

Bridging the divide – matters to be taken into account regarding the integration of the functions of national equality bodies and national human rights institutions

Case study: the British Equality and Human Rights Commission

October 2013

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Acknowledgments

Thank you to Sarah Spencer, Nick O’Brien, Patrick Diamond and Will Somerville for their comments and suggestions regarding drafts of this report, to the interviewees for their expert and candid contributions without which this report would not have been possible to produce, to Professor Francesca Klug at the London School of Economics for providing access to her archived materials on the formation of the Commission and to the Equality and Human Rights Commission for its helpful comments and factual corrections.

The contents of this report and any errors or inaccuracies remain entirely the responsibility of the author.

1. Introduction and Executive Summary

1.1 Introduction

- 1.1.1 This report explores the establishment and subsequent functioning of the British Equality and Human Rights Commission (EHRC) with respect to its status as a body combining the functions of a national equality body and a national human rights institution. It has been produced to inform an EU study on matters to be taken into account with respect to the integration of the functions of national equality bodies and national human rights institutions. It is based on desk research and interviews with key actors involved in the inception, establishment and running of the Commission.
- 1.1.2 The EHRC was the first body in the European Union specifically conceived and designed to house both an equality body and human rights commission in one institution. The Commission has undergone a turbulent and challenging first five years and has recently undergone a programme of legislative and non-legislative reform coupled with a substantial reduction in its budget.
- 1.1.3 This study is not directed towards a general assessment of the challenges the Commission has faced in discharging its mandate.¹ Instead, its focus has been to identify what lessons can be learnt from the integration of equality and human rights functions within the EHRC's remit, which may be of interest and use to the EHRC and the UK government moving forward, to others engaged in discussions about the establishment of unified equality and human rights bodies, and to all with an interest in the effective protection and promotion of equality and human rights.
- 1.1.4 Other national equality and human rights bodies exist in the UK. In Northern Ireland, the Equality Commission for Northern Ireland (ECNI) and the Northern Irish Human Rights Commission (NIHRC) play roles in promoting respect for rights, while the Scottish Human Rights Commission (SHRC) has worked within the framework of Scottish devolution to encourage public authorities in Scotland to integrate a focus on human rights into their work. Even though the Northern Irish bodies work closely on issues of common concern, and the SHRC liaises with the EHRC (which has responsibility for enforcing anti-discrimination law and promoting equality in Scotland as well as non-devolved matters with respect to human rights as they affect Scotland) these bodies do not combine both equality and human rights functions under a single roof. As a result, this report focuses on the EHRC, as part of a wider research project into the merger of equality and human rights bodies. However, reference will be made, as appropriate, to the experience of the other equality and human rights bodies in the UK, as well as to the experience of the British equality bodies (the Commission for Racial Equality, the Disability Rights Commission and

¹ For analysis, see Pegram, T (2011); Spencer S & Harvey C (2012); JCHR (13th Report 2009-10).

the Equal Opportunities Commission) which pre-dated the establishment of the ECHR.

1.2 Summary of findings

- 1.2.1 The task force established by the Labour Government in 2003 to develop plans for the (then titled) ‘Commission for Equality and Human Rights argued that *‘human rights and equality are inseparable and complimentary. A new vision has developed which positions human rights as common standards for the whole of society, and the communities and groups within it, alongside the fundamental rights of the individual protected in law.’* The EHRC’s combined equality and human rights mandate has enabled it on occasion to creatively integrate equality and human rights in its work. Of particular note has been the Commission’s inquiry into the human rights of older people receiving care in their own homes, its work to monitor and advise upon the use of stop and search powers by the police and a number of legal interventions. Generally however the Commission appears to have operated as two bodies under one roof, addressing equality and human rights separately in its activities. One interviewee noted that the extent of the EHRC's integration of equality and human rights in its programmes is *‘much more than people think, but not nearly enough’*.
- 1.2.2 The greatest degree of integration of equality and human rights has been in the area of legal intervention and enforcement. This area of activity had been seen by both those who campaigned for the inclusion of human rights in the body’s remit and by government as largely peripheral to its human rights remit. The Commission has taken longer to establish a body of work focused on the promotion of human rights – which had been considered its primary function -and has taken even longer to integrate its promotional mandate across equality and human rights.
- 1.2.3 The legacy inherited by the EHRC appears to have cast a long shadow over its capacity to develop an integrated approach to equality and human rights. Human rights and non-discrimination had largely occupied separate spheres prior to the early 2000s. They were governed by separate legislative regimes, and different ‘communities of expertise’ had developed in each sphere. The legislative and institutional infrastructure that related to anti-discrimination was more embedded than its human rights counterpart. It had been inspired by looking west to the civil rights law and institutions which had developed in the USA from the 1960s onwards and which evolved from labour law, not from post-War developments in human rights law and standards in Europe and at the United Nations. It was against this background that the decision to unify the separate spheres of anti-discrimination and human rights under the single roof of the EHRC was taken.
- 1.2.4 Further, the primary spur for the establishment of the EHRC was not to create a human rights commission but to provide an alternative to a proliferation of ‘strand specific’ anti-discrimination bodies following the expansion of ‘protected characteristics’ under the European Union Framework Directive 2000 to encompass

age, religion and belief and sexual orientation in addition to the existing ‘strands’ of race, gender and disability. The decision by government to include human rights in the new body’s remit came later and was designed to satisfy quite separate demands for a human rights commission which various campaigners had been pursuing since the early 1990s. Early proposals for the inclusion of human rights in the new body were modest and seem to have been designed to play down the fears of its opponents, especially government Ministers. Human Rights were posited as the invisible context within which the new body would operate, viewing equality as a basic human right of relevance to all. As one interviewee put it the idea would be that *‘the different strands (of equality) are the fish swimming in the pool of human rights’*

- 1.2.5 The Task Force that was subsequently established by the government to assist in the development of plans for what was then planned to be called the ‘Commission on Equality and Human Rights’ (CEHR)² certainly went further than this modest vision in its proposals for the Commission, but overall the focus remained on the creation of an equality body, with human rights duties and powers. The Task Force in particular envisaged the CEHR taking an integrated approach to human rights in the context of its work focused on public bodies and providers of public services. The outcome of this work – the Equality Act 2006 – which is the founding statute of the CEHR was designed to enable the Commission to work across and draw simultaneously on its equality and human rights duties and powers.
- 1.2.6 Despite this, the preparatory groundwork carried out on the question of achieving an integrated approach to equality and human rights appears to have been subsequently overwhelmed by the far more dominant political and procedural debates regarding the process of establishing the new body via the integration of the three existing anti-discrimination commissions, the incorporation of the then new ‘equality ‘strands’ of age, sexual orientation and religion and belief and by the priorities and approach of the first Chair, Board members, staff and stakeholders. This study found limited evidence of discussions during this later period regarding how combining equality and human rights within the mandate of a single commission should shape organisational priorities, organisational design, staff capabilities or the manner in which the new Commission approached its mandate.
- 1.2.7 The EHRC was accorded the same status as its predecessor Commissions all of which were ‘non-departmental public bodies’ This meant that it was not given the status of an independent ‘constitutional watchdog’ which would be accountable to Parliament rather than Ministers, as had been advocated by the Joint Parliamentary Committee on Human Rights. During the passage of the Enterprise and Regulatory Reform Bill in 2011/12 which included proposals to reform the EHRC’s duties and powers, amendments were tabled by the Labour Party which would have regarding reform of

² The Commission for Equality and Human Rights remains the legal name of the organisation, but it was re-branded as the ‘Equality and Human Rights Commission’ at the behest of its first Chair, Trevor Phillips

the EHRC amendments were tabled which proposed that the EHRC reported directly to Parliament. Although unsuccessful, steps have been taken by the government to increase Parliamentary involvement and oversight, such as the Joint Committee on Human Rights (JCHR) carrying out pre-appointment scrutiny of the proposed new Chair of the EHRC Baroness Onora O'Neill.

- 1.2.8 Human rights struggled to anchor itself at the core of the EHRC's early priorities. Even a significant and resource-intensive Human Rights Inquiry was viewed, by some of those directly involved, as having helped further marginalise human rights from the core priorities of the EHRC rather than raise its profile. This view appears to be confirmed by the lack of an appreciable influence of the inquiry on the subsequent strategy of the Commission. Only following the publication of a highly critical report by the Joint Parliamentary Committee for Human Rights, regarding the EHRC's performance in delivering its human rights remit which led to the EHRC's 'A' status as a national human rights institution being the subject of a 'special review' by the International Coordinating Committee of National Human Rights Institutions in 2010, did human rights begin to enjoy greater profile, priority and resources within the commission. It has continued to do so, albeit against a backdrop of sharply declining financial and human resources.
- 1.2.9 The EHRC has struggled to develop a common conceptual framework or approach which integrates its equality and human rights remit, with practical consequences. For example, the EHRC chose to give effect to its duties under s12 of the Equality Act 2006 to monitor and report on progress on equality and human rights by developing separate frameworks of indicators: one to help the EHRC determine which groups are experiencing discrimination or inequality: the "equality measurement framework"; and the other to assess the strength of the UK's legal and institutional framework and whether the Government was fulfilling its obligations to protect, promote and fulfil human rights. The development of the former set of indicators was prioritised and as a direct consequence the Commission's first 'triennial review' – the production of which is a duty of the EHRC - regarding progress on equality and human rights (2010) largely omitted to address progress on human rights, with a separate report on human rights subsequently produced in 2012.
- 1.2.10 The lack of symmetry between the nature, design and demands of the Equality Act 2010 and the Human Rights Act 1998, along with the EHRC's substantively different duties and powers in respect its equality and human rights mandates, has also hindered the development of an integrated approach in major areas of the Commission's work programme, and in particular in its engagement with public authorities. The designers of the EHRC's duties and powers had imagined that the Commission's work in relation to public services would provide a particularly right opportunity to integrate equality and human rights, yet where the Commission was empowered to promote and enforce equality law – including the public sector equality duties – its duties with respect to human rights are to 'encourage compliance' by public authorities. The specific duties placed on public authorities by the Equality

Act and the Human Rights Act are substantively different and there is little evidence of public authorities adopting an integrated approach to meet them. Further, whereas the EHRC is empowered to support individuals to bring cases of discrimination under the Equality Act 2010 before the Courts, including in conjunction with the Human Rights Act 1998, it is not empowered to support individuals to bring complaints solely under the Human Rights Act 1998. Instead, the EHRC is restricted to its powers to intervene in legal proceedings, judicial review or otherwise, in such cases.

- 1.2.10 Many equality and human rights bodies have faced difficulties in combining their promotional and quasi-judicial/legal enforcement functions. Tensions can arise not only in relation to questions regarding the most effective strategies and deployment of resources, but equally with regard to matters of institutional scope, purpose and legitimacy. In relation to the EHRC, its suitability as a provider of ‘neutral and pragmatic’ non-statutory guidance to business regarding the Equality Act 2010 has been questioned by government because of its ‘promotional role’ as both a national equality body and national human rights institution, while its right to carry out activity designed to influence public policy rather than confining itself to promoting and enforcing its implementation has been placed under question by Ministers. These tensions – whether legitimate or not - create particular challenges when combining a largely promotional human rights remit with an equality remit which includes enforcement or ‘regulation.’
- 1.2.11 A toxic public and political discourse surrounding human rights in Britain appears to have affected how the EHRC has discharged the human rights element of its mandate in the first five years of its existence. The EHRC acknowledged this in its response to the government’s consultation on reform of its functions when it said that *‘The Commission’s human rights work took longer than it should have done to develop coherence. Part of this may be due to the broad “promotional” mandate and the largely unfavourable public climate towards human rights.’*³ In general, there is little evidence of the EHRC taking a systematic and sustained approach to discharging its duty to promote understanding of the importance of human rights among the wider public, a task which was considered to be central by those involved in the inception of the Commission, as set out in duties at section 9 of the Equality Act 2006.

³ The Equality and Human Rights Commission’s response to the government consultation paper: ‘Building a fairer Britain: Reform of the Equality and Human Rights Commission’

1.3 Five key ‘learning points’

- 1.3.1 Attention must be paid to how – in conceptual, practical and operational terms – integrated bodies will work across and integrate an equality and human rights mandate.** Although evidence exists of the challenges and opportunities of integration having been explored (for example by the Joint CHR in its inquiry into the case for a human rights Commission, by the Task Force set up to advise the government on the duties and powers of the new institution which met in 2004-05 and by the Women and Equality Unit in the Department for Trade and Industry), these issues appear to have had little purchase on such important matters such as the appointment and development of the Commission’s first Chair, Commissioners and staff, its organisational design, operating model, strategic and business plans or communications strategy. This lack of attention to ‘integration’ issues had significant practical consequences: in particular, it marginalised the EHRC's human rights mandate during its first two years of operation, leading to serious criticism by Parliament. The EHRC has since developed greater parity across its equality and human rights related programmes; and a clearer narrative about the added value of the joint approach and what it means in practice. However, the question of integration, and how best to manage it, was not a major area of focus in public debates regarding reform of the EHRC during 2011/12
- 1.3.2 Effort is required to ensure that parity of esteem is accorded to both equality and human rights in the new institution.** The ‘legacy effect’ of the EHRC having evolved from three equality bodies, the lack of similar experience in the human rights field, the dominance of equality-focused stakeholders in debates regarding the new body, and the new body’s sponsorship by the equalities office in government have all created an institutional bias towards the EHRC's equality remit. The EHRC's human rights remit did not initially enjoy specific focus in relation to matters of organisational and job design, nor did the EHRC, from the outset, institute any kind of sustained staff development programme to help it meet its obligations in relation to human rights (or indeed across the ‘new strands’ of age, religion and belief and sexual orientation). This left the organisation ill-equipped to give full effect to the human rights element of its mandate. This suggests that action to mitigate the potential of such bias towards *either* equality or human rights needs to inform all stages of development and implementation of integrated equality and human rights bodies, from the articulation of duties and powers, to the appointment of the Chair and Board, organisational design, operating models and strategic planning.
- 1.3.3 The unification of equality and human rights creates new opportunities, but a common approach needs to be developed to avoid incoherence.** Realising the potential benefits of unifying equality and human rights within a single integrated

institution demands that attention is given to often complex issues engaged such as of how to define organisational purpose, identify priorities, or measure impact. As the Joint Parliamentary Committee on Human Rights noted in 2003, it is likely that integrated equality and human rights bodies will carry out activity which is sometimes wholly focused on human rights, wholly focused on equality or which spans both. Understanding when to focus on one of these elements in isolation, or when to combine them both together in a common framework, is a central strategic question that integrated bodies should address head-on. The Equalities Review (2007) made some progress in developing a common conceptual framework which drew upon the ‘capabilities’ approach developed by Sen and Nussbaum. This in turn informed the development of the EHRC’s ‘Equality Measurement Framework’. However, the capabilities approach does not appear to have enjoyed an appreciable influence on the Commission’s overall strategy or approach to its work. By contrast, the EHRC’s second strategic plan, 2012-15, embedded the FREDA principles (Fairness, Respect, Equality, Dignity and Autonomy) in the EHRC’s approach to the four themes of education and employment, health and social care, and safety and security, alongside core work to fulfil the EHRC’s statutory and international responsibilities.

1.3.4 The framework of law and policy in which the equality and human rights bodies operate needs to facilitate effective integration. While the advent of EHRC as a single equality body was accompanied by a single equality Act replacing the complex web of anti-discrimination law that had preceded it, outside EHRC’s own duties and powers legislation and practice has not actively sought to integrate equality and human rights. Duty-bearers do not typically regard the two areas of law and practice as synonymous. Taken together with the asymmetry of EHRC’s own duties and powers in relation to equality and human rights, this suggests that the broader governmental approach to equality and human rights has left the EHRC, arguably, fairly isolated in desiring and seeking to achieve a genuine integration of equality and human rights within its mandate and other public authorities.

1.3.5 Issues of ‘de facto’ and ‘de jure’ independence are as important as duties and powers. To carry out its functions with credibility, a body tasked with monitoring and reporting on State compliance with human rights laws and standards needs to enjoy both *de jure* and *de facto* independence from government interference. Although some concessions were made to these ends in the Equality Act 2006, they do not appear to have been sufficiently robust to overcome the problems created by the EHRC’s establishment not as a ‘constitutional watchdog’ supervised by Parliament but as a non-departmental public body accountable to Ministers. These arrangements enabled Ministers and officials to impose their will directly or indirectly on the EHRC, especially through the use of financial leverage and the threat of further reform. Although the EU Equal Treatment Directives require national equality bodies to be ‘independent’, the independence of integrated bodies may be lacking if the UN Paris Principles (which establish clear standards in respect of the independence of human rights institutions) have not provided a primary frame of reference in this

regard. Independence is though as much a matter of organisational culture and behaviour as it is status and accountability arrangements. Difficulties experienced by the EHRC in achieving unqualified accounts in its first few years were seized upon to suggest that it lacked the composite abilities to manage its expenditure, giving rise to much tighter government controls, such as those imposed through the ‘framework agreement’ between EHRC and its sponsor department 2012-13. Perceptions of independence can differ across different stakeholder communities – for example some civil society stakeholders may associate independence with strong advocacy for minorities, whereas others such as business stakeholders may associate independence with neutrality and even handedness. Combining promotional and enforcement roles brings such questions centre stage and requires reconciling in relation to decisions to integrate equality and human rights bodies.

2 The institutional and legal framework for the protection and promotion of equality and human rights in Britain

2.1 The United Kingdom of Great Britain and Northern Ireland enjoys four statutory bodies for the protection and promotion of equality and human rights. These are the Equality and Human Rights Commission for England, Wales and Scotland, the Scottish Human Rights Commission, the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission. Other bodies are also mandated to protect particular human rights, including the Children’s Commissioners in England, Scotland, Wales and Northern Ireland, the Information Commissioner, the Care Quality Commission and the Prisons Inspectorate. This study focuses on the Equality and Human Rights Commission as the only body which presently integrates the functions of a national equality body, as defined by EU law and a national human rights institution, as defined by the Paris Principles.

2.2 The Equality and Human Rights Commission was established by the Equality Act 2006. With respect to its role as a national equality body, it is a ‘promotion type’ body rather than a ‘tribunal type’ body.⁴

2.3 Duties

2.3.1 The Commission has a ‘general duty’,⁵ which requires it to exercise its functions with a view to ‘encouraging and supporting the development of a society in which:

people's ability to achieve their potential is not limited by prejudice or discrimination, there is respect for and protection of each individual's human rights, there is respect for the dignity and worth of each individual, each individual has an equal opportunity to participate in society, and there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

2.3.2 The Commission’s duties with respect to equality and diversity⁶ require it to

- Promote understanding of the importance of equality and diversity,
- Encourage good practice in relation to equality and diversity,
- Promote equality of opportunity,

⁴ The European Network of Equality Bodies (Equinet) describes two typical types of equality body in the European Union, and provides the following explanation: ‘Tribunal type equality bodies are predominantly concerned with generating findings on discrimination while promotion type equality bodies are predominantly concerned with providing legal advice and support to victims of discrimination and supporting good practice by employers and service providers.’ See: Equality bodies and national human rights institutions – making the link to maximise impact, Equinet 2011

⁵ Section 3, Equality Act 2006

⁶ Section 8 Equality Act 2006

- Promote awareness and understanding of rights under the equality enactments
- Enforce the equality enactments,
- Work towards the elimination of unlawful discrimination, and
- Work towards the elimination of unlawful harassment.

2.3.3 With respect to human rights⁷, the Commission’s duties require it to use its powers to:

- Promote understanding of the importance of human rights,
- Encourage good practice in relation to human rights,
- Promote awareness, understanding and protection of human rights
- Encourage public authorities to comply with section 6 of the Human Rights Act 1998

The Act makes clear that ‘human rights’ refers both to those rights included in the European Convention of Human Rights and ‘other human rights’ such as those conferred by the UN Convention on Economic, Social and Cultural Rights and other international human rights treaties.

The Act also creates a bridge between the human rights, equality and diversity and good relations duties of the Commission by requiring that ‘In fulfilling a duty under section 8 (equality) or 10 (good relations) the Commission shall take account of any relevant human rights’⁸ and through clarifying that ‘A reference in this Part (including this section) to human rights does not exclude any matter by reason only of its being a matter to which section 8 or 10 relates.’⁹

Reflecting the decision of the Scottish Parliament to establish the Scottish Human Rights Commission, the EHRC is not permitted to ‘take human rights action in relation to a matter if the Scottish Parliament has legislative competence to enable a person to take action of that kind in relation to that matter.’¹⁰

2.3.4 The Commission previously had a duty to promote ‘good relations’¹¹ (this duty was repealed by the Enterprise and Regulatory Reform Act 2013). It required the Commission to use its powers to:

- Promote understanding of the importance of good relation between members of different groups, and between members of groups and others
- Encourage good practice in relation to relations between members of different groups, and between members of groups and others,
- Work towards the elimination of prejudice against, hatred of and hostility towards members of groups, and work towards enabling members of groups to participate in society.

⁷ Section 9 Equality Act 2006

⁸ Section 9 (4) Equality Act 2006

⁹ Section 9 (5) Equality Act 2006

¹⁰ Section 7 Equality Act 2006

¹¹ Section 10 Equality Act 2006

2.3.5 The Commission is required to monitor the effectiveness of equality and human rights enactments¹² and may:

- Advise central government about the effectiveness of any of the equality and human rights enactments;
- Recommend to central government the amendment, repeal, consolidation (with or without amendments) or replication (with or without amendments) of any of the equality and human rights enactments;
- Advise central or devolved government about the effect of an enactment (including an enactment in or under an Act of the Scottish Parliament);
- Advise central or devolved government about the likely effect of a proposed change of law.

2.3.6 The Commission is also required to ‘monitor progress’ on equality and human rights, specifically:

- from time to time identify:
- changes in society that have occurred or are expected to occur and are relevant to the duties specified in sections 8 and 9,
- results at which to aim for the purpose of encouraging and supporting changes in society that are consistent with those duties (“outcomes”), and
- factors by reference to which progress towards those results may be measured (“indicators”).
- Publish a progress report every five years to be laid before Parliament by the Minister

This duty was amended by the Enterprise and Regulatory Reform Act 2013. Previously the Commission was required to monitor and report on progress towards the aim set out at section 3 of the Equality Act 2006 and to report every three years.

¹² Section 11 Equality Act 2006

2.4 Powers

2.4.1 The EHRC has a broad range of powers. These powers are not however equally available to use across its duties in relation to human rights, equality and diversity and good relations. The table below summarises the relationship between the EHRC’s duties and powers.

	Human Rights	Equality & Diversity	Good Relations¹³
Duties and Powers			
Providing legal assistance to individuals	X	✓	N/A
Arrange conciliation	X	X (this power was repealed by the Enterprise and Regulatory Reform Act 2013)	N/A
Conduct Inquiries	✓	✓	✓
Conduct Investigations, issue unlawful act notices	X	✓	N/A
Establish agreements	X	✓	X
Judicial Review	✓	✓	N/A
Interventions (Amicus)	✓	✓	N/A
Carry out assessments	X	✓	N/A
Issue compliance Notices	X	✓	N/A

¹³ Although the Commission’s ‘general duty’ includes a duty to promote good relations, the Commission’s specific duties and powers in relation to good relations were repealed by the Enterprise and Regulatory Reform Act 2013. The table above relates to the Commission’s duties and powers prior to these reforms.

Provide information & advice	✓	✓	✓
Draft Codes of Practice	X	✓	N/A
Conduct research	✓	✓	✓
Make grants	✓	✓	✓
Cooperate with others (e.g. other NHRIs)	✓	Not explicitly	✓

2.5 Status, Independence and Accountability

2.5.1 The EHRC is an executive ‘non-Departmental public body’¹⁴, accountable to the government Minister for Women and Equalities. The Commission is required to submit its strategic plan, annual report and reports concerning progress on equality and human rights to the Minister, to be laid before Parliament. The Minister has power to determine the EHRC’s budget, ensuring that it is "reasonably sufficient" to enable it to perform its functions. The Commission’s independence in the context of this accountability arrangement relies in law on schedule 1, s42 of the Equality Act 2006. It states that:

- The EHRC shall not be regarded as the servant or agent of the Crown, or enjoy the status, immunity or privilege of the Crown
- Commissioners, investigating Commissioners or employees of the Commission are not regarded as civil servants
- The Minister shall ‘have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining its activities, its timetables and its priorities’.

2.5.2 The EHRC is also recognised as a ‘regulator’ by the Legislative and Regulatory Reform Act 2006 and subject to a statutory Code of Practice concerning the manner by which it discharges its duties and powers.¹⁵

2.5.3 The power to appoint Commissioners, including the Chair resides with the government Minister for Women and Equalities. Although the EHRC is empowered

¹⁴ Add definition of what this means.

¹⁵ Clause 19 of the Legislative and Regulatory Reform Act 2006 requires that regulatory activities must be carried out in a way which is "transparent, accountable, proportionate and consistent", and should be targeted only at cases in which action is needed. Clause 20 and enables a minister to introduce a mandatory [Code of Practice](#) for regulators.

to appoint its own Chief Executive, because the Chief Executive is also an ex-officio Commissioner, the appointment can only be made with the consent of the Minister. Though not stipulated in the Equality Act 2006, the recent appointment of the EHRC's new chair, Baroness Onora O'Neill was subject to pre-appointment scrutiny by the Joint Parliamentary Committee on Human Rights at the request of the Minister for Women and Equalities, providing one positive concession towards Parliament having an increased accountability role vis-a-vis the EHRC.¹⁶

2.5.4 The Minister is responsible for determining the remuneration of the Chair, Deputy Chair and Commissioners as well as travel, pension, allowances or gratuities.

2.5.6 The EHRC is technically empowered to employ its own staff. However the numbers, terms and conditions of staff appointments have to be approved by the government. Until recently, the Commission has been subject to rules which meant that it had to prioritise recruitment from within the civil service. This rule has shaped the character of the Commission's present Senior Management Team (SMT), all of who now come from a civil service background, in contrast to the first SMT whose backgrounds included in addition to the civil service, charities/voluntary sector, journalism, academia, human rights activism and public administration.

2.6 Additional Functions

2.6.1 The EHRC, along with the Scottish Human Rights Commission, the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland has been designated by the UK government as the 'independent mechanism' under Article 33 (3) of the United Nations Convention on the Rights of Persons with Disabilities.

2.7 Reform of the Equality and Human Rights Commission

2.7.1 During 2012/13 the UK Government sought to implement wide-ranging legislative and non-legislative reforms of the Equality and Human Rights Commission, accompanied by significant cuts in the Commission's annual budget.

2.7.2 The Enterprise and Regulatory Reform Bill¹⁷, proposed to repeal the 'General Duty', the EHRC's duty to promote 'good relations', to amend its duties in relation to monitoring progress and to remove its power to arrange conciliation. These legislative proposals followed a consultation on reform of the Commission carried out in 2011 which originally also envisaged amendments to the Commission's duties in respect of equality and diversity.¹⁸ The government was defeated in the House of Lords with respect to repeal of the General Duty, but successfully secured the other reforms. The government has also launched a review of the Public Sector Equality

¹⁶ See: <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/48/48.pdf>

¹⁷ The Enterprise and Regulatory Reform Bill follows the UK Government's 'red-tape challenge' which proposes to remove regulation in order to promote enterprise and economic growth

¹⁸ Home Office (2012) Building a fairer Britain – reform of the Equality and Human Rights Commission

Duty¹⁹, the terms of reference for which include reviewing the EHRC's duties and powers which could result in further reforms.²⁰

2.7.3 The UK government has already determined that it will cease to fund the EHRC to provide a helpline, to run a strategic grants programme, or to arrange conciliation and has reduced its budget accordingly. The Government Equality Office has itself funded the establishment of an advice service to replace the EHRC's Helpline.²¹ It has conducted a "comprehensive budget review" of the EHRC's budget, requiring the EHRC to provide evidence (for example on the basis of a bench-marking exercise with other NHRIs) for budget so carry out its functions under the Equality Act 2006, EU Equal Treatment Directives, and UN Paris Principles. This came on top of pre-planned budget reductions, placing the EHRC's administrative budget at £25.04 million for 2013/14, with the possibility of accessing a further £7.8 million programme budget. In June 2013 it was announced that the Commission would be subject to a further 10% cut in its administrative budget in 2015/16. This compares with pro-rata budget of £70 million for the year 2007-8. 2.7.4 In April 2012, the government and the EHRC published their 2012-13 'framework agreement'²² detailing accountability arrangements between the EHRC and its sponsor department, the Equalities office, now part of the Department for Culture, Media and Sport. The 'framework agreement' states that it has been developed with reference to the principles agreed by the UN General Assembly regarding the status and mandate of national human rights institutions (the Paris Principles). Among other arrangements, the agreement imposes on the Commission arrangements (some of which are standard in the relationship between government and non-departmental public bodies) including:

- Committing the EHRC to securing the agreement of government with respect to all expenditure on marketing and promotion
- Committing the EHRC to sharing all 'near final versions' of external EHRC communications 48 hours before issue
- Setting out how EHRC should engage with Parliament
- Committing the Chief Executive of the EHRC to meet with the Director of the Equalities Office fortnightly.

2.7.5 Following two sets of unqualified accounts, the Government and EHRC renegotiated their Framework Agreement for 2013-14 resulting in:

- the removal of a range of operational controls;

¹⁹ <http://www.legislation.gov.uk/ukpga/2010/15/section/149>

²⁰ <http://www.homeoffice.gov.uk/equalities/equality-act/equality-duty/equality-duty-review/>

²¹ <http://www.equalityadvisoryservice.com/>

²²

http://www.equalityhumanrights.com/uploaded_files/aboutus/ehrc_framework_agreement_april_2012.pdf

- a series of steps to increase the EHRC's accountability to Parliament, for example for the EHRC to answer its own Parliamentary Questions, via correspondence, rather than via Ministers; and
- Agreement that if any of the mechanisms in the Framework are found in operation to restrict the EHRC's ability to perform its functions independently then they will be immediately reviewed.

2.8 Legal Framework for the Protection and Promotion of Equality and Human Rights in Britain

- 2.8.1 Britain enjoys some of the most advanced and comprehensive equality and human rights law in the world.
- 2.8.2 The Equality Act 2010²³ consolidated pre-existing anti-discrimination law and extended protection from discrimination, including in the field of education and goods and services, and the duty to promote equality of opportunity to new 'protected characteristics' including age, sexual orientation and gender re-assignment. It included new proposals to address systemic inequality including positive action provisions and in relation to equal pay, improved protection from employment discrimination for disabled people and included a provision to require public authorities to address socio-economic disadvantage in their decision making (though this provision has not been implemented). The government recently secured reforms to the Equality Act 2010 including repealing its provisions in relation to third party harassment and the 'questionnaire procedure' in relation to employment discrimination. The government has also announced a review of the 'public sector equality duty', introduced²³ by the 2010 Act, which places a duty on public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and to foster 'good relations' between individuals and groups.
- 2.8.3 The Human Rights Act 1998²⁴ (HRA) which came into force on 2 October 2000, incorporated the rights contained in the European Convention on Human Rights into UK law. It applies to all public bodies within the UK, including central government, local authorities, and bodies exercising public functions. It enables cases to be brought under the European Convention on Human Rights within the UK Courts and requires the Courts in the UK to have regard to the Convention and permits them to have regard to the jurisprudence of the European Court of Human Rights. Ministers are required to accompany all Bills laid before Parliament with a 'statement of compatibility' with the ECHR. The Supreme Court of the UK does not have powers to 'strike down' legislation, but it can issue a 'declaration of incompatibility'. The coalition Government which came to power in May 2010 set up an independent commission to review the case for a 'British Bill of Rights' to replace the HRA. The

²³ Equality Act 2010 <http://www.legislation.gov.uk/ukpga/2010/15/contents>

²⁴ Human Rights Act 1998 <http://www.legislation.gov.uk/ukpga/1998/42/contents>

Commission on a Bill of Rights published its report on 18th December 2012.²⁵ The Commission failed to reach a consensus on the way forward and legislative reform is not envisaged prior to the 2015 General Election. However, senior Conservative Party Ministers, including the Prime Minister, Lord Chancellor and Home Secretary have indicated that a future majority Conservative Government would repeal the Act and explore wholesale withdrawal from the European Convention on Human Rights.

- 2.8.4 The UK is presently a party to the European Convention on Human Rights and other Council of Europe Human Rights Conventions and undertakes to secure and guarantee the fundamental civil and political rights defined in the Convention to all persons under its jurisdiction. The Council of Europe has also concluded 6 protocols to the ECHR and a number of other human rights conventions, some of which the UK is party to as well (including the European Convention for the Prevention of Torture and Council of Europe Convention on Action against Trafficking of Human Beings).
- 2.8.5 The UK has not ratified Protocol 12 of the ECHR, adopted on 4 November 2000, which provides a freestanding right to non-discrimination. Unsuccessful attempts were made to do so via proposed amendments to the Equality Act 2010 proposed by among others the Equality and Human Rights Commission.²⁶
- 2.8.6 Human rights protection in the EU is secured by the EU Charter of Fundamental Rights, which requires the EU institutions to comply with the Charter rights in all EU legislation and policy, and requires member states to do so also when implementing EU law. EU law itself secures a range of rights for EU citizens, particularly through the EU equality and non-discrimination directives. The EU has also ratified the United Nations Convention on the Rights of Persons with Disabilities
- 2.8.7 The UK has ratified seven of the UN's international human rights treaties:
- International Convention on the Elimination of All Forms of Racial Discrimination 1965, UK: 1969
 - International Covenant on Civil and Political Rights 1966, UK: 1976
 - International Covenant on Economic, Social and Cultural Rights 1966, UK: 1976
 - Convention on the Elimination of All Forms of Discrimination against Women 1979, UK: 1986 and its Optional Protocol
 - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984, UK: 1988
 - Convention on the Rights of the Child 1989, UK: 1991 and the Optional Protocol on the sale of children, child prostitution and child pornography

²⁵ Ministry of Justice (2012) 'A UK Bill of Rights? The Choice Before Us' – report of the Commission on a Bill of Rights

²⁶ **Article 1 – General prohibition of discrimination.** 1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

- Convention on the Rights of Persons with Disabilities and its Optional Protocol 2008, UK: 2009.

The UK takes a 'dualist' approach the implementation of its UN human rights treaty obligations, which means that it undertakes to ensure the implementation of its treaty obligations via national laws, policies and programmes rather than the treaties becoming part of national law.

- 2.8.8 The common law provides protection for many 'traditional' civil liberties, including the right to jury trial, habeas corpus, and others, some but not all of which have been superseded by the Human Rights Act. Many rights contained in the ECHR and the UN human rights treaties are also protected by or supplemented by domestic legislation, such as the Children's Act 2004.

3. Background to the Present Situation

3.1 The chapter looks at the developments which led to the combination of the functions of an equality body and national human rights institutions in the EHRC and those since its establishment related to its capacity to integrate these functions.

3.2 Equality and human rights – separated by history

3.2.1 Spencer (2005) noted how *‘in contrast to common practice abroad, equality and human rights work in Britain has operated in almost entirely different spheres.’*²⁷

Prior to the early 2000s equality and human rights were governed by separate legislative regimes, and different ‘communities of expertise’ had developed in each area. Furthermore, the legislative and institutional infrastructure that related to anti-discrimination was more embedded than its human rights counterpart: Britain had a 30 year long history of anti-discrimination legislation and bodies in contrast with having had no experience of a human rights Commission prior to 2007.²⁸ The anti-discrimination bodies which predated the EHRC did not possess explicit duties or powers to protect or promote human rights.

3.2.2 Spencer (2005) also noted how, despite the equality provisions of international and European human rights standards, such as the Universal Declaration on Human Rights, European Convention on Human Rights and treaties including the Convention on the Elimination of Racial Discrimination, this *‘international dimension had very little impact on the development of the UK’s own anti-discrimination legislation’* and that *‘the absence of domestic legislation incorporating broader human rights standards into UK law, legislation and practice to address discrimination in employment, goods and services has developed largely in isolation from related human rights concepts.’*²⁹ Britain’s primary inspiration had come from the civil rights laws of the United States. de Búrca (2011) notes how *‘several of the core concepts and provisions of EU anti-discrimination law...were drawn from the United Kingdom’s anti-discrimination laws of the 1970’s. These UK laws, in particular the 1975 Sex Discrimination Act and the 1976 Race Relations Act, were in turn strongly influenced by U.S. law at the time.’*³⁰ Rudolf & Mahlmann (2007) claim that *“British anti-discrimination law was imported from the United States. It has now been exported to Europe through its influence on the directives that regulate discrimination in the European Union.”*³¹ De Witte (2012) traces the origins of the idea of national

²⁷ Spencer, S (2005) ‘Partner Rediscovered – human rights and equality in the UK’

²⁸ The Commission for Racial Equality 1976-2007, the Equal Opportunities Commission 1975-2007 and the Disability Rights Commission 2000-2007

²⁹ Spencer, S (2005) ‘Partner Rediscovered – human rights and equality in the UK’

³⁰ de Búrca (2012) The Trajectories of European and American Anti-Discrimination Law, New York University School of Law

³¹ See Mahlia Malik, *Anti-Discrimination Law in Britain*, in GLEICHBEHANDLUNGSRECHT, 135 (Beate Rudolf & Matthias Mahlmann eds., 2007)

equality bodies to the creation of the Equal Employment Opportunity Commission by the U.S. Civil Rights Act in 1964.³²

- 3.2.3 Similarly, Fredman (2003) noted *‘in most jurisdictions, equality is firmly embedded within human rights law. By contrast, anti-discrimination law in Britain has emerged from labour law, and pre-dates human rights law by a long way.’* Fredman went on to note how *‘it might have been expected that this would change with the incorporation (via the Human Rights Act 1998) of the ECHR. However, little attempt has been made to build bridges between the two jurisdictions.’*³³ Although Britain has developed some of the most comprehensive and sophisticated pieces of equality legislation and human rights law anywhere in the world, the two areas of law remain largely unconnected save for the fact that the Courts and public authorities must act in compliance with section 6 of the Human Rights Act 1998 when implementing or interpreting the Equality Act 2010.

3.3 Calls to create a human rights commission

- 3.3.1 Calls for a human rights commission from within the UK ran alongside campaigns for a domestic law to incorporate the European Convention on Human Rights. Lord Anthony Lester QC introduced two Private Members Bills to these ends including The Human Rights (No 3) Bill 1993, which included provision for a human rights Commission. A number of international developments emanating from the United Nations and Council of Europe, including the elaboration of the ‘Paris Principles’ regarding the status and mandate of national human rights institutions (1991)³⁴ the Vienna Declaration and Programme of Action (1993)³⁵ and Recommendation No.R (97) 14 of the Committee of Ministers to Member States on the Establishment of Independent National Human Rights Institutions (1997)³⁶ had also promoted the development of national human rights institutions by States.
- 3.3.2 In 1993, the Labour Party adopted a formal policy to pursue incorporation of the European Convention on Human Rights via a Human Rights Act. Its 1996 consultation paper ‘Bringing Rights Home’, was ambivalent about the idea of a human rights commission and the Labour Party’s 1997 election manifesto did not include a commitment to establish such a body. However, shortly before the election, the Labour Party had agreed with the Liberal Democrats that a human rights commission or ‘Commissioner’ should be established to: *‘provide advice and assistance to those seeking the protection of the rights enshrined in the Convention,*

³² Bruno de Witte, *New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance*, 60 AM. J. COMP. L. (2012).

³³ Fredman, S, (2003) *The Future of Equality in Britain*, Working Paper Series No.5, Equal Opportunity Commission

³⁴ <http://www2.ohchr.org/english/law/parisprinciples.htm>

³⁵ <http://www2.ohchr.org/english/law/vienna.htm>

³⁶

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&%20InstranetImage=567349%20%20&SecMode=1&DocId=578706&Usage=2>

*and be itself able to bring proceedings to ensure effective compliance with the ECHR, whether by judicial review or by representative proceedings on behalf of a number of people’.*³⁷

- 3.3.3 The White Paper ‘Rights Brought Home – The Human Rights Bill’ (1997) said that the government ‘*has not closed its mind to the idea of a new Human Rights Commission at some point in the future in the light of practical experience of the working of the new legislation.*’ The White Paper proposed that Parliament established a human rights Committee and that one of its early tasks should be to conduct an inquiry into whether: ‘*a human rights Commission is needed and how it should operate. The Government would want to give full weight to the Committee’s report in considering whether to establish such a Commission in future*’³⁸
- 3.3.4 In 1998, a report from the Institute of Public Policy Research, (funded by the Nuffield Foundation), into options for a human rights Commission in Britain and Ireland had arrived at the conclusion that at least some degree of integration between anti-discrimination and human rights would be necessary. It suggested that ‘*the full Human Rights Commission could thus comprise: the UK, Scottish, Welsh and English Human Rights Commissioners; the Chief Commissioner of the Northern Ireland Human Rights Commission; the Race Equality Commissioner, Gender Equality Commissioner, Privacy Commissioner, Disability Rights Commissioner and Children’s Rights Commissioner.*’³⁹ This proposal was however met with opposition from equality stakeholders in particular. Writing in 2005, Spencer noted how ‘*when a colleague and I at the IPPR first proposed in 1998 that a human rights commission be established and that the equality commissions be brought within its umbrella, we met resistance even to the idea that equality is a human rights issue, and institutional fears that equality would, within such an institution, be dwarfed by a vast and controversial human rights agenda.*’⁴⁰ Proposals during the Human Rights Bill’s passage through Parliament to incorporate provisions for an independent human rights Commission – some of which proposed incorporation of the functions of the existing Equal Opportunities Commission and Commission for Racial Equality - were unsuccessful.
- 3.3.5 The subsequent inquiry into the case for a Human Rights Commission by the Joint Committee for Human Rights (JCHR) received evidence of widespread support for such a body. Its interim report⁴¹ (2002) included the following quotes given in evidence:

³⁷ Report of the Joint Consultative Committee on Constitutional Reform (1997)

³⁸ Rights Brought Home – The Human Rights Bill 1997

³⁹ Spencer, S & Bynoe, I (1998) A Human Rights Commission – The options for Britain and Northern Ireland

⁴⁰ Spencer, S (2005) Partner Rediscovered – human rights and equality in the UK

⁴¹ Joint Committee on Human Rights (2002) – the case for a human rights commission

- Baroness Amos (a former chief executive of the Equal Opportunities Commission): *‘We need a body which will raise public awareness, promote good practice, scrutinise legislation, monitor policy developments and their impact, provide independent advice to Parliament and advise those who feel that their rights have been infringed. I am particularly keen to see the promotion of an inclusive human rights culture which builds on the diversity of British society. That would be a key role for any human rights body to play.’*
- Baroness Williams of Crosby: *‘The great advantage of a Human Rights Commission or Commissioner is that it would make human rights open to the public, it would encourage the public to own human rights in a way that would not be exclusive either to Parliament or to the legal profession but should be the beginning of a real and profound change in the democratic ethos and sense of freedom in this country ... I (also) believe the training and education of public bodies is just as important as the establishment of case law. I fear that, for failure to train them in what the Bill means, we shall see a great deal of litigation that is unnecessary, expensive, slow, tedious and repetitive.’*
- Lord Woolf, then Master of the Rolls, had expressed the belief outside Parliament that *‘The most important benefit of a Commission is that it will assist in creating a culture in which human rights are routinely observed without the need for continuous intervention by the courts. Human rights will only be a reality when this is the situation.’*

3.3.6 The concerns expressed during the passage of the Human Rights Bill continued to be expressed after the Act was brought into force on 2nd October 2000:

*‘Without a body that has the powers and the resources to raise awareness about human rights in the first place, and that is able to back that up with the power to take action in support of individuals and groups who are suffering human rights violations, we do not believe human rights will really come alive as a meaningful factor in most people's relationships with public authorities’.*⁴²

3.4 Towards a single equality body

3.4.1 In May 2002, the UK Government announced what it described as *‘the most significant review of equality in over a quarter of a century.’* The spur for this review was the adoption by the European Union of the Race Directive and Equal Treatment Directive (2000)⁴³ leading to the expansion of equality grounds to encompass race, gender, disability, age, religion and belief and sexual orientation. The review raised

⁴² Quote from Children’s Society including in JCHR 6th Report 2002/3 The Case for a Human Rights Commission

⁴³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

the question of what, if any, institutional support should be provided in relation to the three new grounds of age, religion and belief and sexual orientation. The 2002 government consultation paper, *Towards Equality and Diversity: Implementing the Employment and Race Directives*, said:

'We think there are good arguments to move, in the longer term, towards a single Equality Commission. Such a commission could offer support to individuals and business covering discrimination on all aspects of equality.'

3.4.2 The government's review was mandated in its terms of reference to *'consider the relationship between possible new arrangements for promoting equality and those for promoting and protecting human rights more widely.'*

3.5 The case for human rights to be included in the new body's remit

3.5.1 The next consultation paper from the Government published in October 2002 noted the "*complementary nature of equality and human rights*" which was *'...reflected in the government's vision of a society based on fair and equal treatment for all and respect for the dignity and value of each person.'*⁴⁴ It recognised a range of views on institutional support regarding the Human Rights Act 1998 although it did not advocate a particular route forward.

3.5.2 The government's consultation paper noted the distinction that had historically been made between the focus of human rights on fundamental civil and political rights, designed to safeguard the individual in their relationship with the state, and the focus of equality legislation on social and economic protection, in particular protection from discrimination in employment and in the provision of education, goods and services. But it also argued that these distinctions were breaking down in the light both of the race equality duty on the public sector and the aim of the Human Rights Act to drive cultural change, placing obligations on public authorities but also increasingly on individuals.

3.5.3 The Joint Committee on Human Rights was compelled to take account of these developments in its inquiry into the case for a human rights commission commenting that: *'This human rights dimension is an unavoidable element of the debate on the single equality body'*. It considered the differences and similarities between the agenda of any proposed human rights commission and the proposed single equality body⁴⁵:

<i>The work of a human rights commission would be:</i>	<i>The work of the proposed single equalities body will be:</i>
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⁴⁴ Department for Trade and Industry (2002) Equality and Diversity – Making it Happen

⁴⁵ JCHR 6th Report 2002/3 The Case for a Human Rights Commission

Inclusive of the whole population, while recognising that particular groups are especially vulnerable to violations of their rights.	Inclusive of the whole population, while focussed on the need to address the specific discrimination experienced by particular groups.
Focussed on Convention rights, but also taking into account a wider range of rights including those embodied in other international human rights instruments, some of which will have a stronger association with equality than others	Focussed on rights under domestic discrimination legislation and European law, but also taking into account the discriminatory violation of the human rights of particular groups, and international human rights instruments relating to the elimination of discrimination.
Focussed on the power of public authorities over, and their obligations towards, the individual, and on discrimination in access to civil and political rights, but also taking into account the rights of those employed by public authorities, and the protection of individuals or vulnerable groups in the enjoyment of their rights.	Focussed on the duties of private and public employers towards individuals and groups and on the obligations of private and public service providers to individuals and groups, but also taking into account the opportunities for individuals and groups to exercise their civil and political rights without discrimination.
Focussed on promoting cultural change and the mainstreaming of human rights principles into policy and service delivery to forestall infringements of individual rights, but also on protecting individuals' rights through raising awareness and giving guidance on seeking redress.	Focussed on protecting individuals' rights and the enforcement of detailed legislative provisions, but also on promoting systemic change and the mainstreaming of equality principles into policy and service delivery to forestall discriminatory practices
Focussed on promoting the idea of positive obligations under (the UK's domestic human rights law) the Human Rights Act.	Focussed on enforcing the general statutory duty under the Race Relations (Amendment) Act (since built upon to extend a positive duty to have due regard to the need to eliminate discrimination and advance equality of opportunity across all protected characteristics in the Equality Act 2010

3.5.4 The JCHR considered the merits of a range of options including a stand-alone equality commission, an equality commission with a human rights remit, separate equality and human rights commissions or a single human rights and equality

commission. The Committee paid particular attention to matters of public receptiveness towards human rights, viewing a particular advantage of an integrated body as aiding its ability to promote a culture of respect for human rights, with which a separate human rights body would struggle:

A human rights commission would be hampered in this mission if it was cut off from involvement in many of the day-to-day concerns of citizens going about their lives—concerns about, for example, their equal treatment at work, the care of their elderly parents or disabled children, their equal right to observe their religious practices and express their beliefs at work or at school, their equal access to education, and so forth.’ ‘The greatest risk, we fear, is that the human rights body would be in danger of being depicted (not only outside Government circles) as the champion largely of the criminal, subversive, alien or just plain eccentric, and standing in opposition to the state and the interests of the majority of its citizens⁴⁶.

- 3.5.5 Interviewees for this study suggested that this now common narrative about human rights, coupled with the government’s proposals for a single equality body caused those who had previously sought a stand-alone human rights commission to arrive at a political calculation that there was now no realistic prospect of this coming about. At this point they began to pursue instead the inclusion of an explicit human rights remit as part of the proposed new equality body, judging this to be better than having no human rights commission at all.
- 3.5.6 Early arguments and proposals for the inclusion of human rights in the new body appear to have been designed to play down the fears of detractors, emphasising that the inclusion of human rights did not amount to a ‘seventh strand’, that there would be no need for a specialised human rights commissioner or human rights department, and in particular that the body should not have powers to take legal cases or provide individual legal advice. Human rights was posited as the framework within which the new body would operate, viewing equality as a basic human right of relevance to all. As one interviewee put it *‘the different strands of equality would be the fish swimming in the pool of human rights.’* As a consequence, early proposals regarding the inclusion of human rights in the new body appear very modest, calling only for the body to have a duty to promote human rights, and relied almost entirely on the mainstreaming of human rights into the work of the single equality body rather than human rights being accorded its own distinctive focus. One interviewee explained how this tactical approach set the tone for subsequent discourse regarding the proposed body which overwhelmingly characterised human rights as an ‘add on’ to the Commission’s equality remit suggesting that: *‘it’s not entirely fair to blame the Chair, or the Board or staff for the lack of focus on human rights in (the Commission’s) early years. Little more had been expected of it.’*

⁴⁶ Ibid

3.5.7 The JCHR considered key risks facing an integrated body to be that, it may potentially have found itself to have too wide a remit for a single body leading to a loss of focus and specialist expertise on equality issues and that it would face difficulties in prioritising activities.. However, the JCHR concluded that an integrated equality and human rights body was now its preferred option: *‘There are arguments for and against a separate human rights commission standing alongside a separate single equality body. The practical advantages and disadvantages of the alternatives of a single integrated human rights and equality commission and two separate bodies for equality and human rights require careful consideration. There are strong arguments for moving, over the proposed timescale for the establishment of a single equality body, to the establishment of an integrated human rights and equality commission. This is our preferred option.’*⁴⁷

3.5.8 Spencer (2005) notes how debate regarding institutional arrangements for equality and human rights underwent notable shift at this point, with the hitherto opposed anti-discrimination bodies and NGOs now *‘insisting that any new statutory equality body must have a human rights mandate’*.⁴⁸ She attributes this change in approach to various drivers including:

- A perception that there was increasing congruence regarding the focus of equality and human rights on the actions of public services, especially in the light of the Stephen Lawrence Inquiry and the development of the public sector equality duty and the promotion, by government, of a non-legalistic conception of human rights as being designed to affect ‘culture change’ across public services, aligned strongly to its public services reform agenda. For example the JCHR (2002) said that a *‘principal purpose should be to foster a culture of respect for human rights through raising awareness of the need to promote human rights in public authorities in the delivery of services’*.⁴⁹
- The increasingly recognised opportunities presented by the Human Rights Act to ‘reach the parts equality law could not’, upholding rights to dignity in relation to such as areas as health and social care, and plugging gaps in the equality framework not least in relation to those ‘strands’ which at the time only enjoyed coverage in the area of employment and vocational training such as age.
- The promotion of human rights as shared values which could provide an ethical ‘highway code’ for living in a modern, multicultural society and as such provide a bridge and means to resolve conflict between individuals and ‘strands’ or ‘groups’.⁵⁰

⁴⁷ Ibid

⁴⁸ Spencer, S (2005) Partner Rediscovered – human rights and equality in the UK

⁴⁹ JCHR (2002) The Case for a Human Rights Commission

⁵⁰ Ibid

- 3.5.9 It is also perhaps worth noting that where the 1998 IPPR report (see 3.3.4 above) had proposed the incorporation of the existing anti-discrimination bodies into a human rights Commission, now the fundamentally different proposal was that human rights should be incorporated within the remit of a single equality body. Thus, human rights could be viewed as either ancillary or supplementary to the Commission's equality remit rather than as subsuming it, and debates regarding 'incorporation' focused instead on how the new body would address the different equality 'strands' within a single institutional structure.
- 3.5.10 It was announced by the Government on 30th November 2003 that the new body would have a human rights mandate and the subsequent White Paper 'Fairness for All: a new Commission on Equality and Human Rights' (2004) proposed an integrated body the 'Commission for Equality and Human Rights.'

3.6 The Commission for Equality and Human Rights Task Force

- 3.6.1 A 'Task Force' was subsequently established by the government, chaired by Ministers and consisting of members of the existing commissions, academic experts and representatives from civil society organisations linked to the 'new grounds' of age, religion or belief and sexual orientation or involved in the promotion of human rights.
- 3.6.2 The Task Force met in 2004-05 and discussed various options as to how such an integrated commission should be established. It looked at vision, duties and powers, governance, independence and accountability and the approach the new body should take in discharging its role.
- 3.6.3 The Task Force developed a vision, principles and values for the proposed body which presented an integrated approach to equality and human rights. For example, it employed human rights language, stating that '*everyone must be treated with respect for their dignity, autonomy and equal worth, be enabled to participate in society and have the opportunity to fulfil their potential*' (a form of words which was latterly reflected in the General Duty of the CEHR) and said that '*human rights and equality are inseparable and complimentary. A new vision has developed which positions human rights as common standards for the whole of society, and the communities and groups within it, alongside the fundamental rights of the individual protected in law.*'⁵¹
- 3.6.4 The Task Force considered the relationship between the Commission's human rights and equality mandate specifically at a meeting in February 2004. It noted how bringing together human rights and equality in the CEHR reflected a vision based on '*the common value of respect for the dignity and worth of each person*' and argued

⁵¹ CEHR Taskforce final report 2004

that *‘the inclusive nature of human rights reinforces the concept of equality as relevant to all and not a minority concern.’*⁵²

3.6.5 The Task Force suggested that human rights should be promoted as *‘core ethical values shared by society as a whole, supporting social cohesion and providing a framework for resolving potential conflicts between rights.’*⁵³

3.6.6 It also concluded that *‘there are strong arguments for integrating human rights promotion into the CEHR’s broader work, though there will need to be provision for separate work in the areas of human rights with no link to equality.’* By way of example of an ‘integrated approach’ it suggested:

- *‘Advice and information provision through a website, helpline and publications*
- *Promoting mainstreaming of equality and human rights in the public sector where there are clear synergies between work in these two areas and scope for joint delivery*
- *Promotion of good practice to employers and service providers: good human rights practice would also be promoted to private sector contractors via public authorities*⁵⁴

3.6.7 To enable the Commission to adopt an integrated approach, the Task Force adopted a guiding principle that, except where there were special reasons to the contrary, the powers of the new body would apply across the breadth of its work. However, Ministers had already determined the Commission would not have powers to provide assistance to individuals in support of freestanding human rights cases. Some members of the Task Force argued that there was a case for the Commission to have some strategic legal tools to support its promotional role, where their sparing use would help drive forward the development of a human rights culture. The government’s response is telling with respect to the place of human rights in the hierarchy of priorities for the new body: *‘Making an exception to the policy in relation to freestanding individual human rights cases would undermine the policy and open up the scope for litigation well beyond the six strands scheme, which is not the government’s current plan. Moving in that direction would likely disrupt the equality focus on the new body.’*⁵⁵

3.6.8 It was noted that the new body would, in meeting its own responsibilities under section 6 of the Human Rights Act 1998, need to ensure that it discharged its enforcement (and other) powers in relation to equality in a manner compatible with the ECHR, and that the Courts were required to interpret all legislation, including anti-discrimination law in a way that is compatible with the Convention. It was also accepted that the Commission should be empowered to support cases under section 7 of the Human Rights Act where they arose from the same facts as the discrimination

⁵² Minute of CEHR Task Force meeting February 2004

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ CEHR Taskforce final report 2004

case that it was supporting, in the same way that the existing Commission's had been able to support claims arising from other statute such as in relation to unfair dismissal where there was a discrimination component.

- 3.6.9 The Task Force also recommended that amicus curiae powers with respect to human rights should be made explicit in the Commission's statute, and that the Commission should have powers to bring judicial review in its own name under the Human Rights Act.

3.7 Independence and accountability

- 3.7.1 The Task Force concluded that accountability arrangements for the new organisation should *'position the organisation as a non-departmental public body with the appropriate levels of independence, legitimacy, authority and credibility with all its stakeholders.'*⁵⁶ It appears that the Paris Principles regarding the status and mandate of national human rights institutions may have been discussed during debates regarding accountability arrangements and informed the approach, but they do not appear to have provided a template (as in the more recent developments in Ireland and the Netherlands). Parliamentary supervision was proposed, but rejected by Ministers. The government argued that *'the Non Departmental Public Body model has served perfectly satisfactorily for the anti-discrimination commissions, and they see no reason to abandon it. The main argument for adopting the traditional model for the CEHR is that it works, and is tried and tested.'*⁵⁷ The Minister, Lord Falconer also advanced the argument in his evidence to the Joint Committee on Human Rights (JCHR) that *'there were advantages to the present commissions being on the inside—essentially that they were nearer to the levers of influence.'*⁵⁸ The JCHR had argued for alternative arrangements on grounds that *'First and most fundamental is the nature of the relationship between human rights and the State. It is, as we have stressed several times in this report, the State itself which is bound by the Convention and other human rights treaties. Most NDPBs are dealing with non-state actors...Even the existing anti-discrimination commissions have traditionally been involved as much, if not more, with the private rather than the public sphere.'*⁵⁹
- 3.7.2 The subsequent Equality Bill was subject to amendments in the House of Lords in 2005 to strengthen the Commission's independence in line with the 'Paris Principles.' During these debates, Lord Lester of Herne Hill QC said *'We strongly believe that the new commission should be a constitutional watchdog, a strategic law enforcer and a promoter of good practice and public education. We regard it as essential that it will be independent of government and seen to be independent in the way in which its members are appointed and how it is funded. It should not be subject to ministerial*

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Joint Committee on Human Rights (2004) Commission on Equality and Human Rights – structure, function and powers, Eleventh Report of Session 2003/4

⁵⁹ Ibid

direction or dictation. Ultimately, the commission should be accountable to Parliament.⁶⁰ Lester was reflecting the views of the Joint Parliamentary Committee for Human Rights which had argued in 2004 that:

The time has come for the Government to recognise that there is a class of public bodies which have a distinctive constitutional role, and that these need to be designed with this special status in mind. It is not sufficient to pick the NDPB model off the shelf and apply it to every new public institution. There is an emerging, but rather unacknowledged group of these special bodies. They comprise at present the Parliamentary Commissioner for Administration, the National Audit Office and the Electoral Commission. Each does have a distinctive (though slightly different) accountability structure... The relevant shared characteristics of these bodies is that they are established as part of the constitutional machinery, supplementary to Parliament, to act as a check on abuse of executive power. It is inappropriate, therefore, for them to be beholden to Ministers in any way. So far as they are to be held accountable of their actions, and for their use of public money, it is the proper task of Parliament to ensure this. They should not, however, be creatures of Parliament. The basic principles for the design of independent national institutions supporting democracy are that they should enjoy—

- statutory guarantees of independence from both the executive and Parliament;
- a system of funding independent of direct ministerial control;
- independent staffing arrangements;
- statutory involvement of a parliamentary body in approving and overseeing its budget and strategic plan;
- parliamentary involvement in key appointments;
- direct reporting to Parliament.⁶¹

3.7.3 Clauses which had provided the Secretary of State with powers to direct the Commission to conduct inquiries and investigations were removed and a clause was included which was designed to clarify the Commission's independence in Schedule 1 of the Act (see 2.5 above). However, these fell short of proposals made regarding the Commission's independence by the JCHR and accountability remained (and remains) through Ministers.

3.8 Human rights slip down the agenda

3.8.1 During the course of the Bill through Parliament and during the establishment of the new organisation, debate focused overwhelmingly on the Commission's equality

⁶⁰ [Lords Hansard text for 15 Jun 2005 \(50615-09\)](#)

⁶¹ Joint Committee on Human Rights (2004) Commission on Equality and Human Rights – structure, function and powers, Eleventh Report of Session 2003/4

mandate including on maintaining the legacies and on-going work programmes of the existing bodies, while ensuring adequate focus and resources for the ‘new strands’ (age, sexual orientation, religion and belief). For example, an amendment was tabled by Lord De Mauley which proposed that the Commission’s strategic plan *‘shall, so far as it reasonably practical, aim at a proportionate and fair allocation of priorities, activities and resources to each of the different strands of the responsibilities of the Commission under this Act, varying with the circumstances prevailing from time to time.’*⁶² The Disability Rights Commission, with support from disability stakeholders, lobbied successfully for the inclusion of a statutory Disability Committee in the Equality Act 2006. The Commission for Racial Equality secured agreement with government that it should co-exist with the new Commission until October 2009, two years after the EHRC had opened for business, but following the appointment of Trevor Phillips as Chair of the EHRC (who was at the time chair of the CRE) the CRE was dissolved and replaced by the EHRC in October 2007 at the same time as the DRC and EOC. One interviewee noted how the overwhelming focus on equality may have stemmed from the fact that the draft legislation was called the ‘Equality Bill’ and not the ‘Equality and Human Rights Bill’ and because in addition to containing legislation to establish the EHRC, the Bill also included substantive provisions regarding the development of equality law in relation to gender, religion and belief and sexual orientation. This caused most of the debates in Parliament to be dominated by equality specialists rather than those with human rights interest and expertise.

3.8.2 As the Bill passed through Parliament, the government established a ‘transition team’ to begin the process of establishing the new body. The minutes of the advisory group set up in support of the transition team suggest that the Commission’s human rights remit was given very little attention. During an away-day on 22nd February 2005 one participant is recorded as expressing concern that the government was viewing human rights only as a framework for CEHR to conduct its business and overlooking express human rights duties. Discussion at the same away-day on the expertise required by the new body focused only in the correct balance between ‘specific or general strand expertise’ with no reference at all to human rights.⁶³ The specific piece of human rights work that was carried out at this time by the Department for Constitutional Affairs concerned the ‘contribution which human rights have to offer to the achievement of anti-discrimination and equality both generally and in respect to each strand of the CEHR project’⁶⁴

3.8.3 In any case, a great deal of the work and planning of this transition team (and the considerations of the Task Force before it) was abandoned upon the appointment of the Commission’s first Chair, Trevor Phillips in 2006 who, as one interviewee

⁶² [Lords Hansard text for 6 Jul 2005 \(50706-26\)](#)

⁶³ Minute of advisory group meeting 22nd February 2005

⁶⁴ Letter from Edward Adams, DCA to Kate Allen, WEU, March 2005

remarked, adopted a '*year zero*' approach. Phillips was at the same time appointed by Prime Minister Tony Blair to lead the 'Equalities Review', with the review – which focused wholly on equalities - positioned as providing the blue-print for the new Commission's priorities and approach.

- 3.8.4 Despite its far broader mandate and its role as a human rights commission, EHRC was established via a merger of the three existing anti-discrimination bodies. Transfer of Undertakings (Protection of Employment) Regulations (TUPE) guaranteed that all staff that elected to move to the new body were guaranteed a role within it and offered a generous compensation scheme to those who wished not to. Among those staff which did elect to join the new body few had any knowledge or experience in the field of human rights specifically and many did not possess knowledge or experience beyond the specific area of anti-discrimination law that they had worked on previously. The Commission did not during its early years however instigate any form of induction, structured change management process or staff development programme to remedy these gaps.

3.9 Accreditation as an 'A' status national human rights institution

- 3.9.1 Despite this difficult start, in 2008 the EHRC applied to the sub-Committee on accreditation of the International Coordinating Committee for National Human Rights Institutions for accreditation as a national human rights institution, successfully achieving 'A' status. The sub-Committee did however make the following recommendations:

- the functions of the EHRC be expanded to give it an explicit mandate to protect human rights, including the power to receive and determine complaints on human rights violations. The ICC suggested that this could be accomplished through giving the EHRC the ability to fund free-standing human rights cases under Section 28 of the Equality Act.
- the EHRC's mandate be expanded to include explicit powers regarding the harmonisation of national legislation with international human rights instruments and principles, and the encouragement of their ratification and implementation.
- The Equality Act include a specific reference to pluralism with regard to the appointments process.
- the grounds for dismissal of a Commissioner be more clearly defined. The Sub-Committee refers to General Observation 2.9 "Guarantee of tenure for members of governing bodies".
- The Sub-Committee also noted the requirement for the Minister's consent in relation to the following issues, and emphasised that this relationship should not negatively influence the EHRC's ability to function independently:
 - the payment of Commissioners

- the numbers, terms and conditions of staff appointments
- the appointment of investigating commissioners.⁶⁵

3.9.2 The EHRC and the ICC have since raised these recommendations in the context of their responses to the UK Government's proposals to reform the EHRC. This is addressed in 3.12 below.

3.10 Towards harmonised equality law

3.10.1 Alongside development of the institution, the Discrimination Law Review had developed proposals to repeal Britain's anti-discrimination laws and replace them with a single equality Act.⁶⁶ The consultation took place over summer 2007, as the predecessor bodies wound down, closing shortly after the Commission opened for business and providing it with little opportunity to develop a considered position. The journey from White Paper to draft legislation was an arduous one, with the proposals and the EHRC becoming stuck in cross-fire between warring Ministers, inclined towards either leaving a major mark on the equality landscape, or reducing regulatory 'burdens' on business. This was against a backdrop both of the economic crisis of 2008 and the New Labour government's declining popularity and power under Prime Minister Gordon Brown. The consequent delays took the Equality Bill dangerously close to the General Election of 2010, with the Bill ending up in 'wash-up'. EHRC was placed under significant pressure to draft non-statutory guidance for duty-holders while the Bill was still making its way through Parliament and before Codes of Practice had been produced and agreed, with a view to such guidance acting to assuage the concerns of business. The development of the Act and associated activity consumed most of the attention of the Chair, Board and senior staff in the first 3 years of the EHRC's life.

3.10.2 In the end, the Equality Act 2010 harmonised and extended the law to bring about broad parity of esteem across the 'protected characteristics' of race, sex, age, sexual orientation, disability religion and belief, gender re-assignment, pregnancy and maternity. The Act is certainly among the most progressive and comprehensive bodies of anti-discrimination law in Europe if not internationally, expanding both the 'protected characteristics' covered by Britain's equality law, and the scope of protection from discrimination including in relation to education, goods and services and through the public sector equality duty. Following the findings of the National Equality Panel⁶⁷ review into the relationship between inequalities in people's economic outcomes – income, earnings, wealth – and their personal characteristics –

⁶⁵ International coordinating committee for national institutions for the promotion and protection of human rights, Report and Recommendations of the Session of the Sub-Committee on Accreditation, Geneva, 3-6 November 2008

⁶⁶ Discrimination Law Review (2007)

⁶⁷ Government Equalities Office Report of the National Equality Panel (

race, gender, disability – the government included in the Act a ‘socio-economic duty’. This duty would have required specified public bodies, when making strategic decisions such as deciding priorities and setting objectives, to consider how their decisions might help to reduce the inequalities associated with socio-economic disadvantage. The coalition Government which came to power in May 2010 has declined to implement this provision, which had been described by a Cabinet Minister in the previous Labour government as ‘socialism in one clause’⁶⁸. Attempts to incorporate Protocol 12 of ECHR through an amendment to the Bill to secure a freestanding ‘right to equality’ were unsuccessful. Nevertheless, the Joint Committee on Human Rights described the Equality Act 2010 as “*one of the most significant human rights measures introduced into Parliament in recent years.*”⁶⁹

3.11 Perceptions of underperformance on human rights

3.11.1 In relation to human rights specifically, the most significant early initiative of the EHRC was to launch a ‘Human Rights Inquiry’ in March 2008, the terms of reference for which were ‘*To assess progress towards the effectiveness and enjoyment of a culture of respect for human rights in Great Britain*’ and ‘*To consider how the current human rights framework might best be developed and used to realise the vision of a society built on fairness and respect, confident in all aspects of its diversity*’⁷⁰. The final report of the Inquiry was launched in June 2009. One of the lead Commissioners on the Inquiry Sir Bert Massie later argued that “*there was nothing in the human rights report about the Commission that we could not have done earlier*” and suggested that the inquiry had been “*set up to delay things*”⁷¹. One unfortunate effect of the timing of the Inquiry was to preclude inclusion of the actions identified for the EHRC in the Commission’s first strategic plan, published in April 2009.

3.11.2 A review of the EHRC’s performance by the Joint Committee on Human Rights in November 2009 revealed deep dissatisfaction with its work on human rights.⁷² The NGO Liberty said: ‘*We have ... watched the turbulent history of the EHRC with some disappointment ... The EHRC has a vital statutory duty [to defend human rights] and notwithstanding considerable staffing and other resources, this is a duty which it is yet to fulfil.* Ben Summerskill (a recently departed Commissioner and chief executive of LGBT rights charity Stonewall) stated that “*the Commission has not got a sense of itself as a human rights commission*” and Baroness Campbell (also recently departed as a Commissioner and a renowned disability rights campaigner) said “*the Commission’s human rights work was marginalised due to the Chair’s constant consistent lack of appreciation of the importance and effectiveness of the Human*

⁶⁸ <http://www.guardian.co.uk/commentisfree/2009/jan/13/polly-toynbee-harriet-harman-social-mobility>

⁶⁹ JCHR (2009) Legislative Scrutiny: Equality Bill Twenty-Sixth report of session 2008-9

⁷⁰ EHRC (2009) Human Rights Inquiry <http://www.equalityhumanrights.com/human-rights/our-human-rights-work/human-rights-inquiries/our-human-rights-inquiry/>

⁷¹ Joint Committee on Human Rights Thirteenth Report of session 2009/10

⁷² Joint Committee on Human Rights Thirteenth Report of session 2009/10

Rights Act". The then human rights Minister Michael Wills MP said *'I do not think [the EHRC] are doing enough to promote human rights and the Human Rights Act.'* The JCHR commented that *'We have sometimes been frustrated at the EHRC's lack of engagement in major human rights debates. We heard nothing from the Commission on policing and protest, for example, an issue with which we were engaged for a calendar year from June 2008 and which was the subject of considerable public debate, particularly after the G20 protests in April 2009. We were also critical of the evidence we received from the EHRC during our business and human rights inquiry, because it was limited to equality matters, indicating a broader failure to integrate effectively equality and human rights work'*. Overall it concluded *'in our view, the Commission is not yet fulfilling the human rights mandate set out in the Equality Act.'*

- 3.11.3 The JCHR inquiry caused the EHRC to take steps to assign greater priority and focus regarding its human rights remit. These included the assignment of lead responsibility on the Commission's human rights programme to a Director and the creation of a small dedicated team, greater prominence at the Commission's Board and in the overall allocation of budget and staff time both to exclusively human rights-focused projects and greater reference to human rights in areas of activity which previously focused solely on equality law and practice. Although the overall resources of the EHRC have been depleting since 2010, the share of resources, focus and the Commission's profile in the areas of human rights subsequently grew.
- 3.11.4 The JCHR report also prompted a 'special review' of the EHRC's 'A' status by the ICC sub-committee on accreditation. The sub-Committee noted the progress the EHRC had made in the light of the JCHR inquiry and decided to re-affirm the EHRC's 'A' status. It did however re-state its original recommendations and also included a new recommendation to increase the level of Parliamentary scrutiny of the EHRC (as opposed to governmental scrutiny), including with respect to the appointment of the Chair and Board, and its overall performance.
- 3.11.5 At the same time as the JCHR inquiry, the EHRC attracted the attention of the Parliamentary Public Accounts Committee following qualification of its accounts by the Comptroller General. The Committee concluded that the EHRC had opened for business before it was ready to, that it had cost far too much to do so, that the Board had failed to properly scrutinise management decisions and that its accounts had been qualified due to a lack of internal controls. It was also critical of the fact that (at the time) the Commission not had a permanent Chief Executive for over a year, instead paying an interim Chief Executive at a rate of £1000 per day.⁷³ These latter problems became the basis of legislative and non-legislative reform proposals which would see government exercising greater controls over the Commission's activities.

⁷³ Public Accounts Committee - Fifteenth Report Equality and Human Rights Commission

3.12 Reform

- 3.12.1 Following the inconclusive 2010 General Election and the formation of a Conservative-Liberal Democrat coalition government, the new government announced a ‘bonfire of the quangos’ designed to contribute to a reduction in public expenditure and to ‘restore democratic accountability’ through abolishing, merging or reforming non departmental public bodies.⁷⁴ The EHRC was included in the review and though spared abolition (something which a number of backbench MP’s and external commentators had called for) the government announced that it would be the object of significant reform, citing the JCHR report and the report of the Public Accounts Committee as the case for action. The Public Bodies Bill 2010 sought powers for Ministers to reform the Commission (and other bodies) via secondary legislation – the so-called ‘Henry VIII clause’ - but the government was defeated in the House of Lords and was forced to pursue legislative reform to the EHRC via primary legislation.⁷⁵
- 3.12.2 Initial proposals, consulted on by the government in 2011⁷⁶, proposed various legislative reforms including to the Commission’s equality duties to *‘focus (it) on its core role as an independent equality regulator, working in accordance with Hampton principles for modern regulators’*, to repeal the Commission’s General Duty, its good relations duty, its power to arrange conciliation and to increase its accountability to government and to Ministers. The government argued these reforms were necessary to help the EHRC become *‘a valued and respected national institution focusing on its core roles as national expert on equality and human rights issues and a strategic enforcer of the law and guardian of legal rights’*. The manner in which the proposed reforms were communicated appeared to regard the Commission’s human rights remit as discrete and separate from its equality remit, confined to the duties at section 9 of the Equality Act 2006 and assume that by leaving the Commission’s specific human rights powers alone its human rights mandate would be unaffected. The consultation made no reference to the *integration* of the Commission’s equality and human rights activities.
- 3.12.3 Yet in the light of these proposals, both the past and present Chair of the International Coordinating Committee of National Human Rights Institutions (ICC) and the UN Human Rights Commissioner Navi Pillay, corresponded with UK Ministers raising concerns regarding the inconsistency between planned reforms and the Paris Principles.⁷⁷ Pillay wrote to then Minister for Women and Equalities Theresa May

⁷⁴ <http://www.cabinetoffice.gov.uk/news/public-body-review-published>

⁷⁵ <http://services.parliament.uk/bills/2010-12/publicbodieshl.html>

⁷⁶ Home Office (March 2011) Building a Fairer Britain – consultation on reform of the Equality and Human Rights Commission

⁷⁷ Correspondence included in the annex of <http://www.equalityhumanrights.com/legal-and-policy/parliamentary-briefings/new-briefing-enterprise-and-regulatory-reform-bill-2012-13/>

MP to say *'While fully respecting your Government's priority to improve EHRC's financial and operative performance as a public body, I would like to call on your Government to review some of the proposals with a view to preserving EHRC's independence and to ensuring its continued compliance with the Principles relating to the status of national institutions (Paris Principles) endorsed by a UN General Assembly resolution 48/134.'* Pillay expressed particular concerns regarding the financial autonomy of the Commission in light of budget cuts and with respect to the (then recently advertised) person specifications for a new chair and Commissioners which emphasised business experience above other attributes. The Chair of the ICC, Dr Mousa Burayzat also wrote to Theresa May arguing that *'if considered alone, the proposed legislative changes may not negatively impact on the Commission's "A" accreditation, taken as a whole the package of proposals clearly constitutes a diminution of the EHRC's role and responsibilities. Whether this amounts to a threat to the "A" accreditation is a matter that only the ICC Sub-Committee on Accreditation (SCA) can authoritatively advise, following a systematic review.'* Burayzat added that *'In the package of proposals, of particular concern are deep cuts to the EHRC's budget and whether they are proportionate to those experienced by other independent institutions and government agencies; a further zero-based review of funding; and threat of 'more substantial reforms". The second two points appear to contradict the Government's stated recognition of the importance of the EHRC being free from "undue influence in the exercise of its functions" Further, implementation of the recent Framework Agreement, which sets out the relationship between the EHRC and the Government, compounds the ramification of these changes and will undoubtedly affect the EHRC's independence. The Agreement significantly limits its freedom to determine priorities without undue influence by the Government or any other party.'*⁷⁸

3.12.4 The subsequent Minister for Women and Equalities, Maria Miller replied to Burayzat, arguing that *'Once you account for the fact that the EHRC will no longer be running a helpline or delivering grants programmes activities that are not necessary to fulfil its remit and which the evidence suggests it is not best-placed to deliver the reductions to its budget are broadly consistent with the level of savings required from other public sector bodies'* and suggesting that *'the Framework Document...was developed in partnership with the EHRC, and endorsed by the EHRC's Board. As a consequence, we believe that it is consistent both with the Paris Principles and with the public expenditure rules that apply to all tax-payer funded bodies.'*

3.12.5 Nevertheless, the Commission's 'A' status as a national human rights institution and the correspondence referred to above appears to have played a significant role in causing the government to re-consider some of the previously planned reforms

⁷⁸ Copies of the correspondence are included in the annex of EHRC report state and third stage briefing to the House of Commons on the Enterprise and Regulatory Reform Bill October 2012

regarding accountability. The ‘framework document’ was itself agreed between the EHRC and its sponsor department in lieu of the proposed legislative amendments to the Commission’s accountability to government included in the original consultation.⁷⁹ The framework document was revised in 2013 in the light of comments from the International Coordinating Committee on National Human Rights Institutions. The appointment of the new Chair of the EHRC Baroness Onora O’Neill was subject to pre-appointment scrutiny by the Joint Parliamentary Committee on Human Rights,⁸⁰ the Minister for Women and Equalities has also committed to submit the outcome of its ‘comprehensive budget review’ of the EHRC’s budget to the Committee, and the Framework Agreement 2013-14 outlines a number of steps for increasing the EHRC’s accountability to Parliament through the JCHR.⁸¹

3.12.6 The government also abandoned its original plan to amend the EHRC duties in relation to equality on grounds that *‘While the consultation proposed amending the equality duties at section 8 of the Equality Act 2006 to clearly define the EHRC’s role as an “equality regulator”, we have decided that it is neither realistic nor desirable to expect the EHRC to “regulate” every part of society on equality... As a consequence, we think it is more appropriate to regard the EHRC as a strategic enforcer— ensuring the law works as intended and only acting where there is an important point of principle or clarification at stake, which has broader application than its effect on the parties involved.’*⁸²

3.12.7 The Enterprise and Regulatory Reform Bill 2012 – the overall objective of which was to reduce red-tape and regulatory burdens faced by business - included proposals to repeal the EHRC’s General Duty (with consequential amendments regarding its duty to ‘monitor progress’) its duty to promote good relations and its power to arrange conciliation. The reform proposals and the repeal of the EHRC’s General Duty in particular met with opposition in the House of Lords. Peers from across the political spectrum voted in support of an amendment from the cross-bench Peer Baroness Jane Campbell to maintain the General Duty based on concerns both that it would fundamentally change the nature of the institution from a ‘change agent’ to an ‘enforcement factory’⁸³ and because it risked undermining *‘the historic reunification of equality and human rights law which was achieved in the Acts of 2006 and 2010’* (Hepple 2012).⁸⁴ Having been defeated for a second time in the House of Lords, the government announced that it would maintain the general duty, but that it would go ahead with amendments to the monitoring duty to focus it on the Commission’s

⁷⁹ http://www.equalityhumanrights.com/uploaded_files/aboutus/ehrc_framework_agreement_april_2012.pdf

⁸⁰ <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrightts/48/48.pdf>

⁸¹ http://www.equalityhumanrights.com/uploaded_files/aboutus/letter_sos_to_dr_mousa_burayzat_-_24_oct.pdf

⁸² Home Office (2012) Building a Fairer Britain – Reform of the Equality and Human Rights Commission

⁸³ See Committee Stage debate in the House of Lords on reform of the EHRC

<http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130109gc0001.htm#1301094800167>

⁸⁴ Hepple, B (2012) Two steps forwards and two steps backwards for reflexive regulation, *Industrial Law Journal*

specific duties to promote, enforce and encourage compliance with equality and human rights law. It should be noted that the EHRC itself took an ambivalent position regarding the General Duty, suggesting that it did not enable it to do anything which it could not in any case do based on its other duties and powers. The Commissions' Chair, Baroness Onora O'Neill, acting in her capacity as a Member of the House of Lords, spoke and voted against the amendment to keep the General Duty.⁸⁵

- 3.12.8 A number of other changes have or are being implemented via the process of budget setting, such as ceasing to fund the Commission to make grants or to provide a Helpline. A 'comprehensive budget review' determined an administrative budget for the Commission of £17.5 million with the Commission's programme budget, of up to £7.8 million, to be determined via a similar process. In June 2013 the government announced a further 10% cut to the EHRC's budget in 2015/16. The overall performance of the EHRC will be reviewed by the government in autumn of 2013 which could result in further legislative and non-legislative reforms or budget cuts.
- 3.12.9 In a separate but related development, the government has also initiated a review of the Public Sector Equality Duty, including the EHRC's duties and powers in relation to the promotion and enforcement of the duty.⁸⁶

⁸⁵ See

<http://www.parliament.uk/Templates/LordsDivisions/Pages/LordsDivisions.aspx?id=51023&epslanguage=en&date=2013-Mar-04&itemId=1&session=2012-May-09> and

⁸⁶ <http://www.homeoffice.gov.uk/equalities/equality-act/equality-duty/equality-duty-review/>

4. Key Factors Facilitating or Inhibiting the Effective Integration of Equality and Human Rights Functions in the EHRC

4.1 This chapter explores the issues which appear to have exerted the most significant influence on the ability of the EHRC to operate as a body integrating the functions of a national equality body and national human rights institution.

4.2 The legacy effect

4.2.1 As noted in the introductory chapters, prior to the EHRC, Britain had no experience of a national human rights institution. ‘Anti-discrimination’ and ‘human rights’ had occupied mostly separate spaces in law, policy and civil society activism. Britain had no experience of a single equality body either, and this fact (and the positioning of human rights as ancillary to the Commission’s equality role) appears to have ensured that the principle challenge foreseen in the establishment of the new body was that of merging the three existing anti-discrimination bodies and bringing together the (then) six ‘strands’ encompassed by anti-discrimination law within a single institution, via a process which O’Cinneide (2006) described as *‘fumbling towards coherence’*⁸⁷ It is perhaps unsurprising then that equality and human rights did not enjoy ‘equal billing’ on day one in the new body, or that the question of integrating equality and human rights in EHRC’s remit had not enjoyed the same degree of discussion and debate as had the co-habitation of the six ‘equality strands’.

4.2.2 Despite these separate ‘family histories’, little time was made available for the two spheres of equality and human rights to come to know one another before the new body began to take shape. Spencer (2005) notes that *‘activists and policy makers working on equality and human rights (had) only recently began to think through the implications of bringing together these apparently separate bodies of work. Yet the debate on institutional arrangements could not be put on hold.’*⁸⁸ As a consequence, aside from the work carried out by the CEHR Task Force and within government, there appears to have been very little exploration in the run up to the Commission of how it might actually function most effectively as an integrated equality body and human rights commission.

4.2.3 The ex-Chief Executive of the Disability Rights Commission Bob Niven, writing in 2008 noted that *‘notwithstanding a number of useful studies, the various potential linkages and differences between the EHRC’s duties on human rights, equality and good relations have yet to be mapped fully; the HRA only applies to public bodies and does not therefore bite on the private or voluntary sectors; and human rights have not been the favoured flavour of the month for some time in some political and media*

⁸⁷ ‘Fumbling Towards Coherence: The Slow Evolution of Equality Law in England and Wales’ (2006) *Northern Ireland Legal Quarterly* 57-102.

⁸⁸ Spencer, S (2005) Partners rediscovered? Human Rights and Equality in the UK

*circles as well as more widely. All in all, while acting on its human rights remit as particular occasions demand and providing basic information and advice the EHRC may well need considerable time before adopting a fully-fledged strategy on human rights’.*⁸⁹

- 4.2.4 Indeed, while the EHRC began life with a range of legacy reports from its predecessor bodies proposing future agendas, from NGOs and from the government sponsored ‘Equalities Review’ (which had been chaired by Trevor Philips, now the EHRC’s first chair) the priorities identified in these reports paid little attention to human rights. They also came on top of the Discrimination Law Review and plans for a single equality Act which were naturally a priority for the new organisation. Niven (2008) noted how the Equalities Review ‘*seems set to have an appreciable influence on the EHRC’s strategy on equality and diversity. But fully constructed jumping-off points are less obvious for the Commission’s other two duties, on human rights and good relations.*’⁹⁰ The Commission began life with a very full ‘equality plate’, unmatched by demands from within or outside the organisation for specific action on human rights.
- 4.2.5 This legacy bias toward its equality remit was reinforced by the choice of appointment of the Commission’s first Chair and Board. During debates over the Equality Bill in 2005, Lord Lester cautioned that ‘*The choice of the first chair, the commissioners and the appointment of senior staff will be crucially important. People matter at least as much as institutional architecture. It is vital that this should be a genuinely new commission, making a fresh start and not carrying too much baggage from the past.*’⁹¹ This intervention now appears to have pre-empted the appointment of Trevor Phillips – then chair of the Commission for Racial Equality – as the first Chair of the Commission for Equality and Human Rights. The skills and experience of the majority of its first Board of 15 Commissioners were mainly rooted in particular equality ‘strands.’ Human rights academic, Professor Francesca Klug, was an explicit exception though other Commissioners did have some experience of human rights issues, for example Baroness Sally Greengross had expertise on the human rights of older people.
- 4.2.6 The full structure of the new Commission comprised 525 posts and the Commission took on 370 staff from the previous Commissions, few of whom had expert knowledge or experience in relation to human rights, or in relation to matters of equality beyond their own specialism. The Senior Management Team contained members who had held a leadership role at the Equal Opportunities Commission and

⁸⁹ Niven, R (2008) The EHRC: Transformational, Progressively Incremental or a Disappointment, The Political Quarterly, Vol 79, No 1

⁹⁰ Niven, R (2008) The EHRC: Transformational, Progressively Incremental or a Disappointment, The Political Quarterly, Vol 79, No 1

⁹¹ Extract from: <http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo050615/text/50615-09.htm>

the Independent Police Complaints Commission, but otherwise did not have a background in running either statutory equality or human rights bodies. In its first few years, the Commission did not initially put in place a change management programme or training programme for staff to ensure they possessed the breadth of knowledge or competencies to perform their new roles. It wasn't until the end of 2008 that the Commission commenced a campaign to recruit staff with specific human rights expertise or those areas of its equality remit which had not enjoyed prior coverage by a statutory body. This focused particularly on the areas of litigation and legal policy.

4.2.7 The Commission's sponsor department was and has continued to be – in one form or another – the department in government for women and equalities. Policy responsibility for domestic human rights sits in the Ministry of Justice (with responsibility for international human rights matters distributed across various departments including the Department for Work and Pensions, Department for Communities and Local Government and Foreign and Commonwealth Office). This arrangement had significant practical consequences for integration of equality and human rights in the EHRC. For example, in January 2013, Government equality Ministers invited stakeholders to a 'joint planning session' between government and the EHRC, at which only Ministers and officials with equalities responsibilities were reportedly present. The government equalities office's faltering approach to reform of the Commission did not indicate a strong intuitive appreciation of or respect for the Commission's role and status as a national human rights institution. Further, the choice of the Enterprise and Regulatory Reform Bill – focused on reducing 'regulatory burdens' facing business - as the vehicle for reforming the EHRC again would appear to indicate that the Commission's human rights role was not at the forefront of consideration. Nevertheless, it appears that it has been the Commission's status as a national human rights institution – and the interventions of the UN and the ICC – and to a lesser extent a national equality body under the EU equal treatment directives, which above all else has prevented more profound reforms regarding the Commission's powers and independence.

4.2.8 Perhaps as a consequence of the above, a number of avoidable choices made early in the Commission's life would perpetuate this bias toward its equality remit down the line and stand in the way of an integrated approach. For example, the Commission launched a 'Human Rights Inquiry' in March 2008, the terms of reference of which included establishing direction for the EHRC itself with respect to its core duty to encourage compliance by public authorities with the Human Rights Act 1998. However, the Inquiry reported several months after the EHRC had agreed its 2009-12 strategic plan meaning that its recommendations played no part in establishing the overarching strategy of the Commission. Nor were the recommendations conceived with integrated activity in mind.. Similarly, the EHRC chose to give effect to its duties under s12 of the Equality Act 2006 to monitor and report on progress by developing separate frameworks of indicators: an equality measurement framework,

which had its origins in the Equalities Review (2007) and a human rights measurement framework. The equality framework was completed before the human rights framework meaning that when EHRC was due to produce its first ‘triennial review’ in October 2009 – How Fair is Britain?⁹² - its content focused on mapping inequalities between groups and did not look at wider human rights issues. The EHRC later published ‘the Human Rights Review’⁹³ to plug this gap and is now beginning to seek to integrate the two measurement frameworks with the Commission’s second state of the nation report, originally due to have reported in October 2013 and now due in October 2015 further to an amendment to the Equality Act 2006 by the Enterprise and Regulatory Reform Act 2013.

- 4.2.9 Somewhat inevitably, the reform of Britain’s anti-discrimination law and the role of the Commission both in influencing the draft legislation and in facilitating its implementation absorbed a great deal of the Commission’s time and resources between 2007 and 2010. Nevertheless, it should be noted that the EHRC sought – albeit unsuccessfully - to use the occasion of the Equality Bill to seek the incorporation of Protocol 12 of the ECHR (a freestanding right to equality) into British law. The Commission also proposed to include modest references to human rights in the guidance it produced on s149 of the Equality Act 2010 but this did not enjoy the support of the Government Equality Office, so the plan was dropped.

4.3 Competing assumptions and understandings regarding the purpose and status of an integrated equality and human rights institutions among stakeholders

- 4.3.1 The introduction to the White Paper on the CEHR said:

*‘Much of our recent history has been about the claims of groups and communities who have been excluded from society, because of prejudice of stigma, for the right to be included, and to participate as equal citizens in all areas of life. From the great battles of the nineteenth century informed by civil rights and a shared sense of identity, the boundaries of democracy have been slowly enlarged. Internationally after the Second World War, and in response to the horrors of fascism and the holocaust, new human rights instruments have been forged to promote and protect the dignity of every individual. These long-term historical movements point towards a new encompassing vision of equality and human rights – within which individuals with diverse identities, experiences, cultures and faiths can confidently live together’.*⁹⁴

- 4.3.2 As laudable a statement as this was, it implied a clear intent to depart from the approach that had been carved out in relation to anti-discrimination in Britain over the

⁹² EHRC (2010) How Fair is Britain

⁹³ EHRC (2012) Human Rights Review

⁹⁴ DTI 2004 Fairness for All – a new Commission for Equality and Human Rights

previous 40 years, forged around identity-based struggle and the politics of recognition and attached this shift explicitly to the universalistic conception of human rights. The new body would thus no longer be exclusively for those groups which most closely identified with the equality ‘strands’, but for ‘everyone.’

- 4.3.3 Niven (2008) correctly prophesied that: *‘the great bulk of relevant interest groups and stakeholder organisations will remain group-based. The Commission will need to work with them as sources of information, advice and ideas as well as vehicles for delivery. Not all of the organisations (particularly among the BME communities and disabled people) are reconciled to the EHRC or its leadership, and group-based organisations may prefer an EHRC with whom members of the group can readily identify. They will certainly want the EHRC to operate programmes and services that, however presented, bring tangible benefits to those whom the organisation represents.’*⁹⁵

4.4 Competing assumptions and perspectives regarding the independence of bodies integrating the functions of equality bodies and human rights institutions

- 4.4.1 The EHRC was broadly established in the mould of its predecessor anti-discrimination bodies as a non-departmental public body. It was not intended by government to be a ‘constitutional watchdog’ (as proposed by the Joint Parliamentary Committee on Human Rights – see 3.7.1) – part of the checks and balances of Britain’s democracy with equivalence to the Electoral Commission for example, which would be supervised by Parliament, as is the preference of the Paris Principles regarding the status and mandate of national human rights institutions.
- 4.4.2 The JCHR (2005) noted (and ultimately rejected) the then Government’s argument that *‘the NDPB model has served perfectly satisfactorily for the anti-discrimination commissions, and they see no reason to abandon it. The main argument for adopting the traditional model for the CEHR is that it works, and is tried and tested’* and the argument by the then Justice Minister Lord Falconer that *‘that there were advantages to the present commissions being on the inside—essentially that they were nearer to the levers of influence.’* The JCHR had argued for alternative arrangements on grounds that *‘First and most fundamental is the nature of the relationship between human rights and the State. It is, as we have stressed several times in this report, the State itself which is bound by the Convention and other human rights treaties. Most NDPBs are dealing with non-state actors....Even the existing anti-discrimination commissions have traditionally been involved as much, if not more, with the private rather than the public sphere.’*⁹⁶

⁹⁵ Niven, R (2008) The EHRC: Transformational, Progressively Incremental or a Disappointment, The Political Quarterly, Vol 79, No 1

⁹⁶ Joint Committee on Human Rights Eleventh Report 2003/4 The proposed Commission for Equality and Human Rights

- 4.4.3 The decision to disregard this proposal and establish the EHRC as an NDPB was reflected in the subsequent characterisation of the EHRC as an ‘arms-length body’, considered by the government departments which contributed to its budget to be carrying out functions on their behalf. It was apparent again in initial proposals in 2011 to reform the EHRC’s duties, powers and accountability to government, which envisaged powers for the Secretary of State to determine the form and timing of the EHRC’s business plan, to impose financial penalties and which proposed to clarify in law that the Commission was subject to public spending controls. Ministers argued that the poor performance of the EHRC had left them with no choice but to seek to exercise greater controls, yet there was no evidence of their having had regard to the Paris Principles in making such proposals or having regard to alternative arrangements, such as enhanced supervision by Parliament. Despite listing the Paris Principles as a reference point, the 2012-13 ‘framework document’ between the EHRC and its sponsor department emulates provisions to which other NDPB’s are subject. By contrast, the 2013-14 “framework document” explicitly moves away from the standard NDPB framework with a view to strengthening the EHRC’s independence and compliance with the Paris Principles. It does though contain some mechanisms for more structured communications between the EHRC and Government than most other non-departmental public bodies, such as requiring the Chief Executive of the EHRC to meet the Director of the Government Equality Office fortnightly, and a mutual “no surprises” agreement, which requires both parties, where possible, to share near-final versions of public communications 48 hours in advance of publication.⁹⁷
- 4.4.4 The case for greater independence resurfaced during debates in 2012/13 regarding the EHRC’s reform, with amendments tabled by the Labour Party in the House of Lords to increase the degree of supervision of the Commission by Parliament. Although these did not result in legislative amendments, there are signs of non-legislative arrangements such as the recent pre-appointment scrutiny of the new Chair by the Joint Committee on Human Rights (JCHR) and the 2013-14 Framework Agreement outlines a number of steps to increase the EHRC’s accountability to Parliament through the JCHR, and to answer its own Parliamentary Questions via correspondence, rather than through Ministers as previously.
- 4.5 **Lack of symmetry in law, powers and approach across equality and human rights**
- 4.5.1 A central argument made for the integration of equality and human rights in a single body was the perception that greater congruence had emerged between equality and human rights in the field of public services. The CEHR Task Force in particular envisaged that the EHRC would adopt an integrated approach to its work regarding

⁹⁷ Department for Culture Media and Sport and Equality and Human Rights Commission Framework Document 2013

public bodies and public services. However, an Audit Commission study in 2003 found that few links were made between equalities and human rights legislation by public bodies suggesting that any such congruence was largely theoretical at the time that plans for the EHRC were initiated.⁹⁸ The Commission was quick to adopt an integrated approach in those areas where one was already reasonably well-established such as in relation to the regulation of health and social care. It has subsequently established integrated approaches to issues relating to safety and security, and the freedom to religion and belief in the public realm. However, it still has progress to make to push integration much further beyond the situation as identified by the Audit Commission. With these notable exceptions, the EHRC's work in relation to public services has given separate treatment to equality and human rights.

- 4.5.2 Developing an integrated approach in this area is made difficult by the different demands of equality and human rights law. With respect to public authorities, in addition to their duties not to discriminate in relation to employment, goods and services and public functions, s149 Equality Act 2010 imposes a duty to have due regard to the need to eliminate unlawful discrimination, promote equality of opportunity and to foster good relations. This is known as the 'general duty'. In England, secondary legislation sets out specific duties, requiring public authorities to set objectives and publish information, while in Scotland and Wales a much more detailed list of steps is prescribed including engagement of affected groups, equality impact assessment and the publication of equality schemes. The public sector equality duty is a 'process duty' which seeks to affect self-regulation by public bodies as a 'theory of change' designed to unpick institutionalised discrimination and inequality. A public authority fails to comply with the duty if it is unable to demonstrate having had 'due regard' to the need to eliminate discrimination and promote equality of opportunity. It cannot, through the equality duty, breach any individual right to non-discrimination or equality. Conversely, section 6 of the Human Rights Act 1998 places a duty on public authorities to comply with the European Convention on Human Rights. Though compliance with the Act entails the meeting of positive obligations in some areas, section 6 is a duty of obligation, not process. The process by which public authorities are to meet section 6 is not set out in secondary law and no 'theory of change' has been articulated or pursued, despite the last government's initial emphasis on embedding a 'culture of respect for human rights' in Britain's public services. This caused the JCHR (2005) to remark that *'We believe that, in general, public authorities remain insufficiently conscious of the "positive" as well as "negative" duties that they have under the HRA. We remain convinced of the case for a public sector duty in relation to human rights, and we consider that this is a matter which it is essential to return to if and when a single equality bill, harmonising legislative provision in relation to all anti-discrimination strands as well as human rights, is introduced in the future.'*⁹⁹ The EHRC's Human

⁹⁸ Audit Commission (2003) Human Rights – improving public service delivery

⁹⁹ JCHR (2005) 16th Report 'The Commission for Equality and Human Rights'

Rights Inquiry (2009) echoed this call yet the previous government rejected the case for such a duty.¹⁰⁰ In contrast, it was widely accepted that the Commission could only function effectively once Britain's complex web of anti-discrimination law was consolidated and harmonised.

- 4.5.3 An integrated approach is further complicated by the asymmetry of EHRC's own duties and powers with respect to equality and human rights. The Commission is empowered to promote and enforce the equality enactments, but limited to 'encouraging compliance' by public authorities with s6 of the Human Rights Act 1998. Taken together, the asymmetry between the Public Sector Equality Duty and the Human Rights Act and between EHRC's duties and powers in relation to equality and human rights has seriously frustrated efforts to forge a unified approach to discharging the Commission's role in relation to public services.
- 4.5.4 The Commission's board noted in its response to the government's consultation on reform of its duties and powers that *'we consider that the capacity to assist individuals was the best demonstration of equality law in the early years of anti-discrimination work, and we believe that the converse has been true in relation to human rights. The absence of capability to support individual cases pursued by ordinary people has undermined any effort to demonstrate the real everyday value of human rights in protecting the dignity of the individual'*.¹⁰¹
- 4.5.5 However, in its response to the Chair of the ICC, Dr Mousa Burayzat (see 3.12.3), the government rejected the same proposal arguing that *'In the context of the range of dispute resolution mechanisms and alternative sources of funding available to victims of human rights violations in the UK, the Government does not believe it is necessary to make provision for the EHRC to be able to fund human rights claims brought by individuals which do not also include an alleged breach of discrimination law.'*
- 4.5.6 The Government also said that *'Because of the UK's system of individually enforceable rights the EHRC was established as a strategic enforcer of the law and guardian of legal rights. Accordingly, its human rights powers are designed to focus it on identifying serious or systemic human rights issues or abuses - including through its power to conduct inquiries - and on working with Government, public authorities and others to highlight and address these. The legislation establishing the EHRC passed by Parliament therefore contained limited power for the EHRC to provide financial assistance to individuals bringing claims of human rights violations. Section 28 of the 2006 Act gives the EHRC the power to provide legal assistance to individuals with human rights claims where there is also an alleged breach of discrimination law.'*

¹⁰⁰ EHRC (2009) Human Rights Inquiry

¹⁰¹ EHRC (2012) Response to government consultation on reform of the Equality and Human Rights Commission

4.5.7 The problems emanating from this asymmetry of law and the Commission's powers were compounded when, early in the EHRC's life, a decision was made (with strong support from the Government Equalities Office) that the Commission should both characterise itself and adopt the practices and behaviours of a 'modern regulator' (though this decision did not enjoy unanimous support among the Board and senior staff). This is despite the JCHR having earlier said *'The commission we propose should not be seen as another inspectorate, advisory body, regulatory authority or enforcement agency. Nor should it be a body with an adversarial or litigious approach to its mission.'*¹⁰² The Legislation and Regulatory Reform Act 2006 had brought the EHRC within scope of the 'Hampton Principles' for better regulation.¹⁰³ Although the Act was primarily concerned with regulation of the private sector, the quest to become and be regarded as a modern regulator dominated the Commission's plans, consuming considerable amounts of the Commission's internal deliberations and guiding decisions regarding its future organisational structure and internal processes. There is little evidence of the Commission having systematically considered the suitability of these approaches and structures to the Commission's human rights remit. For example, the Hampton Principles require that all regulation supports economic progress, and requires an approach to 'risk-based regulation' which focuses on the scale and duration of non-compliance. Such an approach would not take account of 'gravity', meaning for example that allegations regarding the UK's complicity in torture would be unlikely to engage the Commission's regulatory approach unless they could be shown to be systematic, widespread and persistent. The Government has since expressed its view that the EHRC should not after all be regarded as a regulator on grounds that *'it is neither realistic nor desirable to expect the EHRC to "regulate" every part of society on equality'* and that its promotional role denies it the requisite *'neutrality and impartiality'* to assume such a role.¹⁰⁴ Nevertheless, in a subsequent briefing for Members of the House of Lords in advance of Report Stage of the Enterprise and Regulatory Reform Bill in March 2013, regarding an amendment which aims to overturn the Bill's proposal to repeal the Commission's 'general duty', the EHRC, while maintaining the position that the case had not been made to repeal the 'general duty' suggested a compromise might be to replace it with a statement that the EHRC is *'the national expert on equality and human rights and the strategic regulator for equality.'*¹⁰⁵ The EHRC subsequently withdrew this suggestion in its briefing on the final stages of the Bill.

¹⁰² Joint Committee on Human Rights Eleventh Report 2003/4 The propose Commission for Equality and Human Rights

¹⁰³ Sir Philip Hampton's (2005) 'Reducing administrative burdens: effective inspection and enforcement'

¹⁰⁴ Home Office (2012) Building a Fairer Britain – reform of the Equality and Human Rights Commission

¹⁰⁵ EHRC (2013) Briefing to House of Lords, Report Stage of the Enterprise and Regulatory Reform Bill

4.6 Managing perceived tensions between promotional and enforcement roles

4.6.1 Tensions between the degree of emphasis on promotion and enforcement and whether such roles can both be carried out by one body are not exclusive to integrated equality and human rights bodies. They emerged in the EHRC's predecessor bodies and raise difficult questions regarding the institutional behaviours which help establish and maintain influence and legitimacy across different stakeholders. The perception of such tension appears to have been particularly significant in the context of decisions by the government to pursue reforms of the EHRC. In the government's response to the consultation on reform of the Equality and Human Rights Commission the government said that '*...because the EHRC's overarching purpose is – in line with our European Union and international obligations – to actively to promote equality and human rights, by definition it is not neutral and impartial. Its role as a strategic enforcer of the law and supporter of victims of discrimination means that, while it has done some good work to raise awareness of rights and obligations, it is not seen by many with responsibilities under the law as a trusted provider of pragmatic guidance on how to ensure compliance.*'¹⁰⁶ The government's position reflects a broader drive to reduce 'regulatory burdens' on business and public authorities under the 'red-tape challenge' initiative. In essence, the government appears to have determined that the price of being able to promote human rights standards and the further development of equality law and good practice is to lose the power to advise duty-holders on the law. Though there are no signs that the Government has any intention of implementing this approach, if it were to be followed through, this would undoubtedly have a particularly negative impact upon the Commission's capacity to influence the practices of business with respect to equality and diversity. The cost of such maintaining such neutrality, as defined by the government, to the Commission's ability to discharge its human rights remit and maintain on-going compliance with the Paris Principles would be even greater. As the EHRC's Board note in its response to the government consultation on reform of the Commission '*One difficulty is that currently the Commission has limited regulatory, legal or investigative functions in relation to human rights, other than its reporting function to the UN.*'¹⁰⁷ Not only is promotion central to the function of 'A' accredited national human rights institution, the EHRC's present powers make promotion the *primary means* by which it realises its role as a human rights Commission. Here too however, the government has questioned the appropriateness of the Commission's role and activities. During debate regarding reform of the EHRC in the House of Lords in March 2013, the Minister Baroness Stowell said that the EHRC '*should not be not an impassioned*

¹⁰⁶ Home Office (2012) Building a Fairer Britain – reform of the Equality and Human Rights Commission – response to the consultation

¹⁰⁷ EHRC (2012) Response to government consultation on reform of the Equality and Human Rights Commission

*lobbyist leading emotive campaigns; its role is to be an expert witness, to make recommendations on the basis of the facts.*¹⁰⁸

- 4.6.3 Given the Government's position, the Commission faces a difficult challenge in seeking to forge a new path which is not to the detriment of its role as a national equality body or a national human rights institution (or both).

4.7 Working across the different approaches in domestic and European equality law and European and international human rights law

- 4.7.1 As areas of law and public policy, equality and human rights have not been integrated in Britain other than in the context of the EHRC's duties and powers. As Sarah Spencer noted in 2005 (see 4.1.2 above), the UK's anti-discrimination laws were not inspired by European or international human rights law, nor have they until relatively recently been influenced by them. The civil rights movement in the USA has been a far greater influence. During the Discrimination Law Review, consideration was given to adopting a universal approach to equality drawn from human rights law but such an approach was ultimately rejected by Ministers in favour of the approach which had evolved in Britain and which is also reflected in EU law.

- 4.7.2 Fredman (2003) notes how the equality concept in the European Convention on Human Rights differs from that in equality and anti-discrimination legislation:¹⁰⁹

'Instead of the familiar concepts of direct and indirect discrimination, or the proactive duty, the equality concept in the ECHR is understood in terms of proportionality 'A difference in the treatment is discriminatory if it has no reasonable justification: that it does not pursue a legitimate aim or there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'

Fredman argued that this was a weaker concept than that of direct discrimination in sex and race discrimination law, since though it is based on the principle of equal treatment, it permits States to provide an objective and reasonable justification for unequal treatment, a defence unavailable in the context of both domestic and European Union equal treatment law. Fredman goes on to note how the European Court of Human Rights had further developed its jurisprudence regarding discrimination:

The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

¹⁰⁸ [Lords Hansard text for 9 Jan 2013](#) 09 Jan 2013 (pt 0001)

¹⁰⁹ Fredman, S (2003) The Future of Equality in Britain, Working Paper Series No.5 Equal Opportunities Commission

However, she contrasts this with the approach to indirect discrimination in equal treatment law, asking whether disparate impact would need to be demonstrated or whether it is an individualistic notion, and notes that the standard of justification remains lower than that developed in domestic case law

- 4.7.3 Fredman also noted how the development of jurisprudence on Article 14 ECHR has been stunted by the subservience of Article 14 to other rights (that is, it cannot be used alone, but only in conjunction with e.g. Article 8 – the right to private and family life). As noted earlier, attempts to secure the incorporation of Protocol 12 of the European Convention on Human Rights through a freestanding right to equality in the Equality Act 2010 were unsuccessful.
- 4.7.4 Conversely, the absence of regard to individual dignity in the model of domestic and European equal treatment law has provided scope for duty-bearers to comply with the law by treating individuals with ‘protected characteristics’ equally badly. Klug (2005) highlights how *‘treating everyone equally badly is not a human rights concept. It is not sufficient to ensure no-one is being discriminated against if the consequence is that all groups are treated with an equal lack of respect or lack of opportunity to participate in civic or social life. If equality is the main goal of ‘second wave’ human rights, dignity is its foundational value; as the first Article of the Universal Declaration on Human Rights proclaims.’*¹¹⁰ When one of the EHRC’s predecessors, the Commission for Racial Equality conducted an inquiry into the ill-treatment of black prisoners, the prison officer’s successful legal defence was to say that they subjected all prisoners to the same standards of ill-treatment.
- 4.7.5 Hence, the bridge created between equality and human rights in the EHRC’s duties and powers has therefore uniquely or strongly positioned the Commission in a number of valuable and important ways. For example:

Use of stop and search powers¹¹¹: in the past the main focus of ‘stop and search policy’ influencing has been the issue of its disproportionate use against particular groups – especially in relation to black young men. The EHRC’s human rights remit allowed it to look at the nature of the interaction itself. Stop and search raises issues under art 5, 8 and 14 of the ECHR. In particular the lack of reasonable suspicion needed in s 44 of the Terrorism Act, section 60 of the Criminal Justice and Public Order Act and Schedule 7 of the Terrorism Act arguably breach the ECHR in the absence of any issue of disproportionality. Hence the EHRC’s policy of seeking reform this area is not restricted merely to reducing the disproportionality of stop and search powers

¹¹⁰ Klug, F & Wildbore, H (2005) Equality, Dignity and Discrimination under Human Rights Law – selected cases, Centre for the Study of Human Rights, London School of Economics

¹¹¹ <http://www.equalityhumanrights.com/hafan/canolfan-cyfyngau/2010/gorffennaf/commission-response-to-stricter-stop-and-search-conditions-announced-by-the-home-office/>

but has a principled basis regarding the use of such powers generally, grounded in human rights law.

Religion and belief¹¹²: in the case of *Eweida and Ladele* in the European Court of Human Rights the Commission was enabled to consider the issues not merely as a conflict of two anti-discrimination strands but to put the cases in the context of role of the state and the law in regulating religions and the freedom of religion provision in art 9 of the European Convention on Human Rights.

Use of force against young men in detention: The Commission's intervention in the case of *Re C* which concerned the use of force against young men in detention began life as a case under the Public Sector Equality Duty, but it became apparent issues of Article 3 protection were crucial. Had the case only involved the PSED the Home Secretary could have re-considered the change of policy and re-made the same decision. The issues of Article 3 ensured that the new use of force policy had to be abandoned.

Human rights of older people receiving care at home¹¹³: The Commission's inquiry into the quality of protection of human rights of older people receiving care in their own homes was able to explore the relationship between institutionalised ageism and risks to human rights in the social care system in England, making recommendations relating both to obligations arising from the Human Rights Act, the Equality Act as well as recommendations for legislative reform and practice development. The arena of health and social care has generally provided perhaps the most productive forum in which the EHRC has been able, working with others such as the Care Quality Commission, to adopt an integrated approach to equality and human rights.

Promoting, protecting and monitoring implementation of UN human rights treaties¹¹⁴: The Commission's integrated mandate places it in a particularly strong position domestically and internationally with respect to its role in promoting, protecting and monitoring the UK's ratification and implementation of international human rights treaties, including in particular the UN Convention on the Rights of Persons with Disabilities (CRPD), the UN Convention on the Elimination of Racial Discrimination (CERD) and the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). The Commission is able to carry out the functions of a National Human Rights Institution in promoting and monitoring

¹¹² <http://www.equalityhumanrights.com/news/2011/september/commission-submits-intervention-on-religious-discrimination-in-the-wo/>

¹¹³ <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-home-care-of-older-people/>

¹¹⁴ <http://www.equalityhumanrights.com/human-rights/our-human-rights-work/international-framework/>

implementation of the Conventions by government and through its engagement in relevant UN processes, and employ its duties and powers in relation to human rights, equality and good relations to directly promote and enforce realisation of Convention rights through domestic equality and human rights law.

4.8.1 Bringing equality and human rights concepts and principles together

4.8.1 Despite the clear synergies that can be achieved, underpinning concepts of ‘equality’ – equal recognition, equal treatment, equal opportunities, equality of outcome – deriving from human rights law and from domestic and European anti-discrimination law, in addition to other key principles such as dignity, respect and autonomy do appear to compete as organising principles which provide both a ‘lens on the world’ and against which priorities might be identified and agreed, actions determined, issues approached progress monitored, impact measured and stakeholder relationships defined.

4.8.2 The EHRC has itself adopted different theoretical and conceptual approaches with respect to discharging its duty to monitor progress on equality and human rights. The approach the Commission has taken to measuring progress on equality draws upon the ‘capabilities approach’ articulated by Amartya Sen and Martha Nussbaum, itself founded upon international human rights standards. The Equalities Review (2007) which underpinned the Commission’s measurement framework offered the following definition of equality: *‘An equal society protects and promotes equal, real freedom and substantive opportunity to live in the ways people value and would choose, so that everyone can flourish. An equal society recognises people’s different needs, situations and goals and removes the barriers that limit what people can do and can be.’*¹¹⁵ The measurement framework explores the enjoyment of ‘substantive freedoms’ across 10 ‘life domains’ which are cross-tabulated by ‘protected characteristic’ (including in addition to those in the Equality Act 2010, socio-economic status) and explored at 3 levels: inequality of outcomes; inequality of process (unfair treatment, or being treated with dignity and respect); and inequality of autonomy (empowerment, or the degree of choice and control)¹¹⁶ Clear gaps in outcome, the quality of experience or the persistence of disadvantage can be read as indicative of inequality related to a protected characteristic, so providing an imperative (and justification – see below regarding the Hampton principles) to prioritise action where the Commission has the power to make a difference using its powers. With respect to human rights, ‘vulnerable groups’ – that is those experiencing inequality, discrimination or risks relating to the enjoyment of rights – have been identified during the course of appraising ‘progress’ some of which crossover with groups falling within the

¹¹⁵ Equalities Review (2007) Final Report HMSO

¹¹⁶ <http://www.equalityhumanrights.com/key-projects/equality-measurement-framework/>

‘protected characteristics.’¹¹⁷ However, the Commission’s approach to human rights measurement has been to assess State compliance with the various articles of the ECHR, by reference to evidence of human rights violations or risks, of relevant action to address them and of the existence of effective law, policy or institutional architecture. The different approaches taken, and the separately arranged and timed programmes of work involved, meant that the Commission’s first Triennial Review ‘How Fair is Britain’ provided a comprehensive analysis of equality in Britain, but did not address human rights.¹¹⁸ To fill this gap, the Commission produced a separate report ‘the Human Rights Review’ in 2011 based upon this different methodology.¹¹⁹ The Commission is presently seeking to foster a more integrated approach to discharging its duty to monitor progress, with a further "State of the Nation" report due in October 2015.

- 4.8.3 A challenge for the EHRC (and for other integrated bodies) is then to develop a credible methodology which enables allow it to accord appropriate weight to different types of evidence in determining priorities across its equality and human rights mandate and to do so in a way that commands the support of stakeholders. In its report on the case for a human rights commission, the JCHR (2002) noted with respect to the option of an integrated body that *‘it is possible to construct agenda that put the priorities of the equality bodies and those of a potential human rights commission at different ends of a spectrum which has group rights and economic rights at one end and individual rights and civil and political rights at the other. Or it is possible to construct agenda in which the priorities of each are intermeshed. Just as there are some aspects of equality that are particular to one group and have little resonance with other disadvantaged groups—for example equal pay for women or reasonable accommodation to the needs of people with disabilities—there are some aspects of human rights that have little resonance for some or all of the groups covered by equality legislation.’*¹²⁰

4.9 Addressing the growing ‘governance gap’ regarding human rights

- 4.9.1 A significant development affecting the protection and promotion of both equality and human rights in public services is the growing distance between public authorities as duty-bearers and the delivery of frontline services, increasingly carried out by independent bodies from the private or voluntary sector either under contract, purchased directly by service users on the open market using direct payments provided them by their local authority, or using private resources, especially as the State retreats from provision and tightens eligibility criteria. This trend and its implications was noted by the JCHR (2005) *‘Many of the submissions to us on this*

¹¹⁷ <http://www.equalityhumanrights.com/human-rights/our-human-rights-work/human-rights-measurement-framework/>

¹¹⁸ <http://www.equalityhumanrights.com/key-projects/how-fair-is-britain/>

¹¹⁹ <http://www.equalityhumanrights.com/human-rights/our-human-rights-work/human-rights-review/>

¹²⁰ JCHR (2002) The Case for a Human Rights Commission

*inquiry argued for the commission to have the power to assist private providers of care and other public services to safeguard individuals' human rights by offering appropriately targeted advice and guidance. We do not believe the commission should be disbarred from promoting and assisting the development of human rights awareness beyond the public sector.'*¹²¹ This issue was a central focus of the EHRC's 2010-11 inquiry into the adequacy of the protection and promotion of the human rights of older people receiving care in their own homes, 84% of which is delivered by independent providers. Cases such as that involving the abuse of people with learning disabilities in privately run hospitals or the financial collapse of a major private care home provider have begun to place a focus on the adequacy of regulation of private bodies providing public services. The Bill of Rights Commission concluded in its final report (2012) that *'the growing prevalence of the outsourcing of once traditional publicly provided functions to private and third sector providers means that the current definition of a public authority within the Human Rights Act should be looked at again if a UK Bill of Rights were to be taken forward.'*¹²²

4.9.2 At the international level, the 'Ruggie Principles' regarding business and human rights, endorsed by the United Nations Human Rights Council in 2011¹²³, mark a response to the rapid expansion of the private sector worldwide, coupled with increasing transnational economic activity over the past two decades and heightened awareness of the business impact on human rights. The principles set out a framework including the state duty to protect against human rights abuses by third parties, including business enterprises, the corporate responsibility to respect human rights through due diligence and to address adverse impacts and thirdly to ensure access to remedy for those whose human rights have been violated. The UK Government supports the principles and in October 2012 brought forward proposals requiring quoted companies (those incorporated in the UK and listed on certain UK, EU or US markets) 'to report, to the extent necessary for an understanding of the business, on their strategy, their business model, and any human rights issues.' Quoted companies will also be asked to report on the number of men and women on their board, in executive committees and in the organisation as a whole.¹²⁴ These developments may suggest the evolution of hitherto missing congruence between the Commission's equality remit – which has focused on the private sector - and human rights remit (which has historically focused on State actors - in relation to non-State actors, including the private sector, especially relating to the delivery of public services, but also in relation to broader business activities. The EHRC has been increasingly engaged in relation to human rights and business. In 2013 it published new guidance

¹²¹ JCHR (2004) Eleventh Report Commission for Equality and Human Rights

¹²² Ministry of Justice (2012) A UK Bill of Rights? The Choice before us

¹²³ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Human Rights Council Seventeenth Session, March 2011

¹²⁴ Department for Business, Innovation and Skills (October 2012) A new structure for narrative reporting in the UK

for small and medium sized enterprises covering - at their request -the specific, complex requirements of the Equality Act 2010. It also published separate guidance, in part responding to the Ruggie Framework, which covers nine human rights issues relevant to business. The first of these human rights issues is non-discrimination, with cross-references to the Equality Act 2010, suggesting this also is an area where integration is beginning to develop.

4.10 Working in a hostile climate for human rights

4.10.1 The JCHR concluded in its inquiry into the case for a human rights commission (2003) that an integrated body would be beneficial in ensuring that human rights were not cut off from the day to day concerns of citizens going about their lives and that this would help avoid the risk that *'human rights and the human rights body could otherwise be depicted as 'the champion largely of the criminal, subversive, alien or just plain eccentric, and standing in opposition to the state and the interests of the majority of its citizens.'*¹²⁵

4.10.2 The JCHR did not however appear to consider that a new body, concerned with promoting equality *and* human rights and seeking to establish a positive public profile might as a consequence also be disinclined to associate itself with these negative themes and so avoid prioritisation of related human rights activity. The Commission appears to acknowledge this in its response to the government's consultation on its reform when it says *'The Commission's human rights work took longer than it should have done to develop coherence. Part of this may be due to the broad "promotional" mandate and the largely unfavourable public climate towards human rights.'*¹²⁶ One interviewee suggested that a core tension between the goals and approach of equality advocates and human rights advocates was that *'equality advocates seek to protect and promote the rights of unjustifiably unpopular and marginalised groups by seeking to make them less unpopular. Human rights advocates protect the rights of sometimes justifiably unpopular groups (such as criminals) and are far less concerned with seeking to change public opinion regarding the individuals or groups concerned.'* This insight perhaps reflects different conceptions of justice and fairness pervading equality and human rights discourse, which needs to be reconciled in combined bodies and in the way they establish profile with the general public, the media and others.

4.10.3 There is little evidence of the EHRC taking a systematic and sustained approach to discharging its duty to promote respect for the importance of human rights, a task which government, Parliament and human rights stakeholders considered to be

¹²⁵ Joint Committee on Human Rights (2003) – the case for a human rights commission

¹²⁶ The Equality and Human Rights Commission's response to the government consultation paper: 'Building a fairer Britain: Reform of the Equality and Human Rights Commission'

central. This may have reflected a reluctance to engage on the part of some senior members of the Commission's Board and staff for the reasons outlined above. Equally, it may also have reflected a lack of understanding of and resistance to the methods involved in addressing such negative public attitudes among other influential Board members and staff. This suggests that a potential opportunity was missed to develop communications around human rights at a time when communications was a significant part of the organisation's activity and before public spending rules placed significant limits on marketing and promotional spend. Since 2007 hostility towards human rights and the Human Rights Act has reached new heights, and the Commission faces this challenge with a much reduced budget. Further, EHRC is required by its framework agreement to seek government permission to spend budget on advertising and marketing. While the agreement recognises the Commission's legal duty to promote human rights, this arrangement – which requires extensive pre-planning – means that it lacks the flexibility to respond to or harness opportunities presented by emerging events

- 4.10.4 Following the damaging media coverage surrounding Commissioner resignations, the inquiries of the Public Accounts Committee and Joint Committee on Human Rights and the subsequent allegations made by the (then) Chair of the JCHR, Andrew Dismore MP that Trevor Phillips was in contempt of Parliament, a considerable amount of the EHRC's communications effort appears to have been divested towards keeping the Commission *out* of the media. This crisis-based approach to communications – which interviewees suggested had a considerable influence on the Commission's overall priorities and actions - was not generally amenable to risky or controversial initiatives and interventions and as such depressed public-facing human rights activity. However, it is important to note that the Commission has not always shied away from controversial human rights issues, challenging the government over 42 day detention without charge, the guidance given to the security services in relation to torture, and in relation to the human rights of soldiers on the battlefield. Further, in recent months the Commission appears to have been more actively promoting its activities, across its mandate including human rights.

5. Conclusion & recommendations

5.1. Conclusions

- 5.1.1 The EHRC has had to overcome an inheritance which steered it towards its equality remit at the expense of its human rights remit and which was embedded in stakeholder expectations and in the priorities, preferences and skills of the Board and staff of the new organisation. It has managed to creatively fuse its equality and human rights remits in relation to some key issues, demonstrating the added value that an integrated approach can bring.
- 5.1.2 The asymmetry both of EHRC's own duties and powers, and the design of legislation regarding equality and human rights, coupled with the historically separate communities of expertise and interest regarding equality and human rights have however frustrated attempts to develop an integrated approach
- 5.1.3 The EHRC was born into a hostile climate regarding human rights and the Human Rights Act in particular – a climate that has got worse since 2007. While those who conceived the body anticipated it playing a central role in seeking to change the public narrative on human rights, it appears that the Commission may have played down its own human rights remit in order to prevent such toxicity infecting its work on equality.
- 5.1.4 Putting questions of overall performance aside, the EHRC can be seen to have either significantly exceeded some expectations through human rights having commanded an increasing proportion of the Commission's attention and resources (despite their overall decline) or to have not met expectations because the majority of its equality and human rights work continues to proceed as separate streams of activity.

5.2 Recommendations

- 5.2.1 This study has identified a number of important factors which have frustrated the capacity of the EHRC to operate across and between its equality and human rights remit, a great number of which are amenable to change provided the will exists to do so:
- Ensuring de jure and de facto independence from government, where encouraging progress is currently being made, for example the new Framework Agreement and the steps to increase the EHRC's accountability to Parliament through the JCHR.
 - Developing an integrated approach to the promotion of a culture of compliance with equality and human rights law and good practice by providers, commissioners and regulators of public services
 - Developing an integrated approach – where appropriate – in relation to the promotion of equality and human rights in the private sector
 - Completing integration of its approach to monitoring and reporting on progress, ahead of its next "State of the Nation" report in 2015.

- Using its position to break down barriers between equality and human rights, including through fostering increased dialogue between different communities of expertise around issues of shared concern, and increasingly integrating its products, services and communications
- Using the opportunity of a more settled state post-reform to invest in staff development to ensure all staff are equipped with the competencies to work across the Commission's equality and human rights mandate

5.2.2 The Commission will be greatly assisted in doing so if its efforts are supported and complimented by others and especially by its sponsor government department and other government departments in Westminster, by the Joint Parliamentary Committee on Human Rights, by the government's, Parliament and Assembly in Scotland and Wales, by business, public bodies and civil society.

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List of interviewees

Amanda Ariss, Director, Equality and Diversity Forum

Catherine Casserley, Barrister and previously Senior Legislative Adviser at the Disability Rights Commission

Patrick Diamond, Academic and previously Group Director of Strategy at the Equality and Human Rights Commission

Alice Donald – equality and human rights academic, Middlesex University

Professor Francesca Klug – human rights academic who played a central role in establishing the Equality and Human Rights Commission, inside and outside government, and who served on its first board

Rob Linham – civil servant in the Ministry of Justice who played a key role in the establishment of the EHRC and who liaises with the Commission on matters concerning the European Court of Human Rights

Nick O'Brien – (at the time) human rights adviser to the Parliamentary and Health Services Ombudsman, ex-Director of Legal and Operations at the Disability Rights Commission and member of the CEHR Advisory Group

Angela Patrick – Policy Director, Justice and previously legal adviser to the Joint Parliamentary Committee on Human Rights

John Wadham – Director, Interights, previously Group Director Legal, Equality and Human Rights Commission (to March 2013). Involved in the inception of EHRC via previous role as Director of Human Rights NGO Liberty