

# The Equality and Human Rights Commission

## Challenges and Opportunities



Thomas Pegram

AHRC PUBLIC POLICY SERIES NO.1



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# The Equality and Human Rights Commission

**Challenges and Opportunities**



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Published by Arts and Humanities Research Council  
Polaris House, North Star Avenue, Swindon, Wiltshire, SN2 1FL  
[www.ahrc.ac.uk](http://www.ahrc.ac.uk)

ISBN: 978-0-9571108-0-9

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Published December 2011

Design by Rumba. Printed by Taylor Brothers on paper containing 80% post consumer waste.

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# The Equality and Human Rights Commission: Challenges and Opportunities

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*This report summarises the one day workshop entitled *The Equality and Human Rights Commission: Challenges and Opportunities*, which took place in London on June 17 2011.*

It was convened by Jonathan Breckon, Director of Policy and Public Affairs at the Arts & Humanities Research Council (AHRC) and Dr. Thomas Pegram, a 2011 Visiting Fellow in Human Rights at the Human Rights Consortium (HRC), School of Advanced Study, with the support of Belinda Crothers, Academic Programmes Manager at the Institute of Advanced Legal Studies, who hosted the event.

The purpose of the day was to provide a forum for practitioners and scholars from across disciplines to undertake an appraisal of the EHRC. A panel format of presentations followed by discussions covered four thematic areas:

**PANEL 1.** *What is the relationship between EHRC formal design and political function, with a particular focus on independence?*

**PANEL 2.** *How seriously has the EHRC taken its international duties?*

**PANEL 3.** *What has been the impact of EHRC enforcement activities in advancing domestic equality and human rights frameworks?*

**PANEL 4.** *What has been the impact of EHRC promotional activities in advancing domestic equality and human rights frameworks?*

Briefs on each of these themes had been prepared and circulated among participants prior to the meeting.

## Attendees

### • *Speakers and Chairs*

**Merris Amos**

Queen Mary, University of London

**Amanda Ariss**

Equality and Diversity Forum

**Jonathan Breckon**

Arts and Humanities Research Council

**Richard Carver**

Oxford Brookes University

**Glynis Craig**

Equality and Human Rights Commission

**Neil Crowther**

Equality and Human Rights Commission

**Patrick Diamond**

University of Oxford

**Par Engstrom**

Human Rights Consortium, School of Advanced Study

**Malcolm Evans**

University of Bristol

**Caroline Gooding**

Equality Consultant, formerly of the DRC

**Anna Henry**

Equality and Human Rights Commission

**Liora Lazarus**

University of Oxford

**Bob Niven**

Equality Consultant, formerly of the DRC

**Nick O'Brien**

University of Liverpool

**Declan O'Dempsey**

Cloisters chambers

**Thomas Pegrarn**

Human Rights Consortium, School of Advanced Study

**Sangeeta Shah**

University of Nottingham

**Natasha Simonsen**

University of Oxford

**Sarah Spencer**

University of Oxford

**Brian Thompson**

University of Liverpool

**Polly Vizard**

London School of Economics

**John Wadham**

Equality and Human Rights Commission

### • *Participants*

**Mohammed Aziz**

FaithWise

**Simon Bennett**

Human Rights Consortium, School of Advanced Study

**Lise-Anne Boissiere**

Government Equalities Office

**Lorna McGregor**

University of Essex

**Tim Miller**

Parliamentary and Health Service Ombudsman

**Philip Murphy**

Institute of Commonwealth Studies, School of Advanced Study

**Éadaoin O'Brien**

Human Rights Consortium, School of Advanced Study

**Natasha Posner**

Institute of Commonwealth Studies, School of Advanced Study

**Jiwan Raheja**

Ministry of Justice

**Arwa Rinawi**

Equality Consultant

**Michael Rubenstein**

Michael Rubenstein Publishing

**Rachel Zaltzman**

Equality and Human Rights Commission

## Executive Summary

The discussion was conducted in a context defined by a big unknown; namely, what would result from the government's supposed intention to reform the EHRC through the Public Bodies Bill.

The consultation document circulated by the Government Equalities Office (GEO) presents a significant modification of the Commission's structures and function.<sup>1</sup> This is coupled with a reported proposal to cut the EHRC's funding by 68% by 2015.

Participants were generally of a view that the reforms currently proposed by government are not those that are required to address the problems the Commission has faced and the structural vulnerabilities that may underlay them. In particular:

- Reform to increase Ministerial command and control over EHRC processes (if not substantive activity) was flagged as threatening to compromise the independence of the Commission and jeopardising its international standing as a UN-accredited 'A status' National Human Rights Institution (NHRI).
- Proposals to remove core promotional responsibilities and impose a narrow reframing of the EHRC as an equality regulator under the Equality Act 2010 also raised serious concern. It is unclear on what basis the government has chosen to do this, with no external calls for reform of the EHRC's equality remit.
- The GEO consultation document reaffirms the EHRC's status as a UN-accredited NHRI responsible for promoting international human rights standards in the UK, but is otherwise silent on human rights. The lack of joined-up policy on equality and human rights across government departments is reflected in confusion over whether the promotional role of the EHRC is to advocate for policy change or to educate the public about their rights.

Throughout the workshop, a critical but constructive dialogue on the Commission's performance to date was fostered – ensuring a highly productive exchange of views and opinions. A number of recommendations (outlined on pages 26 – 28) were advanced to encourage the positive development of the EHRC as it enters into a phase of strategic development and outward projection.

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<sup>1</sup> See [www.equalityhumanrights.com/about-us/vision-and-mission/government-consultation-on-our-future/](http://www.equalityhumanrights.com/about-us/vision-and-mission/government-consultation-on-our-future/) (accessed 7 August 2011)

## Background

The Equality and Human Rights Commission replaced the Equal Opportunities Commission (EOC), Commission for Racial Equality (CRE) and Disability Rights Commission (DRC). It came into being in 2007 amidst vocal opposition from across the political spectrum to the Human Rights Act, the increasing influence of human rights legislation emanating from Strasbourg and the legislative project that would eventually become the Equality Act 2010.

The transition from the three legacy commissions it replaced was difficult, but recently the EHRC has begun to take strides towards finding its distinctive institutional voice on the national stage. However, it continues to be buffeted by powerful political crosswinds, and it has remained largely peripheral to mainstream debate.

## Timing and relevance of the workshop

The workshop provided a timely contribution to debate on the development of the EHRC and its future at a time when it faces a number of issues in addition to its formation. These include the Government Equalities Office (GEO) declaring that “the EHRC’s performance to date has been weak,” the same office setting out a manifesto for imposing greater Ministerial control over the EHRC,<sup>2</sup> the government floating a proposal to reduce the EHRC budget by a reported 68% by 2015 and possible reform through secondary legislation in the government’s Public Bodies Bill. In addition there is increasing international attention on the EHRC as a UN-accredited ‘A status’ National Human Rights Institution (NHRI).

## Workshop outputs

The workshop set out to fulfil the following objectives:

- Deepen understanding of the experience of the EHRC over the past four years
- Raise the visibility of the EHRC in current policy discussions around equality and human rights compliance in the UK
- Discuss the future prospects for the EHRC with experts in diverse fields and professions
- Evaluate the impact of significant budgetary reductions on the EHRC as well as possible reform of the EHRC’s remit and powers in the context of the Public Bodies Bill

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<sup>2</sup> See [www.equalityhumanrights.com/about-us/vision-and-mission/government-consultation-on-our-future/](http://www.equalityhumanrights.com/about-us/vision-and-mission/government-consultation-on-our-future/) (accessed 7 August 2011)

- Assist in the development of a network of practitioners, policymakers, and researchers brought together by a professional and/or scholarly interest in the EHRC
- Develop collaboration with partners within the academic, policy and legal world
- Provide an opportunity to raise the profile of research in the humanities in policy-making circles and create new opportunities for the dissemination of cutting-edge research and analysis
- Form the basis for an eventual publication.

## **PANEL 1: What is the relationship between EHRC formal design and political function, with a particular focus on independence?**

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*This panel reflected on what the formal design features of the EHRC, in particular safeguards of independence, reveal about the circumstances of the institution's creation, the intentions of its designers, and the relative influence of different stakeholders within and outside government.*

It further inquired into the track record of the EHRC over the past four years and whether it is possible to identify how particular EHRC formal attributes of autonomy have facilitated or hindered organisational effectiveness. Related to this point, the panel also broached the issue of how to understand the interaction of formal design with more idiosyncratic organisational features such as leadership and strategic vision. The formal design of the EHRC and its bearing on organisational impact is particularly pertinent in light of the possible reforms to the office proposed in the government's Public Bodies Bill.

Looking forward, the panel highlighted key formal drivers of organisational stability and change that are likely to shape the EHRC's future trajectory. In reflecting on perceived design limitations and possible remedies, the panel also addressed the question of whether legislative reform is desirable or feasible. And if so, what form should any reform take and how well do the current reform proposals address a series of "latent vulnerabilities" in EHRC formal design.

### **Summary of presentations**

Sarah Spencer began the panel by arguing that, notwithstanding the Paris Principles and EU discrimination law, domestic politics and institutional histories largely determined the formal design of the Commission. The policy-making process that led to the establishment of the EHRC was flawed from the outset. In particular, there was a lack of analysis into the reasons why the existing commissions had or had not been able to drive change in their field. Also, little thought was given to whether a statutory body of that kind was the right lever to drive change, or whether there were alternatives to the limited devolution provided for Scotland and Wales for instance. Above all, there was a failure to think big and to think different – the assumption was that the new body must absorb the old rather than start afresh.

Spencer continued by exploring the statutory arrangements for independence and accountability, suggesting that limitations in those arrangements have underlain some of the tensions and controversies in the Commission's early years but that the reforms currently proposed by government in that area are not those that are required. She concluded by emphasising that there remains a lack of understanding as to what drives NHRI effectiveness and cautioned against an over-reliance on institutional design modification as a solution. Rather, there needs to be increased attention to the existing tools that can be leveraged by the organisation.

Thomas Pegram, placing the EHRC in a global context, posed three questions: (1) to what extent does the outcome of EHRC reform reflect the standards contained within the Paris Principles? (2) What relevance do the Paris Principles have for EHRC reform in the context of the Public Bodies Bill? And (3) what can the experience of the EHRC tell us about the relationship between NHRI design and performance?

The creation of the EHRC in the image of a generic executive Non-Departmental Public Body (NDPB) reflected domestic rather than international norms. NDPBs are independent bodies but sponsored by individual departments and answerable to a Minister as opposed to Parliament. Pegram argued that this arrangement has denied the EHRC the special status and constitutional role commonly afforded to NHRIs, with important implications for its accountability and independence.

Acknowledging EHRC accreditation as an A status NHRI by the UN, Pegram highlighted the concerns raised in light of current government reform proposals regarding the legal basis of the Commission and, in particular its funding arrangement.

Pegram closed by reflecting upon the links between EHRC formal design and political function in context and advocated closer attention to the gaps that lie therein, such as how to institutionalise 'good leadership' within the Commission.

Merris Amos focused on the turbulent beginnings and subsequent trajectories of the Human Rights Act 1998 (HRA) and the EHRC, both lacking in specialised institutional or political support, and both struggling to take hold in the hearts and minds of the general public, politicians and other public authorities.

Two areas of particular continuing concern include: (1) a lack of government expertise in domestic human rights promotion and protection policy and (2) media hostility towards human rights or the absence of human rights language around what are evidently human rights violations or human rights-related issues.

More than ten years on, the position in which the HRA now finds itself, maligned by the media and the subject of a Bill of Rights Commission to determine its future,

demonstrates the importance of institutional support to the success, or otherwise, of legal measures to protect human rights.

While the full complement of institutional support is now in place it is clear that the HRA has not overcome early difficulties. In common with the HRA, the EHRC has an image problem and is not well understood by the British public.

## **Discussion**

The chair opened the discussion by setting out some of the key themes in the discussion, especially: widespread disagreement on what human rights are and how they should be protected and promoted as well as debate over the optimal structures for an NHRI.

### *Official resistance to the EHRC and human rights*

David Cameron made the abolition of the HRA his third priority at the Conservative party conference and support for the HRA is a major issue that needs addressing – perhaps it is the issue. Is there a role for the EHRC here? Certainly promotion of human rights is within the mandate of the institution and much more could be done with regard to improving public opinion on human rights, as well as promoting and elucidating the content of particular rights.

There may be a general resistance to the HRA in government. However, there is support from some ministers, MPs and, importantly, within the Ministry of Justice (MOJ) which is the lead department for domestic human rights.

### *The profile of human rights within the EHRC*

The UK is not in a bad position worldwide. The Equality Act and HRA are the best in the world, on paper at least. Pre-EHRC taskforce discussions identified the need for the future commission to have a strong human rights narrative. This has not been realised.

Confusion surrounding the appropriate division of labour between equality and human rights is apparent when looking at the EHRC. Initially, £10 million of the original £70 million budget was earmarked for human rights work this has generally taken a backseat to an equality agenda.

### *Government-EHRC relations and reform proposals*

Concerns were expressed about the proposal to give the Secretary of State oversight on the EHRC's business plan. The government should not have a say in the appointment of investigating commissioners, particularly when investigating the government itself.

The issue of proposed financial penalties on the Chair and Chief Executive is a serious issue. A QC has stated this is not permitted but government has imposed financial penalties anyway. The second time the government attempted to levy a financial penalty on the EHRC, in anticipation of further legal action from the EHRC, the government looked to withdraw the Commission's powers to instigate legal proceedings with regard to such processes.

One proposed strategy for enhancing EHRC independence from government is to create a sense of ownership among MPs to give the impression of the 'Parliament's EHRC'. Such an alliance would provide additional defences against government attempts to reduce funding or otherwise interfere with EHRC independence.

### *Legacy effects of the EHRC's point of origin*

The creation of the EHRC highlights the importance of process and is something of a paradigm model for how *not* to undertake the merger and transformation of equality and human rights structures.

The primary concern of each of the three legacy commissions group was to ensure that 'their' issue (race, disability, age etc.) would be addressed, hence the Disability Committee met the demands of the DRC and the good relations remit was a late addition to satisfy the CRE.

It did not make sense to a lot of observers, either at the time or in retrospect, to have so little continuity between the Steering Group and the EHRC itself, nor to appoint a figure as Chair of the board who had effectively alienated so many stakeholders in advance of the EHRC's creation. However, the government and appointment Minister may well have had their reasons. In the end, the pre-EHRC steering group deliberations had little impact on the outcome of reform as its Chair and Chief Executive elected to adopt a 'year zero' approach – a key factor in explaining tensions within the Board, many of whom had played a role in the creation of the new body.

### *Human rights language in public discourse*

There is a general absence of 'uplifting' human rights discourse in parliament. Remarkably, US President Barack Obama's speech to both houses of parliament in May 2011 was the first such event. It is perhaps an institutionalised 'group think' to countenance the idea that the UK abuses human rights at home, and a distaste for 'rights-based' analysis or rhetoric when discussing domestic public policy.

There is a need to communicate human rights in a more 'sophisticated' way, in a lexicon with a more popular appeal. The paradigmatic lens in the UK is that of 'deserving' and 'undeserving' groups, which leads to hysteria about rights claims from the latter.

Often human rights debates tend to be confused and mixed together with other distinct issues, including retribution versus rehabilitation as approaches to criminal justice and criticisms of overbearing European Union legislation, among others. Human rights is sometimes popularly perceived as promoting inequality, which is a highly worrying distortion.

Conversely, splitting human rights into big versus small or hard versus soft issues may be counterproductive and play into the hands of the opposition. The use of terms such as dignity may have a greater public resonance than human rights.

There has been discussion within the EHRC and attempts to identify indicators of social progress with regard to human rights, equality and good relations under section 12 of its powers. These are critical aspects of the EHRC's work and need to be viewed as integral to formal structures and preserved in the face of reform.

Government resistance to human rights is not surprising if human rights are conceived as instruments to deploy against the state. What is surprising and therefore worrying is the media position on this – especially the irony and, to some extent, incompatibility of defending press freedom on the one hand while at the same time denigrating other freedoms.

The question is, what can be done to change opinion in the media? Is complete media silence on human rights preferable to the current situation? Such questions informed the many battles that took place on the pre-EHRC taskforce over what powers would be given to the Commission. For instance, the desirability of a mandate to legislate or issue advisory opinions had to be weighed against a post-9/11 context of derogations from provisions about unlawful internment and the potential to inspire an even greater anti-human rights backlash.

Would it have been better to spend more time thinking about promotion and education of human rights? Attention needs to be given to balancing the development of human rights as culture and human rights conceived in terms of litigation.

## PANEL 2: How seriously has the EHRC taken its international duties?

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*This panel sought to assess the extent to which the EHRC has used international human rights norms at the domestic level to achieve these ends, for instance by highlighting British government inaction around implementation of international obligations.*

National Human Rights Institutions (NHRIs) have gained recognition as a possible missing link in the transmission of international human rights norms and their implementation at the domestic level. The EHRC itself claims that the international realm offers a “valuable framework for helping to embed a strong human rights culture in [Britain]” and “important channels for influencing human rights domestically, as well as the overall international framework”.

The panel probed the extent to which the EHRC has taken advantage of a deepening of engagement with UN and European human rights structures, be they judicial or deliberative. A key question in this regard was the extent to which rights advocacy at the international level can secure substantive results for the EHRC at the domestic level. For instance, what are the domestic and international implications of the EHRC’s designation as the ‘independent mechanism’ under The UN Convention on the Rights of Persons with Disabilities?

### Summary of presentations

Richard Carver began by interrogating the routine assertion that NHRIs constitute a ‘bridge’ between international human rights standards and domestic implementation. Recent research into how this bridge may function has suggested four particular ways:

- Use of international (as opposed to domestic) human rights standards in monitoring and complaints-handling
- Promotion of ratification of international instruments (and monitoring of derogations)
- Review of legislation for compliance with international standards
- Reporting to treaty bodies and other international mechanisms (such as the Human Rights Council’s Universal Periodic Review).

The significance and potential benefit of making explicit reference to international standards for an NHRI are twofold. First, it may expand the scope of the work of a NHRI beyond those treaties directly enforceable at the domestic level. Secondly, reference to international standards can be used to elucidate the content of rights.

Carver offered a preliminary assessment of the work of the EHRC against these criteria. The core of the Commission's human rights work is founded upon the HRA, which comprises those parts of the European Convention on Human Rights incorporated into domestic law. However, it is equally important to explore the margins of the EHRC's work, going beyond the HRA to examine references to other human rights standards and to determine the nature of its relationship with different international protection mechanisms. Carver concluded by highlighting instances of disconnect between the EHRC's work at the international and domestic level and argued that these two domains should be viewed as mutually reinforcing rather than separate.

Malcolm Evans reflected on the importance of broader context when evaluating the performance of NHRIs beyond the UN international standards: the Paris Principles. In particular, Evans highlighted the interface between the protections and pragmatics of political policy and realism which inform the organisations' actions.

The importance of such consideration has increased in recent years as the focus moves away from Geneva-based mechanisms to local developments on the ground. The Optional Protocol to the Convention against Torture (OPCAT) is a significant step in this direction. It obligates the state to create a National Preventive Mechanism (NPM). The idea behind this initiative is to embed international bodies at the national level, and NHRIs may have a role to play here.

Evans stressed that there is no necessary correlation between NHRIs and national preventive mechanisms and each institution should be evaluated on its own merits. In the UK context, it is HM Prison Inspectorate that takes a lead role as part of an 18-strong integrated NPM mechanism. The EHRC is not designated as part of the NPM but it could provide systematic advice to government.

The UN Human Rights Council (HRC) is a relatively new institution, established in 2006 to replace the discredited Commission on Human Rights. In her contribution, Sangeeta Shah analysed the special position of NHRIs before the Council, with the HRC directed to 'work in close cooperation' with such institutions.

NHRIs with A-status accreditation, which the EHRC achieved in 2009, enjoy formal standing to address the Council, however Shah pointed out that the strategic plan and its related human rights strategy say very little about how, and on what basis, the

Commission will participate in this new arena. In particular, NHRIs are encouraged to participate in the Universal Periodic Review (UPR) of their home state.

Shah closed by suggesting two areas of best practice for the EHRC: (1) the Commission should use the recommendations arising from the UPR and accepted by the UK as the basis for its human rights strategy; and (2) the EHRC should focus not only on those recommendations accepted by the UK but also those where a robust case can be made that their implementation should not be qualified or rejected.

Beyond the UPR, Shah noted that the EHRC has been especially vocal at the Council – making a number of written and oral interventions. However, it was not clear what strategy the Commission was pursuing in its interventions.

## **Discussion**

The increasing usefulness of leveraging the international system at the domestic level is recognised within the EHRC. However, there are many unresolved questions.

### *Equality versus human rights*

It is important that the Commission achieves a balance between (1) a discrimination perspective on human rights; and (2) a human rights perspective on discrimination.

On discrimination, it is important to recognise that human rights reviews are often addressing very specific human rights issues. Counter-terrorism, for example, disproportionately affects a very specific section of the population which inherently gives rise to discrimination issues.

A pertinent question to pose is the corporate identity of the EHRC itself. Does the Commission see itself as an equality regulator or a human rights regulator? What do we mean by human rights enforcement? And, is litigation the best way to go about effecting positive change?

One area which would benefit from greater attention is the ability of the EHRC to advise competent bodies about the effectiveness and need for legislation. This goes beyond a pure regulatory role and it is important the EHRC avoids falling into a ‘mono-thematic’ approach of just holding public bodies to account.

Reconciling the equality and human rights mandate is fundamental to the future of the EHRC. It is deeply unhelpful that the government treats the two as very different things. Unfortunately, however, the external context is not favourable to positive change in this area (referring to the proposed cuts to the EHRC budget).

### *Obstacles to international engagement*

There are a series of challenges which the EHRC shares with other NHRIs in engaging with international mechanisms. In terms of engagement, there are also strategic decisions to be made. Obstacles to engagement for the EHRC also stem from lack of clarity around how human rights monitoring and reporting to Geneva is organised by government. After the reporting process there is often a 'reporting fatigue' and then a lull. This period can be destructive, with reduced incentives to ensure implementation of recommendations arising from the UPR.

Another difficulty for the EHRC is prioritisation. This is complicated by the sharp divide that exists between those working within international and those working within domestic human rights frameworks.

It is also important to explore the role of the EU in the wider human rights domain. How will the EHRC engage effectively with EU mechanisms as it is mandated to do?

### *Domestic impact of international activities*

The big gap between government rhetorical support for human rights abroad and at home is very apparent. The EHRC needs to communicate its international activities more effectively, make this work more visible and invite feedback on how to use international mechanisms as a lever to advance human rights promotion and protection at the national level.

As the profile of the EHRC grows at the international level, it is having a 'boomerang effect' at the local level. In other words, the EHRC can use international networks to build external coalitions of support (other NHRIs, NGOs, UN officials) that can, in turn, exert pressure on the British government on behalf of the Commission.

## **PANEL 3: What has been the impact of EHRC enforcement activities in advancing domestic equality and human rights frameworks?**

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*This panel inquired into the significance and outcome of EHRC legal action. Key strategic questions that arise in the area of enforcement include: What guides the decision to use legal powers? How receptive are state agencies to EHRC intervention? And, how effective is the EHRC at balancing individual claims for justice with a potentially wider, more strategic vision?*

A further issue for discussion related to EHRC enforcement of a wide-ranging mandate to: 'eliminate discrimination, reduce inequality, protect human rights and to build good relations, ensuring that everyone has a fair chance to participate in society'. Beyond 'hard law' enforcement activities, how can inquiries into, and assessments of, equality and human rights matters contribute to achieving EHRC compliance objectives?

### **Summary of presentations**

Declan O'Dempsey provided a wide-ranging analysis of the enforcement activities of the EHRC. O'Dempsey asserted that it is now apparent that the pre-existing equality strands of the three legacy commissions have been reasonably well served by the EHRC but the new protected characteristics are taking some time to reach the same level of protection. He attributed this largely to the existence of the public sector equality duties (PSED).

One successful strategic avenue adopted by the EHRC is the issuing of statutory Codes of Practice, as well as non-statutory guidance on obligations arising from the Equality Act 2010. O'Dempsey suggested greater emphasis should be placed on the former (which have status before the courts) although the latter can provide soft-law impact through "second-level enforcement".

The EHRC has made modest, but real, achievements in the area of enforcement. High profile examples include the formal inquiry into the treasury spending review and investigations into sexual harassment at Royal Mail. The EHRC has also made effective use of litigation (e.g. Southall Black Sisters' versus Ealing Council).

O'Dempsey highlighted a number of threats to EHRC enforcement impact, above all, government receptiveness. Proposed funding cuts by the government threaten to undermine the ability of the Commission to make use of its powers.

Liora Lazarus and Natasha Simonsen considered two primary questions: (1) what powers does the EHRC have in relation to enforcement? And (2) how are those powers exercised?

In relation to the first question, they compared the enforcement powers of the EHRC with similar bodies in other jurisdictions (the Canadian and Australian Commissions).

In Australia and Canada there are good streamlined enforcement provisions. The Australian Commission has the power to sponsor strategic litigation and both offices would benefit from greater use of this power. The presentation also highlighted an 'exclusion clause' with the EHRC not having oversight over UK intelligence services.

In relation to the second question, Lazarus and Simonsen considered some of the statistics which the EHRC has produced on enforcement action as well as the Commission's enforcement and compliance policy. They also assessed the impact of EHRC enforcement activities on important human rights issues including the DNA database and the implementation of the decision of the European Court of Human Rights in *S and Marper v UK*.

Nick O'Brien, in assessing the role of the EHRC as a 'regulatory body' and 'enforcer', argued that the Commission's actual performance suggested both descriptions require qualification.

O'Brien asserted that it is straining the reality of the mandate to say that the EHRC has strong enforcement provisions. The powers granted to the EHRC, much like those granted to its predecessor equality commissions, offer a mixed economy of legal or quasi-legal functions: provider of 'legal aid'; law centre service; conciliation service; public interest litigant in its own right (or as an intervening third party); regulator; law reform agency; legal consultant.

Crucially, however, discharge of a somewhat subtle mandate of influence entails the strategic deployment of these legal and quasi-legal powers. For that, their use must be visible and targeted, and their impact disseminated and reinforced by follow-up work. They can then serve coherently as a complement to harder 'enforcement' activity

In the absence of rigorously strategic deployment in support of a reflexive-regulation model, there is a danger that the equality and human rights enactments, and the EHRC's guardianship of them, will be undermined by what is perceived as largely reactive and uncoordinated 'fly-swatting'.

Bob Niven opened his remarks with a reflection on the scope of the EHRC's remit which incorporates a multitude of tasks (as demonstrated by O'Dempsey) and a large number of methods by which they have been pursued (as highlighted by O'Brien). Niven also flagged that the EHRC is still less than four years old as a preface to the following series of questions:

- What is the EHRC's legal strategy?
- What are the objectives of the EHRC's legal strategy and how realistic are they in the environment in which they are to be realised?
- What are the tests of a well-designed legal strategy? Is it internal coherence or is it coherence with the overall strategy of EHRC?
- Is the EHRC concerned with 'guarding' legislation, being an engine of social change, driving human rights culture forward?
- Are strategic decisions demand-led, pressure-led, idea-led, or minister-led?
- What does the future hold for the EHRC?

Ideally, for Niven, the future will see a more ruthless prioritisation to use those 'sharp teeth' that are available to full effect and to ensure that limited resources are not wasted on those parts of the statutory mandate which have less potential for effectiveness.

## Discussion

When compared with NHRIs internationally, including those elsewhere in the British Isles, the EHRC's enforcement record is impressive, particularly in terms of the number of court interventions.

In terms of enforcement collaboration with other actors, willing equality/human rights departments in law firms do exist, but they need the documents to work with. The EHRC has gone some way to providing this service with the issuing of non-statutory guidance and statutory Codes of Practice.

NGOs tend not to want to cooperate with the EHRC in legal interventions as they wish to promote their own, independent role in front of the courts. Problems may also arise in the use of strategic litigation where the client's interests do not necessarily coincide with the strategic aims of the EHRC.

In terms of hard law, the EHRC should focus on how it will operate in the future on a much smaller budget. It must decide whether it will focus on "getting the bad guys", such as big service providers, or "guiding the good guys" such as local authorities which have historically been the opponents in strategic litigation.

### *Use of 'soft law' mechanisms*

Soft law such as non-statutory guidance is useful for reaching 'the willing.' However, to reach 'the unwilling', investigative and enforcement powers and interventions are required.

A pertinent question to ask in this time of austerity is whether there are other bodies that are, or could be, effective in taking on the soft law functions of the EHRC.

### *Prioritisation and impact assessment*

In assessing impact, is it numbers of outputs or the quality of outcomes that is most important? The Commission has failed in some respects to make the best use of its available powers.

There are very different operational models for different NHRIs, e.g. the German and Norwegian offices are to all intents and purposes just research institutes. There also tends to be a pull among NHRIs towards litigating just using domestic law, rather than international standards.

The EHRC is endowed with a wide range of different tools, all of which have the potential to produce positive results. But how is the EHRC to objectively decide which tool is the one which should have more resources allocated to it than another? Academic research would be helpful here.

For example, it is difficult to know, even retrospectively, which actions of the prior commissions are the ones which have led to the most significant social change. Over the last 45 years, racial discrimination has become largely unacceptable in the UK. Is this due to legislation, the actions of the CRE, or other factors?

The EHRC should report properly and publicly on evaluations in order to avoid being a 'sitting duck' for government cuts. But there is not necessarily a 'science' to effective action; rather, it might be more useful to focus on the politics of it.

There is constant development in the literature on measuring effectiveness, so the EHRC should monitor this and make use of it as and when it develops. Discussion also broached the question of authority. The EHRC needs to position itself as *the* authority on equality and human rights, such that its opinion carries weight in society and Whitehall. Linking the theme of leadership to the difficulty of demonstrating impact, the EHRC can nevertheless demonstrate the importance of the space it occupies and seek the buy-in of significant stakeholders and the discourse the Commission can facilitate.

### *Government receptiveness to EHRC enforcement activities*

The quality of the relationship between the EHRC and the Government Equalities Office (GEO) is important. There are signs of tension between these two offices concerning interventions, with the GEO intervening on one occasion in opposition to the EHRC. Extreme caution should be exercised in shifting any enforcement responsibilities from the EHRC to the GEO given that it is directly under the control of the Minister.

## **PANEL 4: What has been the impact of EHRC promotional activities in advancing domestic equality and human rights frameworks?**

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*A corollary function to the protection of human rights is the strategic objective of promoting a strong human rights culture. By promoting an environment where equality and human rights norms are broadly stable and credible within British society, the EHRC may benefit from a situation where the need for enforcement activities is diminished. This panel inquired into how such an embedding of human rights might be achieved in Britain.*

### **Summary of presentations**

Patrick Diamond emphasised the importance of situating the development of the Commission within its historical context, and to take a wider view of the structural, institutional and political forces that have shaped the EHRC's foundation.

He asserted that any analysis of the EHRC's performance must begin with a realistic set of expectations about what it might feasibly have delivered. The Commission had no coherent plan or blueprint in place when it was founded. The infrastructure and organisational wiring of the new institution barely existed, and the harmonisation process for transferring staff from the legacy bodies to the new institution was chaotic, yet the demands from government were incessant from day one. This was positively harmful. Diamond posed the question: how independently can the EHRC operate in the future? It has been argued that governments tend to overestimate what they can achieve in the short-term and underestimate what they can achieve in the long-term. Nowhere is this maxim more appropriate than in relation to the EHRC.

Polly Vizard presented preliminary findings from a recent project commissioned by the EHRC to develop a 'Human Rights Measurement Framework' (HRMF). The HRMF is a new system (or 'tool') for evaluating the human rights position of individuals and groups in England, Scotland and Wales.

The presentation provided an overview of the Framework as well as discussed how it has been developed and agreed through a process of consultation with human rights stakeholders, regulators and inspectorates, subject experts and NGOs. It has built on both the Human Rights Act and on international good practice, as set out by the UN Office for the High Commissioner for Human Rights.

Anna Henry from the EHRC provided additional comments on the Framework which will be activated in late 2011. She highlighted the amount of data and indicators that the project incorporates and the desire to effectively bring together the equality and human rights elements of the EHRC mandate (section 12 obligations).

Henry further flagged up the fact that last year's presentation to parliament focused almost exclusively on equality. In 2011 it will focus predominantly on human rights. The presentation also contributed to reflection on some of the broader themes of the day.

Amanda Ariss flagged the importance of this discussion at a time when EHRC promotional powers are being contested by the government. The reform proposals suggest that government officials are adopting a very narrow view of what it means to be a regulator that denies the promotional aspect to this function.

When surveying what the EHRC has done in promotional terms the enormous diversity of its activities is striking, from practice and attitude change campaigns, to parliamentary work and advocacy on particular campaigns.

Ariss acknowledged areas where promotional work may have positive long term impact but also suggested that there has been quite a marked pattern of promotional work focusing solely on the equality remit thus far.

The problematic beginning of the EHRC continues to cast a long shadow and it is difficult for civil society to discern the main focus of the EHRC. It must work more with allies in civil society to assert not only its own legitimacy, but also the legitimacy of equality and human rights claims. It is very worrying that having an independent voice on issues such as immigration, for example, is something that the government finds problematic.

## **Discussion**

Discussion began with some probing questions on the measurement framework. For example, freedom of expression does not appear to be included in the cluster of rights identified by the HRMF – this would be an important right to include and would potentially incentivise buy-in from journalists. Anna Henry responded that this right will be included in the final Framework. The Framework is devised as a tool to assist advocates to understand the human rights situation in Britain and is not to be viewed solely as a measurement device. To this end, the Framework is a good indicator of the content of human rights.

The question was posed as to whether there is too big a gap between policy makers and academic researchers? Policy makers have little idea of what research is being done and researchers do not have a clear idea of the policy decisions that are being made or the

process of policy formulation. The EHRC can play a valuable role in encouraging these groups to engage in networks of research and policy.

### *Obstacles to strategic action*

The question is: what is so difficult about being strategic? Many public bodies struggle to be strategic. There is something very powerful about being an independent measurer of what is going on in society. The EHRC has a future role as *the* authoritative measure of human rights; as a gatherer and propagator of research and information.

A good example of the EHRC's strategic intent is the report on the discriminate use of stop and search powers by the police. An EHRC research team produced a report on stop and search having isolated the worst offenders in terms of the police force responsible and proportionality. The number of stop and search actions could not be justified and the EHRC stated it would pursue legal action against identified offenders. Two police forces have reviewed their stop and search policies, but the issue of proportionality has not been addressed. In addition, a number of police forces and the Association of Chief Police Officers (ACPO) complained about the EHRC's use of targets as a basis for action, as the police no longer issue targets.

A follow-on question: why was it strategic to choose stop and search policies rather than another priority? This campaign had significant cross-cutting potential. By being a combined body, the EHRC can focus on the root causes of problems rather than being drawn towards the various surface symptoms that may often have a distinct equality strand profile, be it race, gender or disability. The EHRC needs to identify the social change it would like to see happen and then work backwards to locate the axis.

### *The role of journalists and journalism*

Does this Commission have a sense of what it is that is driving strong opposition to human rights within the media?

Parliament has been reticent to give human rights a greater profile but another factor is the media's narrative of deserving and undeserving rights claimants. There is a similar problem in other countries where there is a debate over the legitimacy of human rights. An idea exists that one should have 'clean hands' in order to enjoy human rights.

If we analyse the US media in relation to human rights, the difference there is that while people do not like the decisions on the Supreme Court in relation to the Bill of Rights, they will not attack the Bill of Rights as it is part of the US tradition. That said, the situation has changed dramatically since 9/11.

## Conclusion

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*It is clear that the EHRC has struggled to overcome a series of political, institutional and contextual obstacles to successful organisational development. Activities in recent months, point to the very real contribution the Commission can make to upholding equality and human rights frameworks. It is, however, an open question as to whether the EHRC – in light of professed government reform intentions – can consolidate steps toward overcoming its initial difficulties.*

By bringing together high-level expertise from a range of disciplinary and practitioner sectors, this workshop demonstrated the value of encouraging an interface between policymakers and researchers with a view to building a platform for future public policy activity in this area. Activities such as this can play an important role by promoting rigorous, evidence-based research on some of the most important political and social questions of the day. In sum, the discussion raised a series of valuable questions and insights which would benefit from further research.

There is considerable demand within the academic and policy/practitioner world for this kind of knowledge-exchange. The continuing interest generated by the workshop and proposed follow-up confirms the importance of this topic and its appeal within the broader policy, practitioner and academic community.

### **Next steps**

As a result of the discussions, participants have made a number of policy recommendations. Each of the panels made their own recommendations, and for the purposes of this report, these have been amalgamated for each of the main stakeholders. They are included on the pages that follow.

In October 2011 the AHRC and HRC will host a 'Chatham House' meeting convened by the EHRC where the findings of their forthcoming Human Rights Review will be presented. An 'author's conference' is envisaged to take place in the first quarter of 2012 with a view to publishing an edited collection of policy-relevant research on the EHRC.

# Policy recommendations

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*On the basis of the discussions, the following key recommendations to stakeholders can be made:*

## **To the EHRC:**

1. Focus on the tools the Commission possesses and how to maximise their impact.
2. Communicate information about the EHRC's principal strategic drivers/motivators and establish a corporate identity in the public imagination.
3. Create a strategic plan with a clear agenda on prioritisation.
4. Define and propagate a strong human rights narrative that resonates within British society
5. Further develop in-house human rights-specific expertise and connections to research community expertise
6. Promote, monitor and enforce public bodies compliance with the public sector equality duty, Human Rights Act and international instruments
7. Identify indicators of social progress with regard to human rights, equality and good relations under section 12 of the EHRC's powers, and use Section 12 obligations to set baselines for EHRC activity, as demonstrated by the Triennial Review project and subsequent strategic plan
8. View work at the international and domestic level as mutually reinforcing and use the EHRC's mandate to advise on the effectiveness and need for legislation to advance international human rights standards within domestic law. Communicate international activities more effectively, make this work more visible and invite feedback.
9. Use the recommendations arising from the UPR and accepted by the UK as the basis for the EHRC's human rights strategy, and examine the UPR recommendations qualified or rejected by the UK without firm basis
10. Find a way to better integrate a human rights and equality mandate which reflects international obligations and local demands and expectations
11. Conduct systematic research on EHRC impact on UN Treaty Body deliberations and outputs.

12. Build on high impact inquiries, investigations and litigation in order to advance understanding of the impact of its interventions
13. Deploy legal and quasi-legal powers to create a 'mandate of influence'
14. Clarify the objectives of litigation: be that punishing egregious violations, or guiding behavioural change, or both
15. Raise the volume of public debate on the independence of the EHRC and cast powers in terms of public interest, not just in terms of individual grievances
16. Clearly identify target audiences in promotional work.
17. Define a clear organisational strategy that will appeal to support constituencies in civil society
18. Develop alliances with journalists and encourage networks of policy-makers and researchers
19. Build new and better working relationships with government officials and create a sense of ownership among Members of Parliament to project image of the 'Parliament's EHRC'

### **To government:**

1. Revisit reform proposals which threaten Paris Principles compliance, in particular increased ministerial control of the EHRC business plan and the levying of financial penalties
2. Review merging the mandates of the GEO and the Ministry of Justice under a Minister for Equality and Human Rights
3. Reconsider the proposals to reduce the EHRC budget by 2015 as it is likely to severely impact on the equality and rights promotion function of the EHRC.
4. Give attention to the EHRC's lack of robust powers of entry

### **To parliament:**

1. Lay the EHRC's business plan before Parliament so as to increase the Commission's formal accountability to this body

### **To policymakers/researchers:**

1. Institutionalise 'good leadership' within the EHRC
2. Conduct research on the process of setting up an NHRI, the role of sponsor department(s), and on how to recruit, train and retain top-quality leadership
3. Review the OPCAT activity on systematic advice

4. Conduct systematic research on EHRC engagement and influence on UN Treaty Body deliberations in order to observe and improve impact.
5. Conduct more research into the benefits, limitations and trade-offs of different compliance tools.
6. Carry out research into potential institutional barriers to strategic action.

## Acknowledgements

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*This report and the workshop on which it is based were made possible by the support of the AHRC and the HRC, School of Advanced Study. The convenors gratefully acknowledge the financial assistance provided and wish to express their gratitude.*

The convenors express their deep appreciation to all of the participants. Their excellent interventions ensured an extremely insightful level of discussion throughout. Thanks are also due to a number of individuals who were not able to attend on the day but nevertheless provided valuable input on the project, including John Bowers, Nick Johnson, and Colm O'Cinneide.

For their assistance with logistical preparation, smooth running of the workshop, and minute-taking, the convenors also express their gratitude to Simon Bennett, Events and Communications Intern at the HRC, Samantha Roythorne, Events and PR Officer, AHRC, and Éadaoin O'Brien, Graduate Fellow at the HRC.

This report was prepared by Thomas Pegram, currently Assistant Professor of Political Science at Trinity College Dublin.

# ANNEX 1: Workshop agenda

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## 17 June 2011, University of London

**Workshop convenors**     **Jonathan Breckon** (Director of Policy and Public Affairs, AHRC)  
**Thomas Pegram** (2011 Visiting Fellow in Human Rights, SAS)

**Kindly supported by**     The Arts & Humanities Research Council and the Human Rights Consortium, School of Advanced Study, University of London, with the support of the Institute of Advanced Legal Studies

**9:30**     **Registration**

**9:45**     **Welcome and convenors' introduction**

**Jonathan Breckon** (Director of Policy and Public Affairs, AHRC)

**Thomas Pegram** (2011 Visiting in Human Rights, SAS)

**10:00 – 11:30**     **PANEL 1: What is the relationship between EHRC formal design and political function, with a particular focus on independence?**

**Sarah Spencer** (University of Oxford)

Presentation: *Intention or Design: What Makes an Effective Human Rights and Equality Commission?*

**Thomas Pegram** (SAS)

Presentation: *International Standards and Local Reform Outcomes: Assessing the Equality and Human Rights Commission*

**Merris Amos** (Queen Mary)

Presentation: *The Equality and Human Rights Commission and the Human Rights Act 1998*

Discussant: **John Wadham** (Group Legal Director, EHRC)

Chair: **Brian Thompson** (Liverpool University)

11:30 – 13:00

**PANEL 2: How seriously has the EHRC taken its international duties?**

**Richard Carver** (Oxford Brookes University)

Presentation: *The EHRC and the implementation of international human rights law*

**Malcolm Evans** (University of Bristol)

Presentation: *The EHRC and the Emergence of 'National Mechanisms' under the UN Human Rights Treaty Regime*

**Sangeeta Shah** (University of Nottingham)

Presentation: *The EHRC at the Human Rights Council*

Discussant (and Chair): **Neil Crowther** (Human Rights programme Director, EHRC)

13:00 – 14:00

**Lunch**

14:00 – 15:30

**PANEL 3: What has been the impact of EHRC enforcement activities in advancing domestic equality and human rights frameworks?**

**Declan O'Dempsey** (Cloisters)

Presentation: *What has been the impact of EHRC enforcement activities*

**Liora Lazarus** and **Natasha Simonsen** (University of Oxford)

Presentation: *Enforcement Powers in Theory and Practice: The EHRC in Comparative Perspective*

**Nick O'Brien** (Liverpool University)

Presentation: *The EHRC – Lion Tamer or Fly Swatter?*

Discussant: **Bob Niven** (former Chief Executive of the Disability Rights Commission)

Chair: **Glynis Craig** (Senior Professional – legal, EHRC)

15:30 – 15:45

**Coffee break**

15:45 – 17:15

**PANEL 4: What has been the impact of EHRC promotional activities in advancing domestic equality and human rights frameworks?**

**Patrick Diamond** (University of Oxford)

Presentation: *The UK Equality and Human Rights Commission: Transformational versus incremental change?*

**Polly Vizard** (LSE) with comments by **Anna Henry** (EHRC)

Presentation: *The Human Rights Measurement Framework*

Discussant: **Amanda Ariss** (Equality and Diversity Forum)

Chair: **Caroline Gooding** (former Director at the Disability Rights Commission)

17:15

**Convenors' closing thanks**



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