d) promote awareness and understanding of rights under enactments,
- (e) enforce the equality enactments,
- (f) work towards the elimination of unlawful discrimination,
- (g) work towards the elimination of unlawful harassment.”

The EA itself expressly defines the concepts of 'equality' and 'diversity'¹¹⁹ and with specific

¹¹⁹ EA 2006, s.8(2).

reference to disability, also acknowledges that positive measures may be necessary to create equality of opportunity, recognising the unique nature of disability discrimination.¹²⁰

4.5.3. Engaging with Stakeholders, Consultation and Monitoring

In line with the proposals discussed above, ss.4 and 5 of the EA place a duty upon the CEHR to consult on and produce a strategic plan outlining its activities, priorities and associated timetables, which is to be reviewed at least once every three years. Likewise under ss.11 and 12, the CEHR is under a duty to monitor the law, carrying forward this duty from existing discrimination legislation. It is also under an obligation to produce what has come to be known as a 'state of the nation' report, no more than three years apart following its initial publication. This will be derived from research and consultation and will centre upon identifying indicators and outcomes as well as changes in society that have occurred or are expected to occur, relevant to the CEHR's general aims as specified in s.3.

One particular change from the original Bill concerns the concept of 'groups' replacing that of 'communities'. Groups are defined by reference to those who share a common attribute connected with the existing protected grounds. Importantly, by way of s.10(3), the Act expressly recognises that smaller groups may exist that share an attribute in addition to the one by which the main group is defined, which may be seen to go some way towards dealing expressly with the issue of multiple discrimination. The use of 'groups' as defined in s.10(2) is less distinguishing than 'communities' and better embraces that possibility of cross-group interests, potentially important for those who experience multiple discrimination and yet would not associate themselves with one particular community. Using 'groups' rather than 'communities' is intended to reflect more accurately the possible distinctions between, and the fact that the CEHR's duties also apply, to individuals. The amendment to the terminology during the passage of the Bill was intended to address concerns that some individuals may not identify with a particular community, or may indeed feel as though they belong to more than one community. Fortunately, the refined concept of communities (prior to the introduction of term 'groups') to include 'sub-groups' and 'sub-classes' was removed,

¹²⁰ EA 2006, s.8(3).

given that this may denote a lesser group of diminished importance. Despite this, the explanatory notes to the EA highlight that the CEHR's work can still apply to communities in the broader sense, an example of which may be the good relations duties, where the term 'community' may be used more appropriately. Such detailed consideration of the terminology is welcome, given its prospective interpretative impact.

In relation to these 'groups', the CEHR is under a duty, defined in s.10(1), to promote the understanding and importance of good relations, to work towards the elimination of prejudice, hatred and hostility towards members of groups, and to work towards enabling members of these groups to participate fully in society. Specifically addressing the concerns of the BME sector, s.10(4) of the EA requires the CEHR to have particular regard, whilst determining what action is to be taken in pursuance of s.10, to the importance of exercising the powers conferred upon it in relation to groups defined by reference to race, religion or belief, which specifically recognises the work conducted by the local RECs and outlines the support dedicated to these equality strands.

Consultation and stakeholder involvement played an important role in the process leading to the creation of the EA, perhaps most evident from the creation of the Task Force, which was supplemented through a number of regional events, meetings and seminars. Furthermore, consultation with interested stakeholder groups has continued beyond the introduction of the EA. A transition Steering Group (in conjunction with a specialist project team) has been able to provide ongoing consultation with stakeholders at ground level, exemplified by that fact that during the summer of 2006 a large number of consultation events were held throughout England, Scotland and Wales to gather regional views. In all instances, representatives were present with interests in all the equality strands covered by the CEHR and in some instances events were co-hosted by the relevant regional equality body, which was particularly beneficial in order to build relationships and raise the profile of such bodies, which will be working closely with CEHR. In addition, the Steering Group instigated a number of specific policy seminars between March and July 2006. These were attended by various stakeholders and culminated in a seminar involving equality representatives from relevant Government Departments. It is expected that the CEHR Chair and Commissioners will use the feedback

from these events and ongoing consultation in order to inform their decisions and provide a solid platform from which the CEHR will launch itself in October 2007.

4.5.4. Structure and Framework of the CEHR

The CEHR, as set out in Schedule 1 of the EA, consists of between ten and fifteen commissioners, at least one of whom must be or have been disabled. Interestingly, no corresponding provision applies for black, ethnic minority or female commissioners despite suggestions made during the consultation process. The EA also confirms the CEHR's ability to establish advisory or decision-making committees, with the potential to provide effective support to any function of the CEHR. Specifically, in line with the proposals discussed above, Part 5 of Schedule 1 establishes a Disability Committee, which will receive extensive powers. The Government resisted amendments to the legislation requiring the establishment of a Race Committee sharing similar powers: however, the CEHR upon its creation may itself establish an advisory and/or decision-making committee to address race relations.

4.6. Conclusion

The consultation and drafting process instigated with the introduction of FFA lasted approximately 21 months during which, as discussed, the CEHR ultimately gained the support of the existing equality Commissions following concessions made by the Government. Throughout the consultation process significant attention was paid to the need to shift the emphasis from promotional activities towards the use of enforcement provisions, given the 'soft touch' approach that was perceived by the majority of respondents as running throughout the White Paper. A broad split was evident between those with interests in equality and those with business interests, concerning the balance that needed to be struck, which is understandable since the business sector will feel the 'bite' of the enforcement provisions the most. The existing Commissions were most keen to ensure no regression in the powers available to themselves. However, most of the debate, as illustrated, concerned more peripheral issues such as representation within and the structure of the proposed Commission, with comparably little focus upon the use and effectiveness of the regulatory

mechanisms of the existing Commissions and their proposed application under the CEHR, or to the decreasing use of individual litigant support, despite the shortcomings of the latter approach discussed above in Chapter 3. Despite a broad consensus as to the need to ensure effective enforcement provisions providing equivalent or greater protection (once the powers were 'levelled up'), insufficient consideration was given to the balance between the enforcement procedures themselves and specifically to the balance between individual litigant support and the use of strategic regulatory mechanisms.

The CEHR has been given an ambitious remit, particularly when considering its somewhat limited budget of £70 million, which will place increased emphasis on the effective use of the enforcement powers available. The next chapter will consider these powers in detail, highlighting the similarities and differences between them and the powers of the existing Commissions. The resource limitations will undoubtedly dictate, to a large extent, the approach adopted by the CEHR towards the use of its enforcement powers. Fiscal considerations would suggest that the balance between individual litigant support and utilising the regulatory mechanisms it has at its disposal, focusing on strategic priorities, would come down in favour of the latter. However, it must be questioned, what role the CEHR will seek to adopt as regards its relationship with those protected by the discrimination legislation. In order to develop a relationship with interested parties based on trust and cooperation, it is suggested that the CEHR will have to take a more 'hands-on approach' whereby change may be witnessed at 'ground level' (i.e. in a way that directly benefits the protected groups) rather than operating largely 'from a distance' and in an exclusively strategic manner, perhaps through increasing cooperation with local or regional bodies or interest groups. There is otherwise a real danger that the CEHR will become increasingly removed and detached from the protected groups on an individual level, given that, unlike the existing Commissions, it will not be identified as a champion of any particular strand of equality rights. How the CEHR interacts with those at 'grassroots' level may, therefore, largely determine the effectiveness of its litigant support role.

Chapter Five

5. Enforcement Powers of the CEHR as contained within the Equality Act 2006

The EA has given the CEHR a suite of statutory powers for it to promote changes and seek improvements in society in respect of the three core areas ('pillars') of equality and diversity, human rights and good relations. The CEHR also has specific powers relating to the enforcement of discrimination legislation, although these do not extend equally to the enforcement of human rights. Although the enforcement provisions within the EA have been modelled on those contained within pre-existing legislation, there are some important differences by comparison, in terms of both strengthened and weakened powers. Weakened powers, as will be seen, violate the Government's principle of non-regression; this will be demonstrated by comparing the enforcement powers outlined in the EA with those of the existing Commissions. It will also be considered whether the powers bestowed upon the CEHR strike an effective balance between individual litigant support and strategic regulatory mechanisms. Although differences in the enforcement powers are perhaps inevitable as a result of combining the existing Commissions and all the equality strands, it is arguable, that "any difference in powers will be of less consequence than any difference in attitude and intent; and, relatedly, in external pressures and control"¹ given the limited use (particularly in recent years) of pre-existing enforcement powers.

5.1. Statutory Enforcement Powers

The EA divides the powers of the CEHR into 'general' and 'enforcement' powers. The 'general' powers include issuing Statutory Codes of Practice (s.14), giving information, advice and guidance and conducting research (s.13), making grants to other persons (s.17) and importantly, being able to independently conduct inquiries into any matter relating to its duties.² However, it is argued that the distinction between the 'general' power of inquiry (s.16 EA), and the enforcement powers is artificial. The s.16 power of inquiry will be

¹ Harwood, R, 'Teeth and Their Use: enforcement action by the three equality commissions' (August 2006) Public Interest Research Unit, p.90.

² EA 2006, s.16(1). Schedule 2, para.20 provides an exception whereby an inquiry is prohibited from considering whether an intelligence service is acting or has acted in a way that is incompatible with an individual's human rights or other matters concerning human rights in relation to the intelligence services.

considered together with the enforcement powers, because of its explicit relationship to investigations and its inherent deterrent effect, further discussed below.

5.1.1. Inquiries - Section 16

The primary purpose of inquiries is to develop and promote improved practice. Unlike an investigation, an inquiry need not be founded upon suspicion that the organisation in question is committing or has committed an unlawful act, although the CEHR is much more likely to focus inquiries on areas where discrimination is historically prevalent, so that it can maximise the impact of its efforts.

If during the course of an inquiry, the CEHR begins to suspect that a person may have committed an unlawful act it should avoid considering that act as part of the inquiry.³ However, the CEHR is entitled to use information acquired during an inquiry as the foundation upon which to launch an investigation,⁴ although it is under a duty to ensure that so far as possible, those aspects of an inquiry concerning, or requiring the involvement of, the person being investigated, are not pursued whilst the investigation is in progress.⁵ In effect, the inquiry may be used to generate the reasonable suspicion required under s.20(2).⁶ Inquiries might be seen to allow investigations to be launched 'through the back door', if the level of suspicion prior to an inquiry would not have been sufficient to justify embarking upon an investigation, meaning the CEHR itself could be open to legal challenge. However, because the findings of an inquiry might feed directly into a formal investigation, whereby the organisation will be subject to potential disruption and damage to its reputation, the mere threat of an inquiry may encourage compliance and the implementation of best practice initiatives and as such may be seen to have a deterrent effect.

³ EA 2006, s.16(2)(a).

⁴ EA 2006, ss.16(2)(b) and (c).

⁵ EA 2006, s.16(2)(d).

⁶ See below, section 5.1.2. - Investigations - Section 20.

5.1.2. Investigations - Section 20

The CEHR, like the existing Commissions, has been granted a power to conduct investigations into unlawful acts of discrimination or harassment.⁷ To do this, it must ‘suspect’ that an unlawful act has been committed.⁸ In this respect s.20 seems slightly less restrictive than the comparable investigative powers of the existing Commissions. A literal reading of the provision would suggest that the CEHR may investigate whether a particular unlawful act has been committed, in accordance with the definition of ‘unlawful’ under s.34 of the EA, even if the suspicion which gives rise to the investigation does not concern the act being investigated. In other words “the CEHR may investigate whether a person has committed unlawful act X if it suspects that he or she has committed unlawful act Y or, for example Z”.⁹ Conversely, the DRC (for example) is only entitled to instigate an investigation if there is a direct link between the unlawful act being investigated and the unlawful act the DRC has ‘reason to believe’ has been committed.¹⁰ This means that the DRC “may only investigate whether a person has committed unlawful act X if it has reason to believe that it has committed unlawful act X.”¹¹ Another potential difference that turns upon the wording of the section concerns the use of the word ‘suspects’ as opposed to ‘reason to believe’ as is contained in the DRCA. Schedule 3, Part I of the DRCA, 3(3)(a) states that:

‘(3) The Commission may not investigate whether a person has committed or is committing any unlawful act unless-

(a) it has *reason to believe* [my emphasis] that the person concerned *may* [my emphasis] have committed or may be committing the act in question’

Section 20(2) of the EA, on the other hand, states that:

‘(2) The Commission may conduct an investigation under subsection (1)(a) only if it *suspects* [my emphasis] that the person concerned *may* [my emphasis] have committed an unlawful act.’

Suspicion might be seen to demand lesser evidential certainty than a reason to believe, which would suggest the possession of information or facts that help formulate a belief, rather than a mere ‘hunch’ or ‘intuition’ as the case may be. The definition in the EA fits much more

⁷ EA 2006, s.20(1)(a).

⁸ EA 2006, s.20(2).

⁹ Harwood, R, above at n.1, p.94.

¹⁰ See DRCA 1999, Schedule 3, Part I, s.3(3)(a).

¹¹ Harwood, R, above at n.1, p.94.

closely with the requirements of the EOC and CRE in this respect, as established through case law, which suggests that material must be present before the Commission to raise suspicion that unlawful acts have been committed of the same kind that the Commission is proposing to investigate.¹² However, “the inclusion of the word ‘may’ in both the DRCA and EA provisions, so reduces the requirement for certainty that any difference in meaning between ‘reason to believe’ and ‘suspects’ becomes inconsequential.”¹³

If the CEHR concludes, following an investigation, that unlawful discrimination or harassment has taken place, it will be able to serve an unlawful act notice under s.21 on the ‘person’ (natural or legal) that has committed the discrimination. Alternatively, where a person is willing to work with the CEHR to achieve improvement, the CEHR can enter into a binding agreement with that person under s.23. Furthermore, an investigation may be conducted to determine whether a person has complied with a requirement of an unlawful act notice¹⁴ or with the terms of a binding agreement.¹⁵

It would appear that the EA somewhat circumscribes the investigative scope of the CEHR by specifically setting out in s.20(1) the circumstances in which it may carry out an investigation, whereas the existing Commissions enjoy this power for any purpose connected with the performance of their general duties.¹⁶ Nevertheless, the CEHR can take a cross-cutting approach by being able to take forward cross-strand investigations. An inquiry under s.16 is permitted into any matter relating to the CEHR’s duties under s.8 (equality and diversity), s.9 (human rights) and s.10 (groups) of the EA, and may as noted provide the foundations of suspicion on which to base an investigation under s.20.¹⁷

When compared with the pre-existing investigative powers it is worth noting that the EA does not make provision for a requirement to conduct an investigation at the request of the Secretary of State. Such a provision was removed during the Bill’s passage through Parliament, seemingly to give the CEHR greater independence as to which areas it may

¹² See *Hillingdon LBC v Commission for Racial Equality* [1982] AC 779 (HL) and text to n.39, Chapter 3.

¹³ Harwood, R, above at n.1, p.95.

¹⁴ EA 2006, s.20(1)(b).

¹⁵ EA 2006, s.20(1)(c).

¹⁶ See SDA 1975, s.57; RRA1976; s.48 and DRCA 1999, s.3.

¹⁷ Moreover, echoing the provision in s.16 of the EA 2006, s.20(3) itself expressly outlines that a belief of unlawful discrimination or harassment, sufficient to satisfy the requirement in s.20(2), may be acquired by the CEHR during the course of an inquiry.

dedicate its resources. The role of the general formal investigation seems to have been replaced by that of a s.16 inquiry and the role of the so-called belief or named person investigation with that of an investigation under s.20 of the EA.

Considering the existing Commissions use of their strategic regulatory mechanisms it is clear that, formal investigations have been the most frequently used. However, a sharp decline in their use has become evident.¹⁸ The CRE for example completed 39 formal investigations during the 1980s and 20 in the 1990s. Six and a half years into the present decade, it had only conducted three investigations,¹⁹ a total which is unlikely to be substantially increased given the preparations for amalgamation into the CEHR in 2009, which is high on the CRE's agenda.²⁰ Of the two 'named person' investigations initiated by the EOC against Royal Mail and the Ministry of Defence, both were suspended on the basis of having reached an agreement. Although it may be beneficial to have been able to reach a satisfactory outcome in the form of an agreement without having to commit further resources towards completing an investigation, this may also signify a general reluctance to use the investigative powers available to their full extent. Additionally, as noted in the PIRU report,²¹ there has been a notable decline in the number of formal investigations against private sector bodies, with nineteen being conducted during the 1980s, five in the 1990s and only one so far this decade. It is to be hoped that the approach adopted towards enforcement action during recent years will not be taken as a precedent by the CEHR. Indeed it seems quite contradictory for the CRE to have pushed for a number of changes, while having seldom used its own powers since the turn of the century despite the fact that issues of racial tension and discrimination have been so prominent in society.

¹⁸ For a consideration of the use of formal investigations in the early years of the CRE and EOC see Appelby, G and Ellis, E, 'Formal Investigations: the CRE and the EOC as Law Enforcement Agencies' (1984) PL 236 and Coussey, M, 'The Effectiveness of Strategic Enforcement of the Race Relations Act 1976' in Hepple, B and Szyszczak, E (eds.), *Discrimination: The Limits of Law* (Mansell, London 1992).

¹⁹ These figures are reproduced from the findings in Harwood, R, 'Teeth and Their Use: enforcement action by the three equality commissions' (August 2006) Public Interest Research Unit. Similarly the EOC only completed three formal investigations over this period whilst the DRC completed one, all of which were general investigations.

²⁰ This may be contrasted with the CRE's stance discussed above at section 3.5.2. - CRE's Stance. The CRE's bark may be seen to be worse than its bite in this respect as there is little to suggest that it will seek to increase its use of investigative or legal assistance powers.

²¹ Harwood, R, above at n.1, p.42.

The decline in the use of formal investigations can primarily be seen in the wake of the *Hillingdon* and *Prestige* cases, and the judicial hostility that followed these decisions.²² As Carty points out, in addition to the statutory safeguards, “the courts have added through restrictive interpretation of the Acts, a further “gloss” of safeguards”²³ which have “proved to involve such technicality and to be so time-consuming that the usefulness of initiating a formal investigation has been called into question”.²⁴ Much of the judicial disapproval and hostility was faced by the CRE given its initial aggressive and “over-ambitious”²⁵ use of investigations. As noted earlier, the reluctance of the EOC²⁶ to initiate formal investigations may have resulted from the fear of receiving a similar judicial backlash.²⁷ It is important that the CEHR does not use historic judicial hostility as a reason for using its powers sparingly. The current political climate, free for example from the power struggles with Trade Unions taking place under the Thatcher Government, might have brought about a change in judicial attitudes, to be more receptive to challenges against private and public sector organisations than 20 years ago. Bearing this in mind, it is hoped that the judiciary will adopt a pragmatic approach and positive outlook to discrimination, and that the issues of technicality and judicial interpretation arising from the existing legislation²⁸ will have been addressed by the EA, so that the enforcement powers will not be further circumscribed by the courts.

5.1.3. Unlawful Act Notice – Section 21

The CEHR may issue a notice under s.21 of the EA after an investigation confirms an unlawful act has taken place.²⁹ The notice must set out the equality enactment in question

²² As discussed above in section 3.2.3. In addition, see Munroe, M, ‘The Prestige Case: Putting the lid on the Commission for Racial Equality’ (1986) *Anglo-American Law Review* 187.

²³ Carty, H, ‘Formal investigations and the efficacy of anti-discrimination legislation’ (1986) *Journal of Social Welfare Law* 207, p.209.

²⁴ *ibid.* p.210.

²⁵ *ibid.* p.211.

²⁶ Additionally, it will be remembered that the EOC did not have any background experience, unlike the CRE, which had the Race Relations Board (see above, section 3.1.1. - Creation). The EOC was also without an adequate legal department until 1978, which helps to explain its slow start in the use of formal investigations.

²⁷ As Carty, above at n.23 notes “in the face of such hostility even the CRE had to acknowledge (in its 1983 Report) that its investigative strategy would have to be rethought”. Indeed, the Home Affairs Select Committee in its first report of 1981-1982 criticised the CRE’s investigative strategy and was keen to see more large organisations being investigated.

²⁸ See Sacks, V, ‘The Equal Opportunities Commission – Ten Years On’ (1986) 49 *MLR* 560, pp.582-5 for a further discussion in relation to the EOC.

²⁹ EA 2006, s.21(1).

and breach thereof leading to such a finding³⁰ and may involve the recipient having to prepare an action plan, setting out the steps he or she will take to stop the discrimination occurring or recurring.³¹ In some instances, the CEHR itself may recommend the actions to be taken for this purpose.³² Section 21 also sets out the basis on which a person may appeal against the issue of such a notice³³ and enables a court or tribunal to affirm, annul or vary a notice or requirement on appeal, including the ability to make an order for costs or expenses.³⁴ This section is largely modelled upon the Non Discrimination Notice (NDN) provisions as contained within the SDA, RRA and DRCA. The particular advantage of an Unlawful Act Notice over a NDN, however, stems from the fact that ownership of the solution will in most instances lie with the person or organisation in question, resulting from the creation of an action plan (see section 5.1.4. below), save where the CEHR itself makes recommendations. Also, such solutions will receive careful consideration and in consequence will be much more likely to be realistic, achievable and sustainable (see section 5.1.4. below). Because individuals or organisations must proactively take ownership of and responsibility for the issue of unlawful discrimination, it is reasonable to suggest that any corresponding corrective actions will themselves be more effective.

There may be an aspect of regression, however. The existing Commissions have the power whilst issuing a NDN to require the person committing the discriminatory act to cease doing so.³⁵ However, as Harwood notes, the justification for the absence of such a power in the EA may be that the “recipient of the notice is already, of course, required under law not to act unlawfully.”³⁶ To require an individual or organisation not to commit any further acts may be “superfluous” and may “suggest that the recipient is, in some sense, not required...to commit other kinds of unlawful act”.³⁷ Alternatively, it could be argued that the purpose of the action plan is to avoid repetition or continuation of the unlawful act in question and that, for example, to require individuals or organisations to “cease discriminating immediately or

³⁰ EA 2006, s.21(2).

³¹ EA 2006, s.21(4)(a).

³² EA 2006, s.21(4)(b).

³³ EA 2006, s.21(5).

³⁴ EA 2006, s.21(6).

³⁵ e.g. see SDA 1975, s.67(2)(a).

³⁶ Harwood, R, above at n.1, p.98.

³⁷ *ibid.*

in a short space of time” in accordance with s.67(2)(a) of the SDA would be at variance with the purpose of the action plan as detailed in s.21(4)(a).³⁸

5.1.4. Action Plan - Section 22

An action plan must be submitted in draft by a specified date³⁹ upon receipt of a notice under s.21(4)(a) as discussed above. Upon submission of a plan (whether an initial or subsequent draft) the CEHR is entitled to either approve it⁴⁰ or give notice that it is not adequate.⁴¹ Upon disapproval a date must be given for its resubmission.⁴² The CEHR at this point may also make recommendations regarding the content of any revised plan⁴³ and provision is made to enable the CEHR and the organisation concerned to vary any plan by agreement.⁴⁴ Unless the CEHR disapproves a plan, or applies for a court order under s.22(6), it will come into effect within 6 weeks.⁴⁵ As mentioned, this approach is to be welcomed because it forces the organisation to look at the issue in question and to devise ways of ensuring that such discriminatory acts do not occur in the future. The fact that ownership of the solution lies primarily with the discriminator would suggest that it is much more likely to be effective, given that it is not being forced upon an organisation by a body (the CEHR) that may not completely understand the situation and the politics leading to the circumstances in which the discriminatory act or acts had taken place.

The CEHR under s.22(6) may seek a court order requiring compliance with ss.22(2) and (3) and, importantly, may also apply for an order within five years of an action plan coming into force, to require the person concerned to comply with the action plan or to take specific action for a similar purpose.⁴⁶ The court may also specify in the order any directions regarding the plan’s content.⁴⁷ However, s.22 would seem to be at variance with the comparable power under the DRCA, which provides that the notice itself may require the

³⁸ *ibid.*

³⁹ EA 2006, s.22(2).

⁴⁰ EA 2006, s.22(3)(a).

⁴¹ EA 2006, s.22(3)(b)(i).

⁴² EA 2006, s.22(3)(b)(ii).

⁴³ EA 2006, s.22(3)(b)(iii).

⁴⁴ EA 2006, s.22(7).

⁴⁵ EA 2006, s.22(5).

⁴⁶ EA 2006, s.22(6)(c).

⁴⁷ EA 2006, s.22(6)(b)(ii).

person to take any action specified in the plan once that plan has become final.⁴⁸ It seems that the DRC has greater control over the use and enforcement of its NDN than the CEHR will receive under s.22(6) of the EA, as the CEHR will need to apply to a court for an order requiring the person concerned to act in accordance with the action plan.

5.1.5. Agreements – Section 23

Agreements under this section broadly replicate s.5 ‘agreements in lieu of enforcement action’ as found in the DRCA. The CEHR will be able to enter into a binding agreement with a public authority as an alternative to issuing a s.32 compliance notice for a breach of a public sector-specific duty. An agreement may be entered into where the CEHR ‘thinks’ a person has committed an unlawful act.⁴⁹ Such an agreement can specify either that the person undertakes not to commit a specified unlawful act,⁵⁰ or agrees to take or to refrain from taking specified action.⁵¹ The latter type of agreement may include an agreement to prepare an action plan setting out the steps that will be taken to improve a person’s or an organisation’s practices to avoid such an unlawful act in future. In return, the CEHR is obliged not to undertake any proceedings under s.20 or 21 in respect of the act specified in the agreement.⁵²

The scope of the agreement appears wider under the EA than the DRCA. Under s.5(2)(b)(i) of the DRCA, the person must undertake not to commit unlawful acts ‘of the same kind’ as the act which gave rise to the agreement. The EA refers instead to an agreement not to commit an unlawful act within the meaning of s.34 EA, meaning that, in practice, “if the CEHR entered in to an agreement on the grounds that it thinks that a person has committed an act which is unlawful under the RRA, the agreement could include an undertaking not to commit an act which is unlawful under a provision of the DDA”.⁵³ Although the importance of this may not be readily apparent, it gives the CEHR an important element of flexibility, and may be particularly useful in cases of multiple discrimination in which the burden of

⁴⁸ DRCA 1999, s.4(3)(b).

⁴⁹ EA 2006, s.23(2).

⁵⁰ EA 2006, s.23(1)(a)(i).

⁵¹ EA 2006, s.23(1)(a)(ii).

⁵² EA 2006, s.23(1)(b).

⁵³ Harwood, R, above at n.1, p.101.



proof required might only be satisfied (or might be easier to satisfy) in relation to one of the grounds on which an individual has been discriminated against. By way of s.23(4), an agreement may also contain ‘incidental or supplementary’ provisions, such as a provision for termination in specified circumstances, and the agreement may be consensually varied or ended by both parties. As s.23 can apply to public authorities, the CEHR may enter into an agreement following a breach of the public sector duties under s.34(2) in lieu of issuing a s.32 compliance notice.⁵⁴ An agreement is enforceable through the courts via ss.24(2) and (3) and may include an undertaking to take such further action as may be required by the court.

A notable difference exists between the EA and DRCA in the terminology used. Whereas the DRCA requires the DRC to have a ‘reason to believe’ that an unlawful act had been committed,⁵⁵ the CEHR may enter into an agreement if it ‘thinks’ that this is the case, which according to Harwood requires a “significantly higher degree of certainty” and by implication sets a “higher threshold”⁵⁶ for being able to enter into an agreement under s.23. As this is such an imprecise term, we can only speculate as to how it will be interpreted by the courts. A ‘reason to believe’ for example, would seem to require some form of evidence. Even the term ‘suspicion’ would suggest the presence of some information alluding to a particular belief.⁵⁷ Even if the word ‘thinks’ were to be regarded as requiring a lower threshold of certainty, the judiciary may be encouraged to provide additional safeguards for individuals and organisations by interpreting it strictly, which is to be avoided given the effect of *Prestige* and *Hillingdon* upon the use of enforcement powers, as discussed.⁵⁸ Conversely, the CEHR may apply to a court to require compliance with an agreement if it thinks that a party ‘is likely not to comply’, whilst the DRCA requires the DRC to have reasonable cause to believe that a party ‘intends not to comply’, which would suggest that, at

⁵⁴ EA 2006, s.23(5).

⁵⁵ DRCA 1999, s.5(1).

⁵⁶ Harwood, R, above at n. 1, p.100.

⁵⁷ Moreover, the courts may draw upon the criminal interpretation of ‘suspicion’ in order to determine the required threshold.

⁵⁸ See above, section 3.2.3. - Formal Investigations.

least with regard to enforcing agreements, a higher threshold of certainty is set for the DRC than for the CEHR.⁵⁹

5.1.6. Application to Court – Section 24

Section 24(1) gives the CEHR the power to apply for an injunction, if it believes an individual is likely to commit an unlawful act. This provision is broadly intended to replicate the ‘persistent discrimination’ provisions available under the SDA, RRA and DRCA. However, it differs significantly from the pre-existing legislation, which requires an individual to have been the subject of a NDN or to have already been found to be discriminating. Section 24 imposes no such restriction, and even if there is no historical evidence to point towards the existence of discriminatory behaviour, the CEHR may apply for an injunction as long as it ‘thinks’ a person will discriminate. This has the advantage of enabling the Commission to bring proceedings immediately upon gathering sufficient evidence to suggest that, unless restrained, the person is likely to discriminate. Removing these “completely unnecessary bureaucratic obstacles”⁶⁰ suggests that the CEHR might increasingly use this power. However, safeguards will still apply, as the effect “is not to make the process of applying for an injunction any less vigorous”: only evidence of “real substance will convince a court that an injunction is necessary”.⁶¹ As noted, however, just one persistent discrimination injunction was sought between January 1999 and June 2006, by the EOC in 2004, which “seems to suggest that the ‘bureaucratic obstacles’ might not have been the decisive obstacle to Commission action”.⁶² It is therefore unclear as to what effect the relaxation of the criteria in s.24 will have in relation to the use of this power.

There is no provision allowing preliminary action in employment cases, as is available under ss.73 and 64 of the SDA and RRA respectively, other than in relation to s.25 of the EA (see below, section 5.1.7.). The potential benefit of preliminary action is that “declarative relief might be easier to obtain but still constitutes a strong deterrent” which makes such an option

⁵⁹ Harwood, R, above at n.1, p.102. also notes “the Commission might consider that a person intends to comply but, because of organisational weakness, also believes that the person is likely not to comply”.

⁶⁰ A phrase coined by Lord Lester of Herne Hill, Hansard, 19 October 2005, Column 799.

⁶¹ Baroness Ashton of Upholland, Hansard, 19 October 2005, Column 798.

⁶² Harwood, R, above at n.1, p.103.

potentially “more attractive...than seeking an injunction”.⁶³ In addition, a preliminary finding against an individual prior to the application of an injunction may prompt that person to take active steps to combat discrimination, which may indeed allay the concerns of the Commission and avoid an application for an injunction. This would have benefits both for the Commission in terms of the resources saved and also the discriminator in terms of limiting damage to its reputation, for example. In its Parliamentary Briefing on the Equality Bill,⁶⁴ the EOC called for an equivalent of s.73 of the SDA to be adopted within the EA. It was stressed that this provision is particularly useful, as it allows the EOC to raise proceedings before an employment tribunal and obtain a ruling that the employer in question has committed an unlawful act. The EOC may then, armed with this finding and a suspicion that the employer will commit further unlawful acts, seek an injunction through the county court under ss.71(1) or 72(4). As the EOC is not *required* to seek an injunction it may alternatively, subsequent to the tribunal proceedings, seek an agreement with the employer concerning the discriminatory behaviour. The EOC identifies a number of additional important reasons why this power should be extended to the EA.⁶⁵

- It allows the EOC to operate strategically, by identifying and targeting the worst forms of discrimination and employers, and raising preliminary proceedings with a view to taking persistent discrimination proceedings. Importantly, this allows the Commission to operate proactively, as opposed to reacting when a case appears that an individual is willing to pursue.
- It enables the EOC to challenge employers believed to be persistently discriminating, where there is no specific individual who could be identified as a victim or when an individual has been unwilling or unable to obtain a finding from a tribunal. In particular, the kinds of employer that can be targeted are those that have settled a large number of cases out of court. In such an instance, where it is clear that the employer is making little effort to eradicate the discriminatory practices, a preliminary finding may promulgate change.

⁶³ *ibid.* p.104.

⁶⁴ EOC, ‘Parliamentary Briefing: Equality Bill, 6 July Lords Committee Stage’ (28 June 2005) <<http://www.eoc.org.uk/Default.aspx?page=17688>>.

⁶⁵ *ibid.* pp.8-9.

- All cases taken by the EOC under s.73 have been settled out of court, following an agreement with the employer, suggesting that this is an efficient route for reaching an agreement. The existence of this power whereby the EOC can challenge discriminatory acts can also have a deterrent effect on employers, especially where victims may be pressurised into not taking forward a case.
- Proceedings before the employment tribunal are quicker and cheaper, less resource- and time-intensive, and less bureaucratic than the formal investigation route, and thus represent greater “value for money”. The employment tribunal route is also likely to be preferred by employers, and will be viewed as a less serious step than litigation in the county court which has a propensity for being much more confrontational. Correspondingly, proceedings under s.73 may be seen as a more proportionate response, giving employers the opportunity to tackle the issue in question before a decision is made to take the case to the county court. In addition, the EOC expressed concerns about the level of experience of county court judges.

5.1.7. Application to Restrain Unlawful Advertising, Pressure and Instructions to Discriminate – Section 25

This section concerns the ability to bring legal proceedings regarding the relevant provisions relating to sex (ss.38-40 SDA), race (ss.29-31 of RRA), disability (ss.16B and 16C DDA) and religion or belief (ss.54 and 55 EA).⁶⁶ As with the pre-existing legislative provisions and respective Commissions, only the CEHR itself is entitled to utilise s.25.⁶⁷ It may apply to either a court or tribunal, as determined by the specific provisions being relied upon,⁶⁸ whereupon the court or tribunal will determine whether the allegation is correct.⁶⁹ The resulting injunction will restrain the person from doing an act to which this section applies, and can be sought when either a court or tribunal has determined (under s.24(4)) that such an

⁶⁶ EA 2006, s.25(1).

⁶⁷ EA 2006, s.25(2).

⁶⁸ EA 2006, s.25(3).

⁶⁹ EA 2006, s.25(4).

act has been committed or where the CEHR thinks that the act has occurred and where unless restrained, the person will commit a further act to which this section relates.⁷⁰

This is a less stringent requirement than that imposed upon the existing Commissions, which may apply for a restraining injunction only if the tribunal has made a finding of an unlawful act.⁷¹ Under the EA, it is sufficient that the CEHR *thinks* the individual has committed such an act, which as discussed is a significant difference. Once again, although this should make it easier for the CEHR to utilise this provision, consideration of the previous six years shows that none of the existing Commissions have presented a complaint to an employment tribunal under the discriminatory advertisements provisions, suggesting that the changes initiated may have minimal practical effect.⁷²

The supplemental procedural considerations outline the time limit for an application under s.25(3) of six months,⁷³ whereas an application under ss.25(5) or (6) must be made within five years. Both applications must receive permission of the court or tribunal.⁷⁴ Lastly, a determination under s.25(4) which is subject to a pending or prospective appeal may not be relied upon by a county court in proceedings under ss.25(5) or (6).⁷⁵

5.1.8. Conciliation - Section 27

Although not strictly an enforcement power, the CEHR is empowered to arrange for the provision of conciliation services in disputes concerning discrimination in the provision of goods, facilities, services, education, premises, and the exercise of public functions. For this purpose subsection 1 lists the specific sections of the relevant equality enactments. The field of employment was not included to avoid duplicating the work of the Advisory Conciliation and Arbitration Service (ACAS), which currently provides a conciliatory role in this respect.⁷⁶ Subsection 6 outlines those parties who must not participate in any aspect of the conciliation process; it is to be delivered by an independent provider, which should ensure

⁷⁰ EA 2006, s.25(5).

⁷¹ e.g. DDA 1995, s.17B(4)(a).

⁷² See above, section 3.3. - Use and Effectiveness of Enforcement Powers and Strategic Litigation.

⁷³ EA 2006, s.26(1)(a).

⁷⁴ EA 2006, ss.26(1)(b) and s.26(3)(b) respectively.

⁷⁵ EA 2006, s.26(2).

⁷⁶ See Trade Union and Labour Relations (Consolidation Act) 1992, s.210.

that information concerning the case does not become available to the CEHR. This is especially important as the CEHR itself could potentially be involved in supporting a case where conciliation has broken down or formal enforcement proceedings against the discriminator in question are instigated. In addition, by way of ss.27(5), (7) and (8), the EA provides strict requirements on the use and disclosure of information with the intention of upholding the integrity of conciliation as an alternative method to direct enforcement action. It is open to the Secretary of State, by order, to amend s.27 so as to vary the range of disputes for which the CEHR may provide conciliation.⁷⁷

The efficacy of using conciliation agreements as a method of settling discrimination claims may be seen from an analysis of the Employment Tribunal cases disposed of during the last 4 years.⁷⁸ Over this period, approximately 46.5% of disability, 37% of race and 20.75% of sex discrimination cases were settled through ACAS-conciliated agreements. Conciliation can be particularly useful to promote a settlement between two parties, as the range of outcomes that may be agreed are much broader than those available through an Employment Tribunal. However, much of the success of conciliation depends upon the issue in question. Unfair dismissal claims, for example, may be particularly difficult to settle through conciliation, because of the often negative feelings harboured between the two parties as a result of the circumstances leading to the dismissal: this is equally, if not more, true in relation to discrimination claims.⁷⁹

Given that conciliation aims to reach a settlement, it will inevitably focus upon the immediate interests of both parties, largely ignoring the broader issues of principle that may arise. In addition, conciliation officers will be unlikely to refer an applicant towards independent legal advice, as this is not within their remit, therefore cases of potential strategic importance might never reach a court or tribunal, meaning that the wider potential impact of a case will be lost and its educational and deterrent impact weakened. Hunter and

⁷⁷ EA 2006, s.27(10).

⁷⁸ See Appendix C: Outcome of Employment Tribunal Cases by nature of claim.

⁷⁹ McCrudden, C and Brown, C, 'Racial Justice at Work, Enforcement of the Race Relations Act 1976 in Employment' (1991) Policy Studies Institute, p.190: "Compared with unfair dismissal...discrimination complaints are more likely to lead to considerable argument over the facts. When this is combined with less access to hard evidence on the part of the complainant, it is harder to give sensible advice while abstaining from giving an opinion on the merits of the case."

Leonard⁸⁰ argue that while privacy and confidentiality are major advantages of the conciliation process, as compared to the more “harrowing”⁸¹ nature of the employment tribunal process, there should be a presumption that all mediated settlements are a matter of public interest unless expressly rebutted by the parties to the proceedings, which would ensure that the potential importance of any settlement for informing and developing discrimination legislation and Codes of Practice is not lost.

In addition, there is no guarantee that any monetary settlement sought during conciliation will be comparable to the award a tribunal might have made. The difficulty for an applicant is that a significant monetary offer will invariably put pressure on them to settle out of court, especially as this will avoid the psychological anguish a tribunal case may bring. Alternatively, a determined refusal by an employer to reach an agreement out of court may deter an applicant from taking a case forward. As Hunter and Leonard point out, the “outcomes of mediation will be the product of power relations rather than of the free agreement of each party”.⁸² This will be more apparent if mediators remain impartial and view their role as merely facilitating negotiations, as in that event “the outcome the parties agree, can only reflect the power imbalances, not rectify them”.⁸³ A proposed solution is to adopt “rights based mediation” which “prioritises legal rights and the elimination of discrimination”.⁸⁴ Such an approach could “intervene in the power balances between parties by allowing an otherwise less powerful complainant to assert legal entitlements which have ‘an existence and legitimacy separate from the relationship’”.⁸⁵

The difficulty is that ACAS, who may currently provide conciliation in discrimination cases, is “by virtue of its own traditions as well as the legislative framework as interpreted by the courts...meticulously neutral as between the parties” and is “emphatically not a rights enforcement agency”.⁸⁶ Therefore, despite its experience, ACAS may not provide the most

⁸⁰ Hunter, R, and Leonard, A, ‘Sex Discrimination and Alternative Dispute Resolution: British proposals in the light of international experience’ (1997) PL 298.

⁸¹ Hepple, B, QC, Coussey, M and Choudhury, T, ‘Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation’ (2000) Oxford: Hart Publishing, para.4.61.

⁸² Hunter, R, and Leonard, A, above at n.80. pp.304-11.

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ Lewis, R and Clark, R, ‘Employment Rights, Industrial Tribunals and Arbitration: The Case for Alternative Dispute Resolution’ (1993) Institute of Employment Rights, p.8.

effective service given its “reluctance to attempt a more proactive approach aimed at reaching settlements which promote equal opportunities”.⁸⁷ As noted in the Hepple Report, however, ACAS may indeed be required to take such a proactive approach if it can be specified as a public body in respect of the duty to promote equal opportunities.⁸⁸ In light of the potential disadvantages of the ACAS approach to conciliation, and the difficulty in getting ACAS listed as a public body with a duty to promote equality, the Government should have considered giving the CEHR power to arrange for mediation in the field of employment. In order to maximise the effectiveness of conciliation it will be vitally important for the CEHR to ensure that the mediator addresses any power imbalance between the parties and, where necessary, ensure that legal advice is recommended as an appropriate way forward rather than advising claimants to settle upon agreements that might be unfavourable or only minimally favourable towards them. The importance of this requirement is emphasised when considering that the CEHR is not entitled to directly participate during conciliation but may only facilitate and make arrangements for this process, and only then with regard to proceedings as set out in ss.27(1), (2) and (3).⁸⁹

5.1.9. Legal Assistance – Section 28

The CEHR is entitled to provide assistance to an individual who claims to be the victim of behaviour contrary to the equality enactments (excluding Part V of the DDA⁹⁰) and who is, or may become, a party to legal proceedings concerning the alleged breach.⁹¹ It is not able to support cases brought under the HRA. A particularly welcome aspect of s.28, however, is that the definition of ‘equality enactments’ encompasses relevant provisions of European Community (EC) law.⁹² This relatively broad definition will allow the CEHR to support proceedings that allege incompatibility between domestic and EC law, or to use EC legislation that seeks to combat discrimination on the existing and forthcoming grounds. This

⁸⁷ Hepple, B, QC, Coussey, M and Choudhury, T, above at n.81, para.4.64.

⁸⁸ *ibid.* This may be difficult to argue as although ACAS is a statutory body as established in January 1976 under the Employment Protection Act 1975, it is classed as non-departmental, despite being funded by the DTI.

⁸⁹ Sections 27(2) and (3) are primarily concerned with a landlord’s reasonableness in prescribed circumstances.

⁹⁰ EA 2006, s.28(5)

⁹¹ EA 2006, s.28(1)

⁹² EA 2006, s.28(12).

definition will also give the CEHR the express power to take forward the pioneering work of the EOC, which has used European legislation and litigation to great effect.⁹³

Although there are no statutory criteria limiting the nature of cases it can support, having been removed following the consultation concerning FFA, in light of its decidedly finite resources the CEHR will be expected to support individual cases that will clarify the law and/or have a widespread impact in securing fairer treatment.⁹⁴ The existence of such statutory criteria at present provides an initial 'hurdle' for those seeking legal assistance, the removal of which should therefore grant the CEHR increased freedom to pursue specific cases. It will also give the CEHR freedom to develop its own strategic priorities, which will likely be informed by its own experience, research and consultation activities and the previous experiences of the existing Commissions.

Regarding the CEHR's discretion concerning the provision of assistance, the EA has followed the example of the DRCA under s.7, as opposed to the EOC (SDA s.75) and CRE (RRA s.66) that expressly require the consideration of *all* applications for assistance. The importance of this may be minimal, given that even if the CEHR were obliged to consider all applications, it would still have discretion as to whether to grant assistance to any particular applicant. However, although the CEHR will have the flexibility to use its powers under s.28 in the most effective way, it is important that it does not alienate the very people it is expected to benefit by refusing to consider certain applications, especially if refusals are not underpinned by a clear strategic agenda. As matters stand, despite there being no duty to consider all applications for assistance, the CEHR itself is a public body subject to judicial review and will accordingly be obliged not to act unreasonably. As discussed the CEHR is also expected to produce its own criteria and to consult widely upon this. Any apparently irrational refusal to consider an application may therefore be challenged, which should prompt the CEHR to exercise its powers under s.28 in an appropriate manner.

The CEHR has the power to provide, or arrange for the provision of, legal advice or representation; facilities for the settlement of a dispute; or any other form of assistance to

⁹³ See above, section 3.4.1. - Equal Opportunities Commission.

⁹⁴ DTI, White Paper, 'Fairness for All: A new Commission for Equality and Human Rights' (Cm 6185, 2004) para.4.15.

individuals satisfying the requirements under subsection 1. The CEHR may offer assistance to any aspect of proceedings that relate in part to a provision of the equality enactments. However, such assistance must terminate where the proceedings cease to relate to the equality provisions.⁹⁵ One exception to this latter provision is the Lord Chancellor's power to make an order enabling the Commission to provide assistance in proceedings that no longer concern the equality enactments, but instead relate wholly or in part to any of the Convention rights (as defined by s.1 HRA).⁹⁶ It is quite alarming that the Lord Chancellor has been given such discretion, as this gives the Government "significant influence on the circumstances in which individuals might be given support", compounded by the fact that the Government "might quite frequently find itself subject to action under the HRA" due to its "ambivalent attitude towards human rights".⁹⁷ In addition, it is argued that given the "fundamental and inalienable" nature of human rights, the "enforcement and protection of these rights should not be at all dependent upon what could, in effect, be the populist whim of a declining government".⁹⁸ Another exception is the power of the Secretary of State to make an order enabling the CEHR to provide assistance in proceedings that fall outside of the equality enactments where a disabled person seeks to rely on a matter relating to his or her disability.⁹⁹ These two powers may, however, be exercised in general terms or in relation to particular types of circumstances or proceedings.¹⁰⁰

Lastly, where the CEHR has assisted an individual who receives whole or partial costs, whether by award or agreement as a result of the proceedings,¹⁰¹ the CEHR may recover its expenses at an amount determined by the Secretary of State, should regulations be made for this purpose.¹⁰² Such expenses may be enforced as a debt¹⁰³ although any requirement to pay

⁹⁵ EA 2006, s.28(6).

⁹⁶ EA 2006, s.28(7). At the time of writing, as part of the Constitutional Reforms, the position of Lord Chancellor is currently occupied by Lord Falconer of Thoroton, who has also been given the position of Secretary of State for Justice, operating within the newly created Ministry of Justice (9 May 2007). For the very near future at least, however, Lord Falconer will retain the title and role of Lord Chancellor.

⁹⁷ Harwood, R, above at n.1, p.107.

⁹⁸ *ibid.*

⁹⁹ EA 2006, s.28(8).

¹⁰⁰ EA 2006, s.28(9).

¹⁰¹ EA 2006, s.29(1).

¹⁰² EA 2006, s.29(5).

¹⁰³ EA 2006, s.29(2)(b).

money to the Legal Services Commission will take priority.¹⁰⁴ Such a provision will allow the CEHR to claw back some of the expenditure incurred as a result of providing legal assistance, which is important especially if proceedings are considered in the Court of Appeal and House of Lords where the costs are particularly high. Concern was raised during the consultation as to the limitations imposed upon the CEHR by the available resources; this provision (which is likewise available to the existing Commissions¹⁰⁵) may go some way towards alleviating or countering these concerns.

5.1.10. Judicial Review and other Legal Proceedings - Section 30

The CEHR will be able to institute or intervene in legal proceedings, whether by way of judicial review or otherwise, which are relevant to its remit (i.e. equality and human rights).¹⁰⁶ The CEHR may rely upon a breach of Convention rights for this purpose, even if it is itself not the victim of the actual or potential breach;¹⁰⁷ consequently ss.7(3) and (4) of the HRA do not apply.¹⁰⁸ No award of damages may be made to the CEHR for a breach of Convention rights, however.¹⁰⁹ The power to intervene as a third party in legal proceedings has been an effective litigation tool adopted by the DRC to maximise the impact of its legal assistance by focusing on key test cases, which the CEHR may be able to replicate.¹¹⁰ The case of *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission*¹¹¹ was particularly important with regard to judicial review. The House of Lords held that the EOC had the necessary *locus standi* to allege incompatibility with European Law. This decision precipitated a change in qualifying requirements for unfair dismissal and redundancy payments at a national level. As demonstrated, such proceedings may therefore have a potentially wide impact.

¹⁰⁴ EA 2006, s.29(3).

¹⁰⁵ SDA 1975, s.75(3); RRA 1976, s.66(3); DRCA 1999, s.8.

¹⁰⁶ EA 2006, s.30(1).

¹⁰⁷ EA 2006, ss.30(3)(a) and (b).

¹⁰⁸ EA 2006, s.30(3)(c).

¹⁰⁹ EA 2006, s.30(3)(d).

¹¹⁰ However, see *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] ICR 1498 (CA) at para.1499 where it has been emphasised that it is "only in exceptional circumstances that a tribunal or court will consider it appropriate to receive representations from the commission", in this case the DRC.

¹¹¹ *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission* [1995] 1 AC 1 (HL).

5.1.11. Public Sector Duties: Assessment and Compliance Notice – Sections 31 and 32

Section 31 enables the CEHR to assess the manner or extent to which a public authority has complied with its public sector duties in relation to race, disability and gender. Upon assessment, where the CEHR thinks an authority has failed to comply with a duty it may issue a notice requiring compliance¹¹² requiring the authority, within 28 days of receiving it, to provide written information concerning the steps they have taken, or that they propose to take, for the purpose of complying with the duty.¹¹³ Where a notice requires the production of such information for the purpose of initially assessing compliance with a duty, the CEHR must specify in the notice the manner, form and period in which the information must be given.¹¹⁴ Subsequently where a person fails to comply with the requirements of a notice, and once the specified time has elapsed during which the CEHR may not act,¹¹⁵ it may apply to a court to require compliance.¹¹⁶

5.1.12. Human Rights - Related Powers

The CEHR will have a duty to: promote the understanding, awareness, importance and protection of human rights; encourage good practice; and encourage public bodies to comply with their obligations under the HRA. To this end, the CEHR has been given strong promotional powers and duties. As seen, only the power to support cases under discrimination legislation has been granted to the CEHR; where relevant however, it will be able to draw upon human rights arguments within those discrimination cases ('combined cases').

If human rights have been raised but the discrimination argument underlying a case has fallen away, leaving a human rights issue of strategic concern to the CEHR, as noted, the EA contains an order-making power to enable the CEHR to continue to support such combined

¹¹² EA 2006, s.32(2)(a).

¹¹³ EA 2006, s.32(2)(b).

¹¹⁴ EA 2006, s.32(3).

¹¹⁵ EA 2006, s.32(10).

¹¹⁶ EA 2006, s.32(8). Section 38(9) makes it clear that 'court' refers to a High Court in relation to compliance with a general duty and a county court in respect of specific duties.

cases.¹¹⁷ This power goes some way towards satisfying the concerns expressed during the consultation to the White Paper, that human rights should indeed attract similar enforcement powers to discrimination. It was made clear during the consultation response, however, that the Government was “not persuaded” that positive statutory duties going beyond those in the HRA were needed.¹¹⁸ Moreover it was the Government’s “strong belief” that human rights proceedings should only be brought “by those affected by the actions in question” in line with s.7 of the HRA.¹¹⁹ Despite this limitation, the CEHR will be able to conduct an inquiry into a public authority’s performance in respect of its obligations under the HRA.

5.1.13. Powers to Combat Prejudice and Tackle Hate Crimes

The CEHR has an explicit role to ‘work towards the elimination of prejudice against, hatred of and hostility towards members of groups’ under s.10(1)(c). Section 10(4) ensures that, in determining which action to take in pursuance of its duties under this section, the CEHR should have particular regard to the need to exercise its powers in Part I of the EA in relation to groups defined by reference to race, religion or belief. This provision was expressly intended to recognise the acute needs of BME groups, and addressed the concerns of a number of organisations within BME communities, who had been fearful that the creation of the CEHR would result in a lower priority being given to race issues. Such new powers were also significant in securing the support of the CRE, as discussed above in Chapter 4.

Importantly, the Government also recognised the need to ensure that “combating prejudice and tackling crimes such as incitement to racial hatred”¹²⁰ are included in the CEHR’s role to promote good relations, which, as also noted, forms one on the three ‘pillars’ central to its work alongside equality, diversity and human rights. In addition to the new power in s.10(1)(c), the CEHR is, by way of s.12, under a duty to monitor progress made concerning equality and human rights within the UK. By adopting an evidence-based approach, which could draw on its own research, the CEHR will not only be able to track its own progress,

¹¹⁷ EA 2006, s.28(7). Also see above at section 4.3.3. - Enforcement Tools.

¹¹⁸ DTI, ‘Commission for Equality and Human Rights: The Government response to consultation’ (18 November 2004) p.13

<http://www.womenandequalityunit.gov.uk/equality/project/consultation_govtresponse_nov2004.doc>.

¹¹⁹ *ibid.*

¹²⁰ *ibid.* p.11.

but will also be able to use such data to directly inform its strategic plan. With regard to s.10(1)(c) it is expected that the CEHR will pay particular attention to the area of race, given the creation of the Commission for Integration and Cohesion (CIC) in June 2006. As the CIC is a fixed term independent advisory body and therefore has no direct power to act upon its findings, it may well be that the CEHR will find itself at the forefront of considering and implementing the CIC's recommendations and driving forward change, given the obvious link between discrimination, integration and cohesion. The CIC's findings were published on 14 June 2007 following a period of consultation, which ran from 6 November 2006 until 16 May 2007 (having been extended from the initial deadline of 19 January 2007).¹²¹

5.1.14. Structure of Inquiries, Investigations and Assessments - Schedule 2

This schedule applies to inquiries (s.16), investigations (s.20) and assessments (s.31) and provides supplemental guidance concerning those provisions:

Terms of Reference – As regards an inquiry, the CEHR must give notice of the terms of reference to anyone named within those terms. They must be published in a manner that brings them to the attention of those subject to the inquiry or who may have an interest.¹²²

Prior to conducting an investigation or assessment the CEHR must prepare and give notice of the terms of reference, offer the opportunity to make representations, and upon consideration of any representations must publish the terms of reference once settled.¹²³

Representations – The CEHR must make arrangements to allow persons the opportunity to make representations,¹²⁴ in particular those specified in the terms of reference.¹²⁵ It must consider these in relation to the inquiry, investigation or assessment in question.¹²⁶

Evidence – The CEHR may give notice to any person, at any stage,¹²⁷ requiring the provision of information, documents or oral evidence.¹²⁸ It may be noted that the CEHR may compel

¹²¹ See the CIC final report entitled 'Our Shared Future' (June 2007) <http://www.integrationandcohesion.org.uk/upload/assets/www.integrationandcohesion.org.uk/our_shared_future.pdf>.

¹²² EA 2006, Schedule 2, para.2.

¹²³ EA 2006, Schedule 2, paras.3 and 4.

¹²⁴ EA 2006, Schedule 2, para.6(1).

¹²⁵ EA 2006, Schedule 2, para.6(2).

¹²⁶ EA 2006, Schedule 2, para.8(1). This is subject to limited exceptions as detailed in paragraph 8(2), whereby the CEHR may refuse to consider representations "where they are made neither by nor on behalf of a person specified in the terms of reference, or made on behalf of a person specified in the terms of reference by a person who is not a barrister, an advocate or a solicitor."

this evidence without the authorisation of the Secretary of State, which seemingly constitutes a stronger power than that available to the existing Commissions whereby authorisation is required to compel the production of evidence,¹²⁹ except in the case of a “belief” investigation. The EA also provides, however, that the recipient of such a notice may have it overturned by the county court where it is deemed unreasonable or unnecessary, unlike pre-existing legislation.¹³⁰ Where an individual refuses or is unlikely to be forthcoming with a request for information, the CEHR may apply to a county court to compel compliance with such a notice.¹³¹ Criminal sanctions may apply to those who fail to comply with the requirements of such a notice and may result in a fine being issued.¹³² A notice under paragraph 9 may be disregarded if it would require the disclosure of information prejudicial to national security,¹³³ although any decision to so disregard a notice is open to challenge upon being presented by the CEHR to the Investigatory Powers Tribunal, which will apply the principles of judicial review.¹³⁴

Reports – The CEHR is required to publish a report detailing its findings following any inquiry, investigation or assessment¹³⁵ and in doing so may make recommendations that may be addressed to any individual.¹³⁶ A court or tribunal can have regard to a finding contained within a report but shall not treat it as conclusive,¹³⁷ and conversely an inquiry, investigation or assessment must not question the findings of a court or tribunal.¹³⁸

5.2. Conclusion

An analysis of the enforcement powers available to the CEHR under the EA would suggest that the Government has not fully complied with its commitment to non-regression. The CRE has outlined two specific requirements of the principle of non-regression, which are as

¹²⁷ EA 2006, Schedule 2, para.9.

¹²⁸ EA 2006, Schedule 2, para.10.

¹²⁹ See DRCA 1999, Schedule 3, Part 1, para.4(2) for example.

¹³⁰ EA 2006, Schedule 2, para.11.

¹³¹ EA 2006, Schedule 2, para.12.

¹³² EA 2006, Schedule 2, para.13.

¹³³ EA 2006, Schedule 2, para.14(1).

¹³⁴ EA 2006, Schedule 2, para.14(3).

¹³⁵ EA 2006, Schedule 2, para.15.

¹³⁶ EA 2006, Schedule 2, para.16.

¹³⁷ EA 2006, Schedule 2, para.17.

¹³⁸ EA 2006, Schedule 2, para.19.

follows. Firstly, there must, as a minimum, “be no diminution of scope, powers and resources to promote equality of opportunity and eliminate discrimination on the existing grounds of race, sex and disability”. Secondly, “where there are differences between the existing commissions the minimum standard for the CEHR should be the best or highest standard of the three commissions. In other words, the powers and duties should be harmonised upwards.”¹³⁹ The EA may indeed be seen to achieve such ‘levelling up’ in most sections of the Act, an obvious example of which would be giving the CEHR the power to enter into binding agreements, which is a power contained in the DRCA but not the SDA or RRA.¹⁴⁰ In most areas, it would seem that the powers have been strengthened, or at least, that some of the previously unnecessary ‘bureaucratic obstacles’ associated with the existing Commissions’ powers have been removed. Unfortunately, however, this is not true in all circumstances, where either the EA has included a pre-existing power yet does not replicate important provisions or, as for example in relation to preliminary applications in employment cases, has failed to replicate a pre-existing power in any form leaving a considerable lacuna in the protection afforded. It seems, therefore, following the requirements of non-regression as outlined by the CRE, that the EA does not go far enough, and could be further strengthened. This issue will be considered in the next chapter.

With regard to the CEHR’s human rights role, with the exception of the Lord Chancellor’s order-making power allowing the CEHR to continue support for combined equality and human rights cases where the equality argument has fallen away, and the power to conduct inquiries, the focus is firmly upon promotional activities. Given the interplay between human rights and discrimination (as discussed in Chapter 2), however, it could be argued that as a minimum, the discretion given to the Lord Chancellor should have been placed firmly within the hands of the CEHR itself, which would be expected to utilise this in the most effective way as informed by its own experience and research activities.

As O’Cinneide has suggested, the CEHR has simply ‘inherited’ many of the problems associated with the existing Commissions, while the Government has been largely

¹³⁹ CRE, ‘Parliamentary Briefing: Equality Bill, Second Reading, House of Lords’ (15 June 2005) <http://www.cre.gov.uk/downloads/equalitybill_secondreading.doc>.

¹⁴⁰ DRCA 1999, s.5.

reactionary in the face of stern opposition and has simply sought to make concessions in order to seek the widest possible support for the CEHR. Changes introduced as a result of the consultation primarily concerned those in the BME communities and in particular, the CRE.¹⁴¹ The concern is that the race agenda will in fact receive a disproportionate amount of support, given that this is expressly allowed for in the EA.¹⁴² This is not to suggest that additional support for race is not necessary given the current political climate; however, it is important that the other strands are not neglected or overshadowed. A ‘hierarchy of protection’ must be avoided: a theme echoed by almost all respondents during the consultation response.

As suggested, formal investigations remain one of the most potentially effective enforcement tools, used as a lever for broader change, yet the use of these is declining. Despite this, investigations (s.20) and broader regulatory mechanisms affecting organisations and public authorities such as inquiries (s.16), Unlawful Act Notices (s.21) and agreements (s.23) were the focus of the enforcement procedures in the EA. Powers that focus more upon the individual in the form of conciliation (s.27) and the provision of legal assistance (s.28) form a relatively small proportion of the CEHR’s enforcement powers by comparison, which may be seen as indicative of their intended use. Although legal assistance may be provided without reference to statutory criteria (removed following consultation), the Government expressly stated that it would expect the CEHR to publish its own criteria. Although this would have the benefit of being directly informed by the CEHR’s own experience and research, it is important that such criteria do not act to curb the strategic freedom of the CEHR to support cases that may potentially have a widespread and beneficial impact in a particular field of discrimination. Moreover, it is arguable that there is an aspect of regression given that the CEHR is not under a duty to consider all applications, meaning that, for example, the provision of support and advice to individual litigants could take a back seat to the pursuit of enforcing positive duties. This could leave a significant proportion of individuals without effective assistance against discriminatory practices. In addition the

¹⁴¹ A more cynical view would also note that the creation of the Equality Bill and associated consultation was around the time that New Labour was seeking re-election. One would ask what effect this may have had on the Government’s concessionary measures to confirm support from the CRE and those in the BME communities.

¹⁴² See above, section 5.1.13. - Powers to Combat Prejudice and Tackle Hate Crimes.

inability to support 'combined cases' where the discrimination has fallen away leaving an aspect of Human Rights, would also seem to limit the litigant support role of the CEHR. The balance between the individual and strategic enforcement powers would therefore seem to be in favour the latter, potentially more so than those contained within the pre-existing legislation.

A consideration of the enforcement powers suggest the CEHR will be better able to use its strategic regulatory mechanisms than the existing Commissions given that in several respects the existing powers have not simply been preserved but slightly broadened. For example, the investigative power under s.20 of the EA, as discussed, will apparently give the CEHR increased discretion to act strategically; however, it is important for the CEHR to exercise such discretion carefully. To secure the confidence of stakeholders, the CEHR will have to be seen to act equally across all equality grounds. The danger of not having a clearly defined strategy, and of not allocating comparable resources to each strand, may result in specific grounds being more commonly pursued, perhaps because they may stand more chance of success or because they are more commonly brought forward. It is this aspect that has the potential to seriously undermine the efforts of the CEHR and which constitutes a persuasive argument for the CEHR to act strategically not only in relation to regulatory mechanisms but also in relation to its individual litigant support role.

It is proposed that a more effective balance should be struck between the strategic regulatory mechanisms and the provisions outlining the CEHR's individual litigant support role; suggested amendments in the next chapter arguably go some way towards striking this balance. Additionally, aspects of regression and possible amendments strengthening the enforcement powers within the EA are discussed.

Chapter Six

6. Strengthening the Enforcement Powers of the CEHR

As identified in the previous chapter, there exist a number of areas where the CEHR may have weaker powers than those of the existing Commissions. Given the Government's commitment to non-regression, which was a central pledge during the consultation and debate surrounding the creation of a unifying commission, it is therefore suggested that as a minimum, changes to the EA are necessary with regard to the enforcement powers, to achieve complete 'levelling up' of the protection offered to each of the equality strands. In addition, an analysis of proposals put forward by interested stakeholders is undertaken in this chapter; it is suggested, for example, that the use of Conciliation Agreements proposed by the DRC may not be appropriate for the CEHR. Lastly, it is argued that a broader consideration of enforcement powers is needed, beyond the primary use of the strategic regulatory mechanisms as contained within the EA. Additional avenues to secure change could be utilised to maximise the effectiveness of the CEHR such as greater emphasis on the use of contract compliance, the further extension and implementation of positive duties and the effective utilisation of trade unions, advisory bodies, inspectorates and local authorities. These avenues, it is suggested, would help the CEHR satisfy its general and specific duties by extending the regulatory mechanisms it has at its disposal: as will be seen, the suggested extensions are also better placed to provide assistance and combat discrimination on an individual level that will cut across the public-private sector divide more effectively, striking a finer balance between the use of the CEHR's strategic regulatory mechanisms and individual litigant support.

6.1. Enhancing the Enforcement Powers contained in the Equality Act

6.1.1. Legal Assistance

The sheer number of discrimination cases disposed of by Employment Tribunals (ETs) suggests a need to increase the availability of effective legal assistance. For example, in relation to race, over each of the last four years approximately 3070 cases were presented to an ET. Of such cases, the CRE received approximately 945 applications for legal assistance

each year, and was able to provide some form of assistance to approximately 740 of these; in terms of full legal representation, however, this amounted to only 28 cases on average each year (only four cases received full legal representation between January 2004 and December 2005).¹ Interestingly, the Regulatory Impact Assessment for the Age Regulations notes that approximately 8000 additional cases will be presented to the tribunals each year.² In light of this, it seems vital to provide the CEHR with adequate resources to enable it to support a substantially increased proportion of cases, particularly through the use of full and partial legal representation, to ensure that the new Regulations receive sufficient institutional support. Over the same four-year period, 4.25% of disability, 3.25% of race and 6.5% of sex discrimination cases were successful, while one third to a half of all cases were withdrawn. There would seem to be enormous scope for the CEHR to increase the level of legal assistance provision, in order to ensure that an increased number of worthy cases reach the tribunals and that a larger proportion are successful. Of the cases that currently reach the tribunals, most are dismissed at the hearing stage.³ It is argued that the CEHR should seek to effectively inform, educate and advise those bodies that provide legal assistance, and the legal profession in general, to ensure that cases stand every chance of success.

The duty to consider applications for legal assistance, applicable to the EOC and CRE by way of s.75 of the SDA and s.66 of the RRA respectively, has not been extended to the CEHR. Instead the CEHR only has a *power* to consider such applications by way of s.28 of the EA, which, as noted in Chapter 4, is a less stringent requirement mirroring the power available to the DRC under s.7 of the DRCA. There are primarily two issues in favour of including a duty to consider applications, the first of which concerns the individual's right of access to justice.

¹ See table, above at section 3.3. - Use and Effectiveness of Enforcement Powers and Strategic Litigation.

² DTI, 'Employment Equality (Age) Regulations 2006, Regulatory Impact Assessments' (March 2006) para.76 <<http://www.di.gov.uk/files/file26518.pdf>>.

³ 6.25% of sex, 19.5% of race and 13% of disability cases are dismissed at the hearing stage. Considerable expense will already have been incurred at this point. The resources dedicated to cases with little chance of success may be better used to encourage worthy applications. If the CEHR had a duty to consider all cases and then had the discretion to decide which ones to support, it might be better able to succeed at tribunal level.

The right to individual redress and fair access to justice, a fundamental right, should not necessarily be dependent upon the resources of the individual to take forward a complaint,⁴ or membership of a trade union that may provide assistance.⁵ However, the apparent low priority accorded to this important right is illustrated when considering the minimal amount of public funding allocated from the Legal Services Commission (LSC) to take forward discrimination cases.⁶ The existing equality Commissions remain the primary source of public funding for this purpose, and the removal of the duty to consider applications for assistance may in itself be regarded as regression that could have a detrimental effect on the number and quality of cases brought before the courts and tribunals. It may reasonably be argued, as the CRE has, that if it is the intention of Parliament to provide public funding to the CEHR for the purpose of supporting litigants in discrimination cases, then “for reasons of transparency and accountability each individual application ought to be considered equally by the CEHR.”⁷ In addition, given the potential conflict between the different equality strands upon the amalgamation of the existing Commissions, a duty to consider all applications may also be seen as essential to maintain good relations between the various protected groups. Furthermore, and as discussed by Harwood,⁸ there may be benefits if such a duty were to include a remit to assess applications against objective criteria, determined through cross-sector consultation. This would negate the possibility of the CEHR being accused of providing legal assistance favourably to specific sectors, which could otherwise deepen resentment between the protected groups and seriously undermine the legitimacy of

⁴ As McCrudden highlights, the prospects for success in a discrimination case are “considerably better for applicants with legal representation than others; while this is partly due to selection effects (strong cases attract representation) it does probably indicate that legal representation gives applicants better chances of success.” (McCrudden, C and Brown, C, ‘Racial Justice at Work, Enforcement of the Race Relations Act 1976 in Employment’ (1991) Policy Studies Institute, p.147). This leaves those individuals without legal representation at a significant disadvantage given that “use of the law involves skills which large-scale employers may be expected to command far more readily than complainants...which goes a long way towards explaining both the relative ease with which discrimination claims have been defeated, and also the fact that individual complainants are more likely to be successful if they obtain aid” from the Commissions (Lustgarten, L, ‘Racial inequality and the limits of the law’ (1986) 49 MLR 68 at pp.77-78).

⁵ See below, section 6.2.2. - Cooperation with Trade Unions, Advisory Bodies and Inspectorates.

⁶ The LSC, through the Community Legal Service (CLS) provides legal aid to clients who are often vulnerable and socially excluded, therefore the allocation of resources is primarily related to issues such as debt, housing, welfare benefits and crime. Any help provided by the CLS will inevitably be means-tested, meaning only clients with limited savings and on low incomes, income support or family credit will receive support. Also importantly, where advice is funded by the CLS, this will not extend to representation at the tribunal hearing. See <http://www.legalservices.gov.uk/> for further information.

⁷ CRE, ‘Equality Bill, Report and Third Reading, House of Commons’ (16 January 2006), p.3 <http://www.cre.gov.uk/downloads/equalitybill_hoc3rdreading.pdf>.

⁸ Harwood, R, ‘Teeth and Their Use: enforcement action by the three equality commissions’ (August 2006) Public Interest Research Unit, p.120.

the CEHR. It is argued that any initiative to combat the creation of a hierarchy of protection and to legitimise the positive duties associated with specific grounds is to be welcomed.

The second issue concerns the need for the CEHR to maximise the impact of its finite resources. There exist persuasive arguments that the CEHR should not focus on taking forward excessively high volumes of casework given the limitations imposed by its allocated budget and the fact that the CEHR has additional unique investigative powers that should not be negated through a lack of funds. Additionally, it is important to remember that, of the duties imposed by s.8 of the EA, there is still an emphasis upon promotion, which will further limit the resources available to the CEHR for enforcement purposes.

Although it seems logical to argue from a resource perspective that the CEHR should not be burdened with a duty to consider all applications, it may conversely be argued that if the CEHR is to act in the most strategic and effective manner, it will indeed be necessary for it to be under such a duty. As highlighted by the CRE, in light of its own experience, “the duty to consider cases provides a vital source of information about discrimination in the community” and “is a tool to establish patterns of discrimination and trends in various sectors”.⁹ The expertise resulting from such information, it is believed, “will give the CEHR its legitimacy and secure the confidence of its stakeholders”.¹⁰ The information itself may otherwise be difficult to obtain and establish through traditional research methods. Indeed “practical benefits” are evident from the “provision of pre-litigation advice (which is an inevitable consequence of the duty to consider applications)” and litigation itself, given that they form “the basis for developing expertise” in other functions such as “drafting codes of practice, guidance and standards, education and awareness” and “promoting equality of opportunity and good relations.”¹¹ Importantly, it is believed that an insight “cannot be obtained from reading the decision and judgements in other cases” and is dependent upon the “first hand observations of witnesses, their actions, behaviour and motivation”.¹² Furthermore, the CRE has also tried to argue that the current duty to consider applications

⁹ CRE, ‘Equality Bill, Second Reading, House of Commons’ (21 November 2005) p.4
<http://www.cre.gov.uk/downloads/equalitybill_hoc2ndreading.doc>.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.* p.3.

for assistance, does in fact confer upon the victim a 'right' to apply for assistance, and that the removal of this duty is "possibly retrogressive where no other arrangements are made".¹³

It is important to remember that a duty to consider all applications would not require the CEHR to provide legal representation in all cases of merit, as it would maintain discretion to decide which cases are most appropriate to fund to satisfy its strategic aims and priorities. The concern that the CEHR would become overwhelmed with casework and financially exhausted by litigation would only be realised if it should choose to provide assistance too broadly. The consideration of an application does not automatically suggest that assistance will be granted; the case may be unworthy or outside the scope of the CEHR. Importantly however, as noted, such consideration would provide the CEHR with further information concerning the perceived extent of discrimination, and enable it to effectively inform the applicant of the reason(s) for supporting or not supporting a case, giving the applicant some form of pre-litigation advice. Considering each application and giving reasons for declining legal assistance is less likely to deter individuals from pursuing meritorious cases without support from the CEHR, unlike a simple refusal, which might reasonably be taken by the complainant to reflect the merits of the case. Ultimately, it is argued that the duty to consider applications and the resulting expertise will give the CEHR increased legitimacy; will help to secure the confidence of its stakeholders; and will be an effective method to identify cases of strategic importance and thereby select the most effective cases to support. It is therefore recommended that s.28 of the EA should be amended to include such a duty, in light of the advantages discussed above; consequently a more equal balance might be struck in favour of individual litigant support.

In addition, adhering to the principle of fair access to justice, as advocated by the CRE during its submissions to Parliament,¹⁴ it is proposed that the CEHR should also be under a duty to consider appeals made against its decisions, and for this purpose an appeals procedure should be adopted and publicised which clearly indicates the process involved. Despite the CEHR having full discretion as to which cases to support, this discretion does

¹³ *ibid.*

¹⁴ See above, n.7, at p.3.

not extend to the manner in which decisions are reached, therefore an avenue should be made available by which an applicant may challenge a decision.¹⁵ Although the existing Commissions have their own internal complaints procedures, these are subject to restrictions that negate their use in relation to complaints about the provision of legal assistance.¹⁶ The general complaints procedure could be used as a forum for considering an alleged failure to provide legal assistance, however, it is suggested that this does not provide the most appropriate and effective means of challenging the CEHR's decisions. Given the specific nature of the procedure for considering applications for assistance, especially if, as discussed, the CEHR were to adopt and publish criteria against which applications are assessed, it would seem more effective to have a separate appeals procedure dealing exclusively with this function, as opposed to channelling such complaints through the standard complaints procedure.¹⁷

In addition, as regards the regulation of the CEHR in terms of its discretionary powers, it would seem particularly beneficial to have an Ombudsman, whether in the form of the Office of the Parliamentary Commissioner or a committee affiliated with the DCLG, that could provide a final tier to consider complaints from individuals who still feel aggrieved having exhausted the right to appeal, as is available to those who wish to complain against the existing Commissions. In light of the foregoing discussion and as Harwood has suggested,¹⁸ alongside the creation of a specific right to appeal and corresponding procedure, the role of an Ombudsman or Commissioner in investigating complaints against the CEHR, should be clarified and publicised so that applicants are aware of its existence and the manner in which they should exercise this right. Providing these avenues of recourse would help to ensure the

¹⁵ An example of which may be where there has been unnecessary delay or where the CEHR has failed to follow its published procedures for considering applications.

¹⁶ The CRE, for example, expressly states that its complaints procedure does not cover "dissatisfaction with the CRE's policies or decisions about individual cases or grants" (<http://www.cre.gov.uk/about/complaints.html>). Similarly the DRC states that it "does not cover complaints about a refusal by the Commission to provide legal assistance in connection with a claim under the Disability Discrimination Act 1995. The DRC will take decisions on whether or not to provide legal representation. These decisions will not be reconsidered unless there is new evidence" (http://www.drc-gb.org/contact_us/complaints_and_compliments.aspx). The EOC is not quite as restrictive and does not identify legal representation as an area in which it will not entertain a complaint. Rather it states that the 3-stage complaint procedure it adopts will not apply where comments are made about the EOC's policy decisions (<http://www.eoc.org.uk/Default.aspx?page=15483>).

¹⁷ For example, the standard complaints procedure may not pay particular attention to time-constraints, which could be particularly important in a discrimination case, whereas a tailored complaints procedure would be much better equipped at considering the specific problems that may arise in relation to the provision of legal assistance.

¹⁸ Harwood, R, above at n.8. p.120.

accountability of the CEHR to all its stakeholders, and to ensure that the CEHR remains able to maintain the balance between and across the current equality strands whilst upholding the individual's right of fair access to justice.

Taking this proposed amendment one step further, Harwood is also of the opinion that "applicants should be informed of, and offered assistance in relation to, the appeals and complaints procedure",¹⁹ and specifically links this idea with the CEHR. Such a suggestion may be dismissed however, primarily on the basis of the CEHR's finite resources: it would seem unwise to charge the CEHR with a duty to provide assistance to individuals who wish to challenge its own decisions. Moreover, if the proposed appeals procedure were to be drafted and publicised in an appropriate manner so as to make it easy to find, understand and follow, it should not require any specialist assistance. In any event, if necessary an individual could always seek assistance from existing advisory bodies such as the Citizens Advice Bureau.

6.1.2. Investigations

It is suggested that the concept of the formal investigation (and the NDN that can flow from this) has the potential to tackle discrimination at a structural level and thus to compensate somewhat for the highly individualistic focus of the legislation as enforced via individual cases. However, much more could be done to make the process more effective. Removing the requirement of suspicion from the use of named person investigations would grant the CEHR increased freedom to instigate investigations into a wide array of areas, which may increase the associated deterrent effect. The budgetary constraints upon the CEHR would still be a major limiting factor and would require the CEHR to exercise its discretion carefully regarding which investigations to adopt: primarily those that will have the most far-reaching effect and ultimately serve to benefit the most people. In addition, the use of the preliminary inquiry in a named person investigation may be seen as an additional unnecessary safeguard given that it will ultimately serve to delay proceedings.

¹⁹ *ibid.*

Although such changes may call into question the power of the CEHR, it is important to remember that this power would not remain unchecked. To maintain the balance between eliminating discrimination and upholding the fair application of the law, the role of the courts is pivotal: the courts provide an unbiased platform from which to assess the collated evidence and representations before deciding, for example, to grant an injunction or allow an appeal. It would not be wise to give the CEHR the unfettered discretion to act as judge and jury in all instances and therefore the role of the courts in providing final determinations and decisions should be maintained. Moreover, the allocation of an Ombudsman, as discussed above, may provide an additional avenue of recourse should the CEHR exercise its discretion improperly. The courts may not provide the most suitable forum to resolve grievances in all circumstances, given that this would be a resource-intensive route for both claimants and the UK's justice system to adopt.

Given the role of the courts in effectively keeping the CEHR in check, it would also seem appealing to give to the CEHR the widely-supported and long-argued-for power to seek and enter into legally binding undertakings with a named person,²⁰ a breach of which would give the CEHR the additional power to go to a court or tribunal. Once again, provided that the final decision lies within the unbiased hands of the courts and subject to the possibility of appeal by the named person, this would seem an effective extension of the enforcement powers available, as it could be used to avoid the arduous and often lengthy process of undertaking a full formal investigation.

In relation to the CEHR's power to conduct investigations, and in a similar vein to the amendment proposed above concerning legal assistance, the CEHR should be under a duty to monitor, record and consider all requests made for it to conduct an investigation by way of s.20 of the EA. Additionally, this could be extended to requests that the CEHR conduct an assessment of compliance with public sector duties as contained in s.31 of the EA. Discretion would still lie with the CEHR as to whether it would take forward an investigation in full, and through considering all requests the CEHR would hopefully be able

²⁰ See above, section 3.7. - Disability Rights Commission, for details on the DRC's power to enter into 'agreements in lieu of enforcement action' by way of s.5 of the DRCA 1999.

to decide, using the empirical evidence gathered from these requests, which cases it wishes to investigate, linking its decision to its strategic aims at any given time. Considering all requests and recording these in the appropriate manner would help the CEHR to capitalise on its research responsibilities and would allow it to monitor much more effectively the breaches and complaints that are occurring most frequently, and in which sectors. The importance of investigations as a method of law enforcement must not be undermined, as only the CEHR itself is able to conduct these.

Harwood has proposed that this duty should be similarly extended to that proposed for legal assistance whereby the CEHR would consider requests against set published criteria.²¹ However, it is argued that this may indeed amount to over-regulation. It is important that, as far as possible, the CEHR maintains sufficient independence to allow it to function as it deems necessary to satisfy its statutory duties, subject to statutory safeguards for the protection of the individual complainant (such as those suggested concerning the right to complain in relation to legal assistance). As investigations are potentially a very useful albeit currently underused tool, it would seem beneficial to give the CEHR the widest possible discretion so that it could utilise its expertise in the most appropriate manner in order to achieve the most wide-reaching results. If the CEHR were to consider all requests against published criteria, however, it might be required to take on investigations into areas which it might otherwise have decided were of low priority. For example, if the published criteria required the CEHR to undertake an investigation following the reception of a minimum number of requests, this might unduly circumscribe the discretion of CEHR as well as opening it up to the possibility of abuse, such as individuals making unscrupulous requests in the knowledge that the CEHR would then be required to investigate their claims. Additionally, if those requesting an investigation are given the corresponding right to appeal against a decision, this may unduly tie up valuable resources and detract from the enforcement role of the CEHR.

A potentially important omission in the EA concerns a comparable provision to that found within the DRCA at Schedule 3, Part 1 paragraph 3(3)(b), which states that:

²¹ Harwood, R, above at n.8. p.120.

‘(3) The Commission may not investigate whether a person has committed or is committing any unlawful act unless -

(b) that matter is to be investigated in the course of a formal investigation into his compliance with any requirement or undertaking mentioned in sub-paragraph (1)(b) or (c).’

This provision currently entitles the DRC to investigate whether an individual has committed an unlawful act, even if it does not suspect so, as long as the unlawful act in question is being investigated in the course of assessing compliance with a non-discrimination notice or an undertaking under an agreement in lieu of enforcement action. Such a power would provide the CEHR with additional flexibility whilst conducting an investigation and allow it to consider whether the issue that instigated the unlawful act notice in the first instance had indeed been appropriately resolved; this in turn would highlight whether further action was needed. In light of this, s.20 of the EA should be amended to include an equivalent provision in addition to a duty to monitor, record and consider requests to undertake an investigation.

6.1.3. Unlawful Act Notices and Action Plan

Although the CEHR may require a person to take specified action in an action plan which has become final, it must apply for a court order in order to achieve this (s.22(6)), which adds a further level of procedure when compared to the power available to the DRC by way of the DRCA s.4(3)(b), which may itself require a person through the Unlawful Act Notice to take specific action. Any unnecessary judicial interference should be avoided given that recourse to the courts will be resource intensive, and including a comparable provision in the EA will allow the CEHR to utilise its power under s.22 much more effectively. In any event, it is anticipated that in most instances the court will merely affirm that the specified action in question is to be completed, particularly when both parties have accepted the action plan. The value of this extra judicial tier may therefore be questioned. Section 22 should be amended accordingly; as discussed in Chapter 4, any ‘unnecessary bureaucratic obstacle’ will only serve to increase the delay in proceedings and demands on the Commission’s

resources. It is therefore suggested that any actions specified in an action plan should automatically become enforceable without further recourse to the courts.

6.1.4. Preliminary Action in Employment Cases

As discussed in the previous chapter, the EA does not contain the power to make preliminary applications as currently provided for by way of s.73 and s.64 of the SDA and RRA respectively, which constitutes a flagrant breach of the Government's commitment to non-regression. The importance of this missing power might not be noteworthy had it been largely ineffective: however, from the discussion in the previous chapter it may be seen that there are indeed advantages to be had from its inclusion.²² The power would allow the CEHR to present to an employment tribunal a complaint that the respondent had committed an act in breach of the equality enactments. The tribunal might then issue a finding confirming such a breach and in addition, might make an order declaring the rights of the person who has been discriminated against, which could have a deterrent effect. Importantly, such a finding and declaration could be made as if the actual victim of the discrimination had brought the complaint. It is suggested that this power should indeed be included in the EA given its potential usefulness.

6.1.5. Combined Cases

As discussed, s.28(6)(b) dictates that the CEHR must cease to provide legal assistance when the part of the proceedings that relate to the equality enactments are no longer pursued. By way of s.28(7) the Lord Chancellor is given discretion to disapply this provision. However, it is suggested that the discretion to take forward combined cases beyond the point when the equality enactment ceases to be in question should lie with the CEHR itself, upon assessing the value of continuing such support. The CRE stated in its submission to Parliament that the main reasons for recommending this change are serious concerns for access to justice for the victim and the cost to the legal system, whilst noting that it "raises practical problems for the

²² See above, section 5.1.6. - Application to Court - Section 24.

lawyers who owe duties to their clients, the courts and tribunals”.²³ Although these concerns may not be discounted, it is suggested that a more pressing reason for the amendment of this provision concerns the independence of the CEHR and its ability to provide strategic legal assistance as it sees fit. Placing discretion in the hands of the Lord Chancellor effectively gives the Government the ability to determine when and if cases may be brought against public bodies on the basis of a breach of Convention rights, a concern expressed by Harwood.²⁴ Therefore s.28 of the EA should be amended to place this discretion in the hands of the CEHR.

6.1.6. Compromise Agreements

The DRC, in its submissions to Parliament during the second and third readings of the Equality Bill, whilst emphasising that the Government had indeed listened to the various responses submitted given the strengthening of the enforcement powers, was also keen to see the inclusion of a provision enabling the CEHR to settle “employment related discrimination claims using compromise agreements where this is in the interests of the clients”.²⁵ Compromise agreements themselves may presently be used to settle discrimination arguments within the employment sphere. However, the existing equality Commissions are prohibited from facilitating and taking an active role, given that they are indemnified by Government and therefore do not hold professional indemnity insurance, which is a statutory requirement for those who give advice in such circumstances.²⁶ For this reason and as the DRC highlights, compromise agreements have to be made using external advisers, which involves additional time and expense.

Compromise agreements differ from an out-of-court settlement in that the latter are not legally binding and cannot exclude an employee's right to take the matter concerned to an Employment Tribunal, whereas a formal compromise agreement that adheres to the conditions as set out in the Employment Rights Act 1996 s.203(3) will constitute an

²³ See above, n.7, at p.5

²⁴ See above, section 5.1.9. at n.97.

²⁵ DRC, ‘Parliamentary Briefing: Equality Bill, Second Reading, House of Lords’ (15 June 2005), p.11 <http://www.drc-gb.org/docs/107_18_EqualityBillDRC2ndReadingLordsBriefingjune2105.doc>.

²⁶ Employment Rights (Dispute Resolution) Act 1998, s.10.

exception to this rule. Importantly, compromise agreements are not intended to provide a means of excluding possible future complaints that may arise; the agreement itself must specifically settle the complaint in question. As such, and as may be seen from the case of *Lunt v Merseyside TEC Ltd*²⁷ for example, a compromise agreement which covers an unfair dismissal claim yet does not effectively settle a complaint of sex discrimination will not prevent the complainant from bringing a claim on the latter grounds, which does provide a degree of protection, particularly for the weaker party which will in most circumstances be the employee. Although a compromise agreement may seem particularly attractive to the parties concerned, given that it would avoid the need to go before a tribunal and may be financially appealing, a major drawback is that, as noted earlier, the potential impact of the case will be minimised as the argument in question will not reach a court or tribunal and will therefore have no persuasive or interpretative effect. It is the individualistic focus of discrimination legislation to date, and in particular the remedies available,²⁸ that have helped to circumscribe the widespread effect of cases, and therefore it could reasonably be argued that it is beneficial to have potentially worthwhile cases presented before the courts, so that the impact of these can be felt much more widely.

In summary, compromise agreements may indeed provide a useful tool in certain circumstances where both parties are in full agreement and are adequately informed, however the present arrangements would seem adequate. Those who wish to use a compromise agreement to settle a complaint may use existing routes such as ACAS or a solicitor, for example. It would not seem to be in the best interests of the CEHR, particularly from a strategic point of view, if it were to become embroiled in compromise agreements as a way of settling discrimination arguments.

6.2. Additional Proposals

It is suggested that the changes advocated above would strengthen the enforcement powers available to the CEHR and reverse the apparent regression in powers contained within the

²⁷ *Lunt v Merseyside TEC Ltd* [1999] ICR 17 (EAT).

²⁸ See above, section 3.9. - Evaluation.

EA as compared with the Commissions' existing powers. In relation to the CEHR's litigation role, a duty to consider all applications would be welcomed. The additional changes advocated, however, being largely focused upon the improvement of the strategic regulatory mechanisms, suggest that further avenues may be explored that would directly benefit individuals, particularly those within the private sector. Beyond those enforcement functions expressly outlined in the EA, however, it is argued that there are a number of other areas to which the CEHR may turn its attention in order to fulfil its primary duties as detailed under s.8 of the EA. It is proposed that the first three of these, as detailed below, may be implemented without the need for statutory amendment. The latter suggestion, however, regarding the extended use of positive duties, would require implementation through statutory measures.

6.2.1. Contract Compliance

The use of contract compliance as an enforcement mechanism has been largely neglected throughout the consultation process leading to the establishment of the CEHR. The notion of contract compliance itself refers to the practice of specifying certain requirements and conditions in public contracts. Private contractors must then ensure that they comply with these specifications in order to enter into the tendering process and gain contracts with these public authorities. Such a method can be used to promote specific social policy objectives, which in the area of discrimination, might for example relate to the desire to seek improvements in equal opportunities for disadvantaged groups.

The USA and Canada have been pioneering in their use of contract compliance.²⁹ The UK realised the potential use of contract compliance following the election of New Labour in 1997, after this had been denounced by the Thatcher Government. The first local authority to adopt proactive measures, by requiring all contractors and suppliers to comply with equal opportunities policies and practices, was the Greater London Council (GLC) in 1983, spearheaded by Ken Livingstone. The GLC relied on the original s.71 of the RRA, which

²⁹ See Cormack, J and Niessen, J, 'Public Procurement and Anti-Discrimination Legislation' at pp.40-42 as contained in Chopin, I and Niessen, J (eds.), 'Combating Racial and Ethnic Discrimination: Taking the European Legislative Agenda Further' (March 2002) CRE and Migration Policy Group <<http://www.cre.gov.uk/downloads/combat.pdf>>.

imposed on councils the need to seek to eliminate discrimination and promote equality of opportunity as “primary legal support for its contract compliance policy”.³⁰ Although there was no specific legal obligation to extend this to other areas of discrimination, “it was considered justifiable on moral grounds for public bodies to seek positively to promote the laws against sex discrimination in equivalent ways”.³¹ Despite this, the Conservative Government under Margaret Thatcher sought to put a stop to this practice by introducing compulsory competitive tendering (CCT) laws whereby the award of contracts could only be decided by price and quality. Under Part II of the Local Government Act 1988, public authorities were forbidden to take into account non-commercial matters when devising approved contractor lists and inviting and establishing tendering agreements, albeit with the exception of race equality, which preserved the limited scope for contract compliance to be used under the RRA. The introduction of CCT had a particularly detrimental effect upon women in low-paid positions; upon ethnic minorities; and upon the terms and conditions of those who occupied former public sector jobs following the widespread move towards privatisation.³²

Following its election success in 1997, New Labour replaced the practice of CCT in local government with the notion of ‘Best Value’,³³ requiring public bodies to seek continual improvement and value for money. This regime is more relaxed towards the specification of ‘non commercial matters’ and has provided an environment less hostile to the use of contract compliance, as may be witnessed by the Government’s endorsement of a Statutory Code of Practice on Workforce Matters in Local Authority Service Contracts, which was introduced in March 2003. The Government increasingly recognises that the achievement of equality is directly linked to cost effectiveness and is sound business practice, and upon the launch of the National Procurement Strategy for Local Government in October 2003, expressly stated

³⁰ See McCrudden, C, ‘Codes in a Cold Climate: Administrative Rule-Making by the Commission for Racial Equality’ (1988) 51 MLR 409 at 429, and *Wheeler v Leicester City Council* [1985] AC 1054 (HL) where s.71 was subsequently interpreted in a way that supports the position of the GLC.

³¹ *ibid.* McCrudden at p.429.

³² See Dickens, L, ‘Gender, race and employment equality in Britain: inadequate strategies and the role of industrial relations actors’ (1997) 28 Industrial Relations Journal 282 at p.284.

³³ Local Government Act 1999, s.19. See also the Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001 (SI 2001/909).

that all councils should seek improvement in the area of equality of opportunity by factoring this into each stage of the procurement process.

Arguments for a widened use of contract compliance extend beyond the principle of the 'Best Value' regime, which is itself the subject of criticism.³⁴ An analysis of the approach adopted towards contract compliance by six local authorities in the West Midlands who combined to create a 'common standard' (WMCS) for assessing service providers' compliance with the race equality duty has provided solid evidence that contract compliance can indeed be very effective.³⁵ The advantages are twofold, benefiting both the councils in question and potential contractors. As regard each council, rather than adopting an individual approach to racial equality and procurement, the use of a common standard means that contractors are to be assessed against the same standard in the same way. It follows that if one council has approved a contractor following assessment then they would be deemed to have satisfied the requirements of all councils involved, thereby avoid unnecessary duplication of effort. The increased consistency this approach attracts also has substantial benefits for contractors who may otherwise fail to satisfy procurement requirements in relation to one council yet meet the requirements for another. Likewise duplication of effort is avoided for contractors: in relation to members of the West Midland Forum (WMF) for example, this would mean that a contractor need only apply and satisfy the criteria of one council as opposed to the six separate councils who came together to form the common standard.³⁶ Although the WMCS was based upon the use of six questions permitted by the Secretary of State as an exception to Part II of the Local Government Act 1988, and was therefore available to all councils, it was the "imaginative and innovative way"³⁷ in which the questions were applied, such as requesting documentary evidence to support the finding that a contractor had an effective race equality policy and demanding contractors to take positive action to remedy under-representation as identified by their own monitoring, that

³⁴ See Higgins, P and Roper, I, 'Does Best Value Offer a Better Deal for Local Government Workers than Compulsory Competitive Tendering?' (Middlesex University) <http://mubs.mdx.ac.uk/research/Discussion_Papers/Human_Resource_Management/dpaphmno8.pdf>.

³⁵ Orton, M and Ratcliffe, P, 'Race, Employment, and Contract Compliance: A Way Forward for Local Authorities?' (2004) 19 Local Economy 150 <<http://www.informaworld.com/10.1080/0269094042000203081>>.

³⁶ Those councils who came together to form the WMF and apply the common standard include Birmingham, Coventry, Redditch, Sandwell, Walsall, and Wolverhampton.

³⁷ Orton, M and Ratcliffe, P, at n.35. p.153.

made the scheme so effective. The regional application of the WMCS was also regarded as “highly innovative”.³⁸

Importantly, the WMCS is not a ‘static’ standard: just because a contractor has been deemed to satisfy the procurement requirements in relation to racial equality, this is not to be taken as compliance for the duration of the contract and upon re-tendering. The WMF has adopted a three-yearly review process requiring contractors to highlight the progress and changes they have made to their policies and procedures. Additionally, the WMF strives to monitor each contract throughout its duration to ensure that policies are being adhered to, which, as Orton and Ratcliffe highlight, “provides great potential for ensuring that contractors implement and develop their equalities policies.”³⁹ In this sense, the WMCS is focused more upon outcomes than merely seeking procedural compliance.

A significant finding of this scheme has been that the Common Standard was “successful in making firms introduce an equal opportunities policy for the first time; moving companies from simply having a statement to developing a policy; and in making good policies better.”⁴⁰ The standard was also seen to be “encouraging good companies to do more, getting companies that had not previously engaged with equalities to take the first steps and providing momentum for further development.”⁴¹ Although the report also identified areas for further development such as encouraging contractors to actively monitor the composition of their workforce, it concludes by focusing upon the transferability of the scheme to other public authorities, to other policy arenas and to other equality agendas. Additionally, a scheme of contract compliance focusing on equality more generally is further supported by the introduction of the RED, DED and GED. Although these duties do not apply directly to private sector organisations, the public authorities themselves are responsible for ensuring that contractors do not compromise compliance with the duties. Indeed, the CRE,⁴² EOC⁴³

³⁸ *ibid.* p.154.

³⁹ *ibid.* p.154.

⁴⁰ *ibid.* p.155.

⁴¹ *ibid.* pp.155 and 156.

⁴² The CRE has published specific guidance relating to procurement; ‘Race Equality and Public Procurement’ (2003) and ‘Race Equality and Procurement in Local Government’ (2003). Interestingly the CRE has also published guidance specifically for suppliers in conjunction with the Confederation of British Industry, highlighting the relationship and effect the Race Equality Duty has upon contractors; ‘Public Procurement and Race Equality - Briefing for suppliers’ (2003).

and DRC⁴⁴ through their Codes of Practice and guidance have linked the public authorities' procurement function to their respective duties, adding further weight for local authorities to take more proactive steps towards seeking compliance with the equality duties through the use of contract compliance. Furthermore, the Office of the Deputy Prime Minister's (2003) Circular on Best Value and Performance gives far greater importance to equalities issues under the 'Best Value' regime. Local authorities are expressly allowed to take "account of the practices of potential service providers in respect of equal opportunities" generally which includes race, gender, disability, religion, age, and sexual orientation, "where it is relevant to the delivery of the service under the contract".⁴⁵

Despite the many advantages of using contract compliance to secure improved levels of equality, in recent years there has been a worrying trend towards improving the efficiency and effectiveness of procurement, promulgated initially by the Byatt Report,⁴⁶ which was a review of local government procurement and has put local authorities under increased pressure. As Orton and Ratcliffe note, if "efficiency is defined in crude cost terms this presents a potential threat to an initiative such as the WMCS" which is so even if "there are no dedicated resources" as "its operation inevitably requires officer time".⁴⁷ In the three years since the publication of Orton and Ratcliffe's article however, it may be seen that there has indeed been a shift in emphasis, focusing much more closely on efficient spending following the implementation of the Government's 2004 Efficiency Review⁴⁸ with the aim of saving approximately £21.5 billion a year by 2007-2008,⁴⁹ a move which recalls the much

⁴³ See EOC, 'Gender Equality Duty Code of Practice' (November 2006) Chapter 5: Procurement and partnerships.

⁴⁴ See DRC, 'The Duty to Promote Disability Equality, Statutory Code of Practice' p.122. The DRC has also published specific comprehensive guidance separate to the Code of Practice; 'Procurement and the Disability Equality Duty, Implications of the Disability Equality Duty for Public Procurement and the Management of Public Sector Contracts' (December 2006).

⁴⁵ ODPM, 'Local Government Act 1999: Part 1 Best Value and Performance Improvement' (12 March 2003) ODPM Circular 03/2003, Annex C, para.38
<http://www.communities.gov.uk/pub/98/ODPMCircular032003BestValuePerformanceImprovementwith2004adendumsPDF196Kb_id1136098.pdf>.

⁴⁶ Sir Ian Byatt, 'Delivering Better Services for Citizens A review of local government procurement in England' (June 2001) Department for Transport, Local Government and the Regions. Interestingly, 'equality' in its broad sense did not form part of the review, with only a small mention contained in p.35, para.3.8. of the duty to promote good race relations.

⁴⁷ Orton, M and Ratcliffe, P, above at n.35, p.157.

⁴⁸ See Sir Peter Gershon CBE, 'Releasing Resources to the Front Line, Independent Review of Public Sector Efficiency' (July 2004) HMSO.

⁴⁹ For this purpose the Government has created an 'Efficiency Team' charged with assisting both central departments and the wider public sector to deliver the core aims of the Government's Efficiency Programme. For

criticised approach of CCT under the Thatcher era. This drive for cost effectiveness would seem to highlight a “continuing lack of political will on the part of central government to take a firm stance on the equalities agenda”,⁵⁰ which, when combined with the lack of clear guidance as to what authorities can ask prospective contractors beyond the standard six questions, leaves the use of contract compliance significantly weakened with regard to the equalities agenda as a whole, across England and Wales.

It is estimated that spending on public sector procurement is worth more than £125 billion a year,⁵¹ whilst the private sector employs over 75% of the UK’s workforce. Given the enormous amount of purchasing power held by public authorities, it follows that they could be particularly effective in countering discrimination, implementing effective equal opportunities policies and becoming a positive force for change. Contract compliance can also be used as a powerful tool for change alongside the positive statutory duties imposed by legislation and, moreover, may help public authorities seek and demonstrate compliance with these. By including conditions relating to equality in their contracts, public authorities can play an important role in encouraging private sector employers to tackle issues of equality and discrimination at all levels. Businesses within the UK, especially given the growing popularity of privatisation, could be utilised to drive forward social change by ensuring, for example, that they reflect much more closely the make-up of the population in their locality which would cut across all of the protected grounds. The CRE, for example, already provides guidance for organisations that attempt to establish contract compliance principles in their purchasing and contracting practice.⁵² Usefully, the CRE also breaks down its published guidelines, frameworks and policies as they relate to small, medium and large organisations, which helps to ensure that the legislation is made relevant, and its applicability demonstrated, at all stages, according to particular organisations’ requirements.⁵³

It has been demonstrated that instituting contract compliance and including provisions on

more information on the Government’s current approach to procurement see the Office of Government Commerce website at www.ogc.gov.uk.

⁵⁰ Orton, M and Ratcliffe, P, above at n.35, p.158.

⁵¹ HM Treasury, ‘Transforming government procurement’ (January 2007), para.1.4 <http://hm-treasury.gov.uk/media/4EA/89/government_procurement_pu147.pdf>.

⁵² See <http://www.cre.gov.uk/duty/procurement.html>.

⁵³ *ibid.*

equal opportunities, does increase employment opportunities for those who have traditionally faced discrimination.⁵⁴ Recent research by Dr Ravinder Singh Dhimi, Professor Judith Squires and Professor Tariq Modood argues that contract compliance “is the most effective instrument for promoting positive action in employment and particularly well suited to changing key employers’ practices with minimum pain and resistance.”⁵⁵ This research also suggests looking at the experiences of America and Canada where the “creation of an institution responsible for overseeing contract compliance programmes is crucial”.⁵⁶ As far as enforcement is concerned, “in addition to being clearly and coherently explained and defended, positive action policies need to be backed up by robust enforcement mechanisms if employers are to comply” which “should entail mandatory goal-setting and vigorous enforcement, including sanctions (such as debarment), by government.”⁵⁷ The findings and reasoning in this report would add weight to the use of contract compliance in the UK, and it is suggested that the CEHR could become the institution charged with ‘overseeing’ its development and implementation.

If the CEHR were to adopt a proactive stance to drive forward the inclusion of contract compliance, whilst not conceptually confusing it with affirmative action or positive discrimination, this would seemingly enable the CEHR to have a far-reaching effect in relation to its duty to combat discrimination and promote equality of opportunity across the protected grounds as they relate to employment practices. Additionally, the CEHR could also be charged with a duty to produce a Code of Practice relating to contract compliance and the tendering process, which would span all of the protected grounds, unlike the guidance produced by the CRE which understandably relates almost exclusively to race.⁵⁸ It is

⁵⁴ See, for example, GLC/ILEA statistics relating to contract compliance activities, as contained in Appendix 4, CRE, ‘Racial Equality and Council Contractors’ (1995).

⁵⁵ Department for Work and Pensions, ‘Research Report No 406, Developing positive action policies: learning from the experiences of Europe and North America’ (2006) p.80.

<<http://www.bris.ac.uk/sociology/ethnicitycitizenship/employment.pdf>>.

⁵⁶ *ibid.* p.120.

⁵⁷ *ibid.*

⁵⁸ For example, in relation to the construction industry, all those firms who wish to register with Constructionline (the UK’s register of pre-qualified local and national construction and construction-related contractors and consultants, owned and endorsed by the DTI), must complete an Equal Opportunities Questionnaire (Section A). This questionnaire was formulated with the cooperation of the CRE and only concerns the SDA, DDA and EqPA in respect of a ‘Yes’ or ‘No’ answer, whether the supplier in question has been subject to an adverse finding on such grounds and whether it is their policy to meet the statutory duties under the Acts. Section B requires much more information to be provided and is considerably more in-depth, however, the completion of this is not compulsory, severely limiting its potential effectiveness. The questionnaire can be found at

suggested that contract compliance should be officially applied to public authorities in the form of a specific statutory duty, as the danger is that as long as it operates on a largely optional and *ad hoc* basis, not only will its potential widespread effect will be lost but there will also be a differential detrimental effect on the private sector depending upon the localities in which private-sector organisations operate.

6.2.2. Cooperation with Trade Unions, Advisory Bodies and Inspectorates

There are two primary reasons why the CEHR should seek to work with trade unions and advisory bodies in the provision of legal advice and assistance. The first of these relates to the funding for the CEHR, which, as seen, has been identified as being in the region of £70 million (plus 'start-up costs'). It is widely believed that this will be insufficient to enable the CEHR to meet all of the demands that will be placed upon it. A strong advocate of this view has been the EOC, which points out that the existing Commissions receive a combined budget of approximately £50 million. Despite anticipated efficiency savings it is difficult to see how an extra £20 million will allow the CEHR to meet the needs of the additional three strands, its human rights obligations, the expanded operations in the devolved nations and, throughout England, the proposed community functions and the extended positive duties. The EOC, in its parliamentary submission, following an examination of projected running costs, has estimated that a budget nearer £120 million would be required to allow the CEHR to effectively meet its obligations and duties and believes that without this sum "the CEHR could be undermined before its work has even begun",⁵⁹ a belief echoed by the DRC.⁶⁰ As yet, there has been no indication that the budgetary allocation will be increased, therefore the CEHR will need to consider ways in which it may best utilise its resources to achieve the most effective results, especially during its first year of operation, which will be particularly important for the new equality strands that are to receive institutional support for the first

[http://www.constructionline.co.uk/static/pdfs/Equal%20Opportunities%20\(All%20UK\).doc](http://www.constructionline.co.uk/static/pdfs/Equal%20Opportunities%20(All%20UK).doc).

⁵⁹ EOC, 'Parliamentary Briefing, Equality Bill, 21st November, Commons 2nd Reading' (November 2005), p.5 <<http://www.coc.org.uk/Default.aspx?page=18032>>.

⁶⁰ See above, n.25, at p.15. The DRC found that a budget in the region of £120 million is required "if it [the CEHR] is to manage its workload effectively" and meet its "hugely ambitious remit", having calculated this with reference to the budget of the Northern Ireland Equality Commission and the DRC's own anticipated budget for the next 5 years. The DRC also notes that the budget calculations for the CEHR were based on figures for the period 2002/3, which do not take into account budgetary changes e.g. the DRC's allocated budget increased by 35% for the financial year 2005/06.

time. To this end, it would seem beneficial to actively involve trade unions in the provision of legal support and to educate and train those who provide legal advice such as the Citizens Advice Bureau and ACAS so that they are fully knowledgeable on the latest developments concerning anti-discrimination law and are able to advise individuals accordingly. There are approximately six and a half million trade union members in the UK and such membership will in most cases entitle an employee to legal advice and assistance when instigating a claim against an employer, although the possibility of legal representation is much smaller. It is also common for a trade union to limit such support to those individuals who have been fully paid-up members for a prescribed period of time prior to the request for assistance. Trade union membership in the UK however continues to decline⁶¹ limiting the potential effectiveness of supporting litigation through a union's legal department. Perhaps an effective method would be for the CEHR to subsidise the provision of legal advice and assistance so that this ceases to be dependent upon union membership.

The need for legal advice and assistance is pressing not only given the financial implications as expressed above, but also because of the approach to enforcement that the CEHR is apparently going to adopt. The Government has commented that the CEHR will "use its regulatory powers only rarely"⁶² and also states that it "will support cases brought by individuals only in a very few cases".⁶³ The suggestion that few cases will be supported, coupled with the track record of Trevor Phillips as Chair of the CRE (whose record is widely regarded as being weak in terms of utilising enforcement procedures and providing legal assistance⁶⁴) and the fact that legal aid is not available for representation before an Employment Tribunal, would further suggest that existing discrimination legislation will not be adequately enforced. If so, the CEHR should look to create and strengthen other existing

⁶¹ DTI, Employment Market Research, Trade Union Membership 2005 (March 2006)

<<http://www.dti.gov.uk/files/file25737.pdf>>.

⁶² Meg Munn, HC Standing Committee, 2005: Column 97.

<<http://www.publications.parliament.uk/pa/cm200506/cmstand/a/st051201/am/51201s03.htm>>.

⁶³ Baroness Ashton of Upholland, 19 October 2005: Column 811.

<<http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo051019/text/51019-21.htm>>.

⁶⁴ Of the work undertaken by the CRE, Ken Livingstone, speaking to Vanessa Feltz on BBC London (94.9 FM) has noted that "when he [Trevor Phillips] was appointed to run the CRE, it did an awful lot of work taking up genuine cases... what he did was turn it into a vast press department and wound down all the legal work." Despite a statement by the CRE denouncing these comments, and citing how its legal department had grown and its press team had shrunk, the statistics provided by the CRE (see above, section 5.2.) do little to support this counter-assertion suggesting that there is indeed perhaps more truth to Mr Livingstone's comments.

avenues and networks of equality and employment rights organisations, trade unions and perhaps local authorities⁶⁵ in order to carry out direct enforcement of the equality legislation on its behalf.⁶⁶ Nevertheless, it is important to remember that at present, only the CEHR has the power to utilise certain enforcement provisions (such as the power to conduct investigations) and to seek the remedies that may flow from these (such as an unlawful act notice) and in this respect, the CEHR must itself be fully dedicated to making an effective use of these powers, which after all, have been long campaigned-for by the majority of respondents involved in the public consultation surrounding the creation of the CEHR, including Trevor Phillips himself (acting as CRE Chair).

Lastly, as regards the monitoring and investigative role that will be undertaken by the CEHR, an additional avenue available could be to utilise the experience of the mainstream audit commissions so that these can formally build equality into their inspections, which has already been achieved to some extent with regard to race equality; the CRE having orchestrated such arrangements with a number of inspectorate bodies including the Healthcare Commission. It is important to avoid duplication of effort in this respect, however, not only in terms of avoiding unnecessary expenditure but also to avoid imposing a bureaucratic burden upon those subject to such monitoring. The inspectorates could, acting in their ordinary course of business, build equality into their inspections using the CEHR as a source of expertise and guidance, given that the CEHR itself will not have the necessary resources in order to carry out inspections of comparable frequency to those mainstream audit and inspection bodies. In light of the foregoing discussion, and as Fredman and Spencer have already suggested,⁶⁷ such an approach could be adopted by either incorporating this equality-monitoring function into the appropriate regulations governing the inspectorate bodies, or by creating memorandums of understanding between the CEHR and each individual inspectorate.⁶⁸

⁶⁵ For a consideration of the use of local authorities see below section 6.2.3. - Delegation to Local Authorities.

⁶⁶ This would primarily involve and would be limited to the provision of legal assistance and support for individuals, given that many of the enforcement powers are available to the CEHR only, such as the power to bring an action against discriminatory advertisements and investigations.

⁶⁷ Fredman, S and Spencer, S, 'Equality: towards an outcome-focused duty' (2006) EOR No.156. p.19.

⁶⁸ See above, section 4.1.6. - Regional Arrangements and the Scottish and Welsh Dimensions at n.58, for a similar use of a Memorandum of Understanding between the CEHR and SHRC.

6.2.3. Delegation to Local Authorities

A further issue for consideration concerns the role of local authorities⁶⁹ and whether they could be given powers to enforce parts of the equality enactments. This would be beneficial, as each local authority would arguably be more responsive towards organisations within their locality. It would seem that local authorities may be well situated to conduct investigations into allegations of discrimination, and there could also be a consideration of whether fines and fixed penalties could play a role in the enforcement of the equality acts, an obvious example being a fixed penalty for those public bodies who fail to publish and act upon a race equality impact assessment. As Harwood notes, this may involve each local authority having its own anti-discrimination officer who, working closely with the local authority's legal services and equality and diversity departments, could ensure "an effective mix of enforcement action, education, support and encouragement".⁷⁰

However, it is important to remember that each local authority, as well as trade union, inspectorate and advisory body, is also subject to limited budgets and may perhaps have varying agendas making the adoption of common goals difficult. Providing for such an enforcement function amongst small district councils in particular would seem unrealistic given the finite resources available. A major question to be addressed would be how to reconcile local authorities having both duties under discrimination legislation on the one hand, and also powers to enforce discrimination legislation on the other. It would seem illogical for a local authority to seek to enforce discrimination law, when it may fall short of the statutory requirements itself.

As illustrated there are advantages and disadvantages regarding the extended use of existing bodies, such as Local Authorities. It is suggested that the transitional committee, which will oversee the amalgamation of the existing Commissions, should consider enhancing the effectiveness of the CEHR by making use of such bodies to enforce and/or monitor compliance with discrimination legislation. However, Harwood's proposal to give such bodies investigative powers would appear inappropriate.⁷¹ The CEHR should remain the

⁶⁹ See Harwood, R, above at n.8. p.121.

⁷⁰ *ibid.*

⁷¹ *ibid.*

only body entitled to conduct investigations, as local authorities will have neither the time nor the resources to do so effectively, and the CEHR will risk losing credibility if it delegates this important function.

An issue that received minimal attention in FFA, and was subsequently largely ignored during the consultation, concerned the use of the Equality Standard for Local Government (ESLG). The Government proposed that the CEHR would “build upon the work of the current Commissions in...developing the Equality Standard in conjunction with the Employers’ Organisation for Local Government”.⁷² The Employers’ Organisation for Local Government ceased operation on 31 March 2006 with the Improvement and Development Agency (IDeA) taking over responsibility for its work on equality and diversity (amongst other things) on 3 April 2006.

The Equality Standard itself recognises the importance of equal treatment in local government employment and services and was launched in 2001 primarily to assist local authorities in mainstreaming equality (including race, gender, disability, religion or belief, sexual orientation and age) into council policy and practice at all levels. The ESLG is a voluntary Best Value Performance Indicator (BVPI), whereby each participating council will report upon the standard they have reached by measuring their own progress. There are currently 5 levels of attainment to the ESLG, with levels 3 to 5 requiring external assessment, and at present the ESLG is adopted by 90% of all local authorities. On the surface this would seem impressive, however a closer examination would suggest that there is still considerable scope for improvement; for the year 2005-2006, the BVPI for each local authority is broken down as follows:

⁷² DTI, White Paper, ‘Fairness for All: A new Commission for Equality and Human Rights’ (Cm 6185, 2004).

Summary of the 2005-06 Equality Standard BVPI data Type of Authority

Type of Authority	Level 0	Level 1	Level 2	Level 3	Level 4	Level 5	Total
County	1	10	15	8	0	0	34
London Borough	0	2	16	10	2	3	33
District	28	132	61	15	1	1	238
Met District	0	7	16	13	0	0	36
Unitary Authority	1	11	21	14	0	0	47
Total	30	162	129	60	3	4	388

Breakdown of Equality Standard and Authorities (2005 – 2006) ⁷³

As may be seen, some 82% of authorities have only reached Level 2 or below, with a mere 2% of authorities satisfying Level 4 and 5 of the Standard, despite having had a period of five years in which to implement and adopt the standard. Each level is of course increasingly progressive⁷⁴ and it is suggested that only the latter levels are capable of deriving the benefits originally identified by the Employers' Organisation for Local Government which include:⁷⁵

- providing a systematic framework for the mainstreaming of equalities;
- helping local authorities to meet their obligations under the law;
- integrating equalities policies and objectives with Best Value;
- encouraging the development of anti-discrimination practice appropriate to local circumstances;
- providing a basis for tackling forms of institutionalised discrimination; and
- providing a framework for improving performance, over time.

A closer look at the standard reveals that for Levels 1 and 2, compliance is largely procedural, with the standard becoming much more outcome-focused from Level 3 onwards. It is suggested that in order to make a real impact, local authorities should be encouraged to seek compliance with the latter levels of the Equality Standard and that the CEHR could be an effective partner in order to encourage local authorities to achieve this. In doing so, the Standard could be used by the local authorities to complement the work of the CEHR,

⁷³ Source: IdeA website <http://www.idea-knowledge.gov.uk/idk/core/page.do?pageId=5145192>.

⁷⁴ See the Employers' Organisation for Local Government, 'Equality Standard for local government' (May 2007), which details the requirements of the different levels. Level 1: Commitment to a Comprehensive Equality Policy; Level 2: Assessment and Consultation; Level 3: Setting equality objectives and targets; Level 4: Information systems and monitoring against targets; Level 5: Achieving and reviewing outcomes <<http://www.idea-knowledge.gov.uk/idk/aio/6377193>>.

⁷⁵ *ibid.*

particularly in relation to sexual orientation, religion, belief and age. At present, the statutory equality duties only relate to race, disability and gender whereas the ESLG extends the need to mainstream equality across the new grounds. Although the overall goal for the statutory duties and the ESLG are similar in that they both seek to improve equality of opportunity and outcomes, the ESLG requires that this is to be achieved by incorporating it into the performance management system of the local authority, whereas the statutory duties may seem to be more prescribed and specific in their methodology. It is acknowledged that some authorities may find it much more plausible than others to implement the standard taking into account the size of the authority, the fiscal resources available and their progress to date. In this respect the CEHR could focus its attention on the authorities finding it most difficult to implement the standard whilst ensuring that the Standard itself does not remain static, so that it is revised to take into account legislative amendments and changes in best practice. There is an important balance to strike between having a dynamic and flexible standard while maintaining consistency in the application and integrity of the particular standard which satisfies the equality duties, that the public authorities are required to fulfil.

6.2.4. Extending Positive Duties

Following the introduction of the Race Equality Duty (RED) in 2001, the Government has, as discussed, also introduced the Disability Equality Duty (DED) which came into effect on 4 December 2006 and The Gender Equality Duty (GED) which came into effect on 6 April 2007. There may be scope to extend these duties further so that they cover the three most recently-protected equality strands of religion or belief, sexual orientation and age. Although the Discrimination Law Review has been charged with considering how discrimination legislation will progress within an ever-changing society, the CEHR will hopefully have a large say concerning the changes and progression to be made. In this respect, it is hoped that the CEHR will focus heavily in the immediate to short-term upon the positive duties aforementioned in order to highlight their effectiveness at combating discrimination and creating real change, which will make the argument for their extension much more concrete.

A number of advantages may be associated with the use of positive duties, not least because they encourage public authorities to take proactive measures to tackle persistent structures of discrimination as opposed to seeking what O’Cinneide has termed “negative compliance,”⁷⁶ whereby the public authority will take only the minimum steps required to avoid attracting liability. As a result of the latter approach, equality is largely marginalized as opposed to being an important and integral part of decision-making, service delivery and employment practice. A reactive process will do little to drive a public authority to consider equality alongside its central objectives and as such only limited progress will be achieved unless there is a considerable shift in attitude. The Hepple Report⁷⁷ was one of the first to advocate the use of new equality strategies to supplement the formal guarantees of equality as contained within the anti-discrimination legislation. These strategies, such as the extension of positive duties on public authorities, are only just starting to receive serious consideration with the instigation of the Discrimination Law Review, corresponding academic research and the general attention given to issues surrounding discrimination. However, with the creation of the CEHR and addition of the recent equality strands, it is suggested that these positive duties could be extended further so that public authorities are encouraged to take a holistic approach to equality as opposed to dealing with positive duties as they relate to each ground separately.

O’Cinneide identifies two central concepts with regards to positive duties (which can contain both positive and negative obligations): relevance and proportionality.⁷⁸ Given that the bodies subject to these duties must assess and monitor the impact of their policies and practices, it is clear that the resources spent on establishing assessment procedures and formulating steps to combat discriminatory practices may be quite considerable, therefore a realistic and proportionate approach should be adopted to enforcement that balances the importance of promoting equality and combating discrimination with the other key roles and

⁷⁶ O’Cinneide, C, ‘A new future for equality; extending positive duties across all the equality grounds’ (2003) Equality and Diversity Forum <<http://www.edf.org.uk/news/Cinneide%2026%20Nov.doc>>. See also, O’Cinneide, C, ‘Beyond the Limits of Equal Treatment: The Use of Positive Duties in Equality Law’ as contained in the conference report, ‘Mainstreaming Equality: Models for a Statutory Duty’ (27 February 2003) commissioned by The Equality Authority <http://www.equality.ie/getFile.asp?FC_ID=125&docID=93>.

⁷⁷ Hepple, B, QC, Coussey, M and Choudhury, T, ‘Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation’ (2000) Oxford: Hart Publishing, Chapter 3, Part B.

⁷⁸ O’Cinneide, C, ‘Extending positive duties across the equality grounds’ (2003) EOR No.120, p.13.

responsibilities associated with the bodies in question. The intention of positive duties is not to unduly burden those subject to them, but to ensure that the duties are incorporated in such a way that they become integral to the workings of these bodies, becoming 'part and parcel' of their core activities.

The restriction of positive duties to the grounds of race, disability and sex would seem artificial and ultimately may serve only to widen the disparity of protection afforded to the equality strands, strengthening the concern that a hierarchy of protection will be created. An analysis and evaluation of the duty upon specified public bodies in Northern Ireland to have due regard to the need to promote equality of opportunity across all equality grounds, as provided by s.75 of the Northern Ireland Act for example,⁷⁹ would indicate that extending positive duties across all of the equality grounds can achieve discernable results. It would seem to be a more effective method to introduce a general positive duty, similar to that provided for by way of s.75, than to introduce individual duties in a piecemeal fashion, which has historically been the approach to developing discrimination legislation in the UK. However, the diversity within and between the different equality strands needs to be reflected so that consideration is given as to how each ground may be better served, as opposed to having a 'one size fits all' approach. For this purpose, supplementary specific duties may be required to ensure that the different requirements of each strand are met. However, this need not detract from an overall general positive duty. Such a duty would help avoid the creation or affirmation of a hierarchy of inequalities in which certain grounds receive a higher level of protection, by ensuring that there is an equal focus across all the grounds, to minimise the difference in treatment and priority.

An area of concern surrounding compliance with such positive duties is that public authorities focus too heavily on process compliance, such as creating appropriate policies and paperwork, as opposed to focusing upon achieving outcomes that would consider the

⁷⁹ See Equality Commission for Northern Ireland Statutory Duty progress reports, which consider the implementation of the Equality and Good Relations Duties by public authorities between 2000 and 2005 <http://www.equalityni.org/sections/default.asp?secid=8&cms=Publications_Statutory+duty_progress+reports&msid=7_43_251&id=251>. See also Chaney, P and Fevre, F, 'An Absolute Duty: Equal Opportunities and The National Assembly for Wales, A Study of the Equality Policies of the Welsh Assembly Government and their Implementation: July 1999 to March 2002' (June 2002) <http://www.eoc.org.uk/PDF/absolute_duty_fr.pdf>, for information on the Welsh Duty.

actual results of these policies, and upon the process of assessment and evaluation that would drive forward improvements in equal treatment. The outcome-focused approach has generated considerable support for positive duties. Fredman and Spencer have argued that a new duty upon public bodies to promote equality should be “action-based and goal-orientated but should allow these bodies greater autonomy in how they deliver equality”.⁸⁰ The main advantage of an outcome-based duty is that it would help to avoid compliance becoming an exercise in procedure and paperwork. It may encourage authorities to take new and innovative approaches to challenging discrimination.

Authorities will vary greatly in terms of size, resources and demographic makeup of their locality, which may render a blanket application of a positive duty and the methods required to satisfy this unsatisfactory. For example, a duty to monitor the racial composition of a workforce and to ensure that it accurately reflects the demographics of the locality, may be more achievable for an authority in the Midlands, which has a much higher proportion of black and ethnic minority individuals, than for an authority in the North East. Therefore it could be argued that less emphasis should be placed upon the method used to achieve a desired outcome and more upon the question of whether or not that outcome has been achieved. Moreover, giving public bodies greater level of autonomy to choose how they wish to achieve outcomes also gives them ownership of the duty, which should be beneficial. As discussed in section 5.1.4. above, an action plan is generally believed to be more effective when the body in question has been directly involved in its creation and implementation, as opposed to having a plan imposed upon it by an external body that may not fully appreciate the internal politics involved; such logic may similarly apply to an outcome focused duty. It has already been demonstrated that original and innovative ways of tackling discrimination such as the WMCS, can be particularly effective. For authorities with scarce resources, however, it would seem appropriate to have in place baseline guidance concerning compliance. The CEHR could facilitate positive duties by encouraging best practice initiatives and innovative ways of tackling discrimination. Disseminating information and encouraging the adoption of programmes and practices that have been demonstrated to be particularly

⁸⁰ See above, n.67 at p.14.

effective (for example, contract compliance) could also add significant weight to the CEHR's research and education functions.

Fredman and Spencer, whilst recognising that the specific requirements of the current positive duties differ, have identified 'equality of opportunity' as being the common goal associated with them all. They have denounced this as being "too vague and too limited to function as a workable target", and state that the actual duty to pay due regard "merely requires a body to consider the need to promote equality, not to take any action".⁸¹ Instead the proposed 'goal orientated, action based and progressive duty' moves beyond the current framework, by considering a four-dimensional concept of equality.⁸² Additionally, in order to fulfil such a general duty, Fredman and Spencer propose that specific duties should set out the basic steps to be taken to "ensure a level of transparency that is essential to empower local organisations and individuals to engage with the authority on its record and for the CEHR and inspectorates to monitor delivery".⁸³ Importantly, as far as the CEHR is concerned, this would make the task of complying with ss.11 and 12 of the EA much easier (i.e. monitoring the effectiveness of the equality and human rights enactments and any progress that is being made), as much of the information required will already have been gathered by the public bodies seeking to comply with the positive duty. The CEHR would also be better able to exercise the power under s.31 of the EA, which allows it to conduct an assessment of an authority's public sector duties, for the same reason.

As regards the enforcement of a general duty, as Fredman and Spencer highlight, the CEHR is currently faced with the difficulty of grappling with the requirement to pay 'due regard', which focuses more upon arrangements than action. The fluidity of this phrase also makes enforcement much more difficult. It would be much easier for the CEHR to challenge an organisation that had failed to undertake the necessary and proportionate steps that it had

⁸¹ *ibid.* p.14.

⁸² *ibid.* The four dimensions in question are: equal life chances, equal dignity and worth, affirming and accommodating difference and equal participation.

⁸³ See *ibid.* pp.17-18. Such specific duties would include 1) obtaining evidence on discrimination and equality and forming a 'baseline assessment' to diagnose the causes of any inequality identified, 2) seeking consultation and participation, 3) creating an action plan setting out the necessary and proportionate steps to be taken that is integral to the organisations business plan, 4) assessing the potential impact of these new steps and 5) monitoring the progress made and publishing assessments.

identified in its assessment. In this respect the CEHR would be better able to make effective use of its existing enforcement tools.

6.3. Conclusion

The changes advocated above, it is suggested, would allow the CEHR to perform its strategic role more effectively and would provide a more effective balance between the CEHR's individual and strategic enforcement powers. It is regrettable that many of the suggestions aired during the consultation process were not included in the EA. Importantly, the amendments advocated would align the enforcement powers with the Government's commitment to non-regression. However, these changes will do little to help those subject to discrimination unless the CEHR adopts a position that sees enforcement as an integral component of its role, alongside and not secondary to the issue of promotion. By taking a hard-line approach against the worst offenders and fostering supportive relationships with those bodies seeking to comply with the equality enactments, which may be achieved by acting in a strategic and effective manner, the CEHR would give itself the best chance of success.

A theme resonant throughout the consultation period concerning FFA and somewhat addressed by the EA concerns the independence of the CEHR. Despite concessions during the EA's passage through Parliament, such as the welcome removal of the power of the Secretary of State to request the CEHR to conduct an investigation, it is suggested that the CEHR could also be granted increased independence from the courts. At present the courts may be seen to provide a superfluous tier of procedure that may only delay investigations and inquiries and drain the CEHR's already limited resources. An obvious example is the requirement for the CEHR, by way of s.22(6), to seek a court order requiring compliance with an action plan. As suggested, such plans should become automatically enforceable without recourse to the courts once they have been agreed by both parties. It is hoped that the CEHR will take a firm stance against unnecessary interference and will not shy away from facing up to the Government concerning issues of discrimination and human rights. Its independence is vital to its success. Moreover, the extent of its independence could

significantly influence its strategic freedom and dictate the use of its enforcement powers. Although the CEHR will have a direct link with the Government, being funded by the DCLG, the focus of the regulatory mechanisms is primarily upon the public sector, which could necessitate the CEHR taking enforcement action against government agencies, if (for example) this is determined to be an area of strategic importance. External considerations resulting from its relationship to the Government should have no bearing on its decision-making process or strategic determinations.

As has been seen, the enforcement powers available to the existing Commissions have been increasingly little used, particularly since the turn of this century, which perhaps may be seen as a bigger hindrance and potential drawback in the fight against discrimination than the content of the legislation itself. Given that the powers available have remained relatively static since their creation, and have only significantly been supplemented by the addition of the RED, DED and GED, it would seem that the reason for their declining use extends beyond the actual powers themselves and settles more upon the strategic priorities of the Commissions. The ever-increasing number of tribunal claims concerning discrimination and the comparably minimal success rate of these suggests that more could be done to ensure that better use is made of the CEHR's enforcement powers than has recently been the case.⁸⁴

It is suggested that the amendments outlined that relate to the powers contained within the EA, will strengthen the regulatory enforcement powers. However, it has been argued that a wider consideration of possible enforcement methods is necessary if the CEHR is to make a strong and effective impact in the field of discrimination, effectively fulfil its specific duties under s.8(e) and (f) of the EA, and, as is the focus of this thesis, strike a more effective balance between the CEHR's strategic regulatory mechanisms and individual litigant support in its broadest sense. Such a balance is important, especially given the complementary relationship that may be seen to exist between litigant support and the strategic regulatory mechanisms: as highlighted, the CEHR may only really effectively decide its strategic priorities and therefore utilise its regulatory mechanisms if it is able to determine those areas

⁸⁴ See Appendices B and C, outlining the number of Tribunal Claims registered by the nature of the claim and the outcome.

in which discrimination is most prevalent. An approach to litigant support whereby all applications will be considered would seem to be the most effective method of gathering such information.

It is important not to overlook the fact that ultimately, the success of the CEHR will be judged by whether there is a real and measurable impact in the field of discrimination, an example being a reduction in the number of unemployed individuals from ethnic minority backgrounds. A 'soft touch' approach to enforcement will do little to significantly advance equality, especially in the short term. Whilst the CEHR may be seen to have increasingly effective methods to instigate change with public authorities, particularly in conjunction with the extension of the positive duties, it is important that efforts to tackle inequalities within the private sector and on an individual level are not negated and in this respect, individual litigant support, it is suggested, can play a significant role. The additional proposals arguably strike a more effective balance in this respect.

The additional methods identified above focus upon a consideration of contract compliance, the extension of positive duties, and an increased role for trade unions, advisory bodies, inspectorates and local authorities. It is important to remember, however, that enforcement powers themselves are only one side of the coin and that it is equally important to have, in the first place, effective provisions to be enforced. The current patchwork of equality legislation seems to make it unduly difficult to act in a strategic manner, therefore the shift in focus towards the creation of a unified SEA is to be welcomed. The danger is that without the introduction of new and innovative methods of tackling discrimination, such as the extended use of positive duties as proposed, the CEHR will be largely limited in its effectiveness and will never be able to fulfil its true potential. Moreover, without a more sweeping reform of the legislation, the establishment of the CEHR would seemingly be a lost opportunity.⁸⁵

⁸⁵ See Chapter 7 for a brief discussion of the proposed legislative reforms leading to a Single Equality Bill.

Chapter Seven

7. Conclusion

From an analysis of the EA, its consultation process and the enforcement powers of the existing Commissions, it is proposed that a more effective balance needs to be struck between individual and strategic enforcement, both as regards the legislative provisions themselves and the Commissions' approach to the use of these powers. The EA, it is argued, has advanced the strategic regulatory mechanisms, although at the expense of individual litigant support. Adopting additional enforcement powers as suggested in this thesis, however, will be of particular benefit to victims of discrimination within the private sector and may better address the balance between individual litigant support and the use of strategic regulatory mechanisms.

As has been demonstrated, a primary weakness of the current legislative approach to discrimination is the fact that enforcement procedures and resulting remedies are individualised.¹ Although strategic regulatory mechanisms, particularly investigations, may be better equipped to deal with institutional or structural discrimination, they can be particularly resource-intensive and take years to translate into any meaningful results, because of the length of the investigation or the period of consideration and consultation following the publication of any findings. The CEHR should proactively seek to enforce discrimination law and make known its intention not to tolerate discrimination; a focus on individual litigant support, being able to instigate change much more quickly than (for example) strategic investigations, would arguably be an effective way to achieve this. The deterrent effect this would generate may not only 'shock' individuals and organisations into action but would allow the CEHR to gain increased credibility. Unless an aggressive and effective pursuance of enforcement is adopted, there is a danger of further disillusionment and dampened enthusiasm from protected groups.

In summary, it has been argued in Chapter 5 that the enforcement powers of the CEHR as contained within the EA, together with a consideration of the consultation process in Chapter 4, favour a strategic regulatory approach at the expense of individual litigant support. The

¹ See above, section 3.9. - Evaluation.

suggested amendments in Chapter 6, however, would seemingly strike a more effective balance between these methods of advancing equality. Although the existing Commissions, as O’Cinneide says,² are not “representative bodies”, it is argued that they nevertheless play a vital role in voicing the views of their protected groups. They are charged with a duty to consider all applications and to provide legal advice and assistance where appropriate. Moreover, the CEHR will be under a duty to consult with its stakeholder groups and to produce a ‘state of the nation’ report. Interactions with individuals, whether directly or through delegated organisations, would therefore seem to form an integral part of its role, suggesting that a shift in balance further towards the individual and away from reliance upon strategic regulatory mechanisms would be welcome.

It is to be hoped that the CEHR will continue stakeholder consultation while lending its considerable weight to supporting the newly protected grounds of religion or belief, sexual orientation and age. Given that the CEHR will not be fully incorporated until 2009 when the CRE will be fully amalgamated, the timing is right to press ahead with implementation of a SEA, which, it is hoped, will free both hands of the CEHR and enable it to fulfil its potential.

The disparity of protection afforded by the legislation has been a cause for concern for many interested parties since a single Commission was first proposed, given the perceived difficulty and ineffectiveness of trying to work with legislation and regulations that share little common ground and have limited overlap. The Government, having stated that it will pass the task of reviewing legislation to the CEHR, has already made inroads by commissioning the Equalities Review and the Discrimination Law Review, the findings of which will directly inform the creation of a SEA.

A SEA received almost unanimous support during the consultation response to FFA; although the CEHR is set to become a leading body on the international stage charged with securing equality and combating discrimination, the same cannot be said for the legislative framework within which it is required to operate, which falls some way behind that

² O’Cinneide, C, ‘The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times’ (2007) 36 ILJ 141, p.146.

established in other jurisdictions.³ Until that legislative framework is updated, simplified and harmonised, taking into account best practice initiatives from around the world, which will modernise the UK's approach to discrimination dating back over 35 years, the CEHR will effectively have one hand tied behind its back in pursuing its general duties. Importantly, without such legislative reform, the effectiveness of individual litigant support as a way of securing widespread change will, arguably, be limited.

The Government is currently looking to fill the most obvious gaps in the existing anti-discrimination legislation and is considering proposals even before the CEHR has commenced its duties, informed by the Discrimination Law Review contained within the consultation document, '*A Framework for Fairness*' (FFF).⁴ This Green Paper contains proposals for the creation of a Single Equality Bill. The consultation period will run from 12 June until 4 September 2007. The primary aim of FFF is to provide a more effective, simplified and modernised discrimination law framework, which will be better equipped to protect against discrimination and address disadvantage. Specific proposals put forward in Part 2, setting out the visions for the SEA, concern the equality duties, the role of public service inspectorates, public sector procurement and the effective use of alternative dispute resolution.

Firstly, various opinions are sought concerning the proposal to replace the race, disability and gender duties applying to public authorities with a single equality duty covering all these grounds;⁵ including whether that duty should be extended, as discussed in this thesis, to include the grounds of religion or belief, sexual orientation and age.⁶ The Government, however, alludes to its expectation that the CEHR will take a light touch to enforcement in the first instance by encouraging cooperation and seeking improvement through the provision of advice and support; it expects that formal enforcement powers will only be used

³ See O'Cinneide, C, 'A Single Equality Body: Lessons from abroad' (2002) EOC Working Paper Series No. 4 <<http://www.eoc.org.uk/Default.aspx?page=16088&lang=en>>.

⁴ DCLG, 'Discrimination Law Review, A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain' (June 2007) <http://www.communities.gov.uk/embedded_object.asp?id=1511244>.

(Accompanying *A Framework for Fairness* is an initial Regulatory Impact Assessment <<http://www.communities.gov.uk/index.asp?id=1511255>> and Equality Assessment <<http://www.communities.gov.uk/index.asp?id=1511252>>).

⁵ *ibid.* para.5.21.-5.24.

⁶ *ibid.* para.5.57.-5.72.

when informal routes have been unsuccessfully exhausted.⁷ However, this thesis has argued that more use should be made of enforcement powers. In addition, the Government is considering whether a single enforcement mechanism will be more appropriate for a single duty enabling the CEHR to issue a compliance notice with or without reference to the county court.⁸ This thesis would recommend that the county court's approval should not be required. Secondly, the Government is considering the role that public sector inspectorates could play in assessing compliance with a proposed single equality duty and monitoring compliance.⁹ This involves developing the relationship between these inspectorates and the CEHR and avoiding duplication, so that more time is spent on producing real outcomes. This thesis has argued that such inspectorates could indeed assess and monitor compliance with equality legislation

Thirdly, as regards public sector procurement, while considering proposals such as the inclusion of specific duties relating to procurement, the Government has rejected any form of legislative amendment in favour of the provision of clarified guidance, arguing that the current (and any proposed) duty would cover procurement as a function of public authorities, subject to the equality duties. However, this thesis recommends that a specific duty should be imposed, as for example, guidance might not be equally complied with by all public authorities.

Lastly, the Government is committed to encouraging the use of Alternative Dispute Resolution (ADR) in non-employment related cases: a DTI-sponsored review of dispute resolution¹⁰ proposed amendments in relation to the employment sphere separately in the DTI consultation paper, *'Resolving disputes in the workplace'*.¹¹ Having emphasised the benefits of ADR in discrimination cases, the Government illustrated its desire to promote the early resolution of disputes, avoiding the need for litigation.¹² This thesis has argued that ADR should be used with caution in cases that concern employment, where there is a

⁷ *ibid.* para.5.79.

⁸ *ibid.* para.5.83.

⁹ *ibid.* paras.5.84.-5.90.

¹⁰ Gibbons, M, 'Better Dispute Resolution, A review of employment dispute resolution in Great Britain' (March 2007) <<http://www.dti.gov.uk/files/file38516.pdf>>.

¹¹ DTI, 'Success at Work, Resolving disputes in the workplace, a consultation' (March 2007) <<http://www.dti.gov.uk/files/file38553.pdf>>. The consultation period ran from 21 March 2007 until 20 June 2007.

¹² See n.4. at paras.7.13.-7.19.

significant power imbalance between victims of discrimination and employers. Given that the FFA consultation did not pay sufficient attention to the effective balance between strategic regulatory enforcement and individual litigant support, it is to be hoped that the FFF consultation will do so, for the reasons given in this thesis.

Appendices
&
Bibliography

Appendix A - Budget Allocation.

EOC	2005-06		2004-05		2003-04		2002-03		2001-02	
	£'000	%	£'000	%	£'000	%	£'000	%	£'000	%
Total Budget	10449	100	9462	100	8093	100	7702	100	9304	100
Legal Services	414	3.96	370	3.91	563	6.96	613	7.96	269	2.89
Research	578	5.53	432	4.57	473	5.84	210	2.73	98	0.97
Publicity and Information Services	1659	15.88	1190	12.58	832	10.28	859	11.15	882	9.48

CRE	2005-06*		2004-05		2003-04		2002-03		2001-02		2000-01	
	£'000	%	£'000	%	£'000	%	£'000	%	£'000	%	£'000	%
Total Budget	19380	100	17465	100	20151	100	20512	100	19906	100	16885	100
Legal Services			961	5.5	628	3.12	809	3.94	912	4.59	787	4.66
Research			264	1.51	50	0.25	317	1.55	266	1.34	270	1.6
Publicity and Information Services			332	1.9	111	0.55	547	2.66	1143	5.74	959	5.68
REC Grants			4249	24.33	4373	21.7	4418	21.54	4960	24.92	4613	27.32
Compliant Aid			0	0	250	1.24	424	2.07	470	2.36	378	2.24

* Budget breakdown unavailable

Source: CRE and EOC Annual Reports

Appendix B - Employment Tribunal Claims Registered by Nature of Claim.

	Number of Claims			
	2002/03	2003/04	2004/05	2005/06
<i>Sex Discrimination</i>	11,001	17,722	11,726	14,250
<i>Disability Discrimination</i>	5,310	5,655	4,942	4,585
<i>Race Discrimination</i>	3,638	3,492	3,317	4,103
<i>Discrimination on grounds of Religion or Belief</i>	0	70	307	486
<i>Discrimination on grounds of Sexual Orientation</i>	0	61	349	395
<i>All discrimination claims</i>	19,949	27,000	20,641	23,819
<i>Equal pay</i>	5,053	4,412	8,229	17,268

Source: *Employment Tribunal Service, Annual Report and Accounts 2004/05 and 2005/06, p28, table 1.*

Appendix C - Outcome of Employment Tribunal Cases by Nature of Claim.

	Withdrawn		Acas Conciliated Settlements		Disposed of Otherwise		Successful at Tribunal		Dismissed at Hearing	
	No.	%	No.	%	No.	%	No.	%	No.	%
	2005/06									
<i>Sex Discrimination</i>	9,586	40	3,031	13	6,669	28	4,068	17	778	7
<i>Race Discrimination</i>	1,437	42	1,064	31	200	6	119	3	600	18
<i>Disability Discrimination</i>	1,336	33	1,849	45	194	5	173	4	498	12
<i>RB Discrimination</i>	119	35	126	37	22	6	9	3	63	18
<i>SO Discrimination</i>	100	31	129	40	30	9	14	4	47	14

Source: *Employment Tribunal Service, Annual Report and Accounts, 2005/06, table 2.*
http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAR05-06.pdf

	Withdrawn		Acas Conciliated Settlements		Disposed of Otherwise		Successful at Tribunal		Dismissed at Hearing	
	No.	%	No.	%	No.	%	No.	%	No.	%
	2004/05									
<i>Sex Discrimination</i>	9,355	58	3,157	19	2,623	16	299	2	777	5
<i>Race Discrimination</i>	960	31	1,215	40	195	6	107	3	603	20
<i>Disability Discrimination</i>	1,419	30	2,280	49	172	4	236	5	566	12

Source: *Employment Tribunal Service, Annual Report and Accounts, 2004/05, table 2.*
http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAR04-05.pdf

	Withdrawn		Acas Conciliated Settlements		Disposed of Otherwise		Successful at Tribunal		Dismissed at Hearing	
	No.	%	No.	%	No.	%	No.	%	No.	%
	2003/04									
<i>Sex Discrimination</i>	3,983	45	2,100	24	2,086	23	265	3	446	5
<i>Race Discrimination</i>	853	31	1,074	39	172	6	115	4	572	21
<i>Disability Discrimination</i>	852	33	1,208	47	109	4	99	4	297	12

Source: *Employment Tribunal Service, Annual Report and Accounts, 2003/04, table 2.*
http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAR03-04.pdf

	Withdrawn		Acas Conciliated Settlements		Disposed of Otherwise		Successful at Tribunal		Dismissed at Hearing	
	No.	%	No.	%	No.	%	No.	%	No.	%
	2002/03									
<i>Sex Discrimination</i>	3,791	48	2,117	27	1,100	14	289	4	615	8
<i>Race Discrimination</i>	1,059	35	1,128	38	153	5	104	3	561	19
<i>Disability Discrimination</i>	839	34	1,119	45	115	5	90	4	377	16

Source: *Employment Tribunal Service, Annual Report and Accounts, 2002/03, table 2.*
http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAR02-03.pdf

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