TEETH AND THEIR USE

enforcement action by the three equality commissions

(1 January 1999 to 1 June 2006)

Report includes:

- an investigation into - how the three equality commissions used ten direct enforcement powers between 1999 and 2006; how the commissions present, and might perceive, their direct enforcement powers and actions; and whether their actions have been accountable.
- consideration of the impacts that the Equality Act 2006 could have on enforcement of the equality and human rights enactments.
- recommendations for increasing the effectiveness of the Commission for Equality and Human Rights.

Some coverage and reactions:

"Sex, race and disability laws are not being enforced by the three equality commissions set up to prevent discrimination, according to the Public Interest Research Unit". **The Guardian**

"Equality Bodies Failing to Enforce Discrimination Law". **Equal Opportunities Review Journal**

"Equality law powers 'under-used'". **BBC News Online**

"Equality Commissions leave employment discrimination enforcement powers gathering dust on the shelf". **Personnel Today**

"We are mystified by some of the recommendations in the report". **DRC website**

"Enforcing nothing". **TUC's Changing Times**

"The Public Interest Research Unit's evidence supports what we believe ...". General Secretary of Inclusion Scotland on **BBC Radio Scotland**

"DRC criticised for 'neglecting' its full powers". **Disability Now**

"This is a devastating report for the new chair of the CEHR Trevor Phillips". Simon Woolley, head of Operation Black Vote, reported on **BLINK**

"he feared ... the new body would grow to resemble the CRE, and be less likely to 'use its teeth'". **People Management**

Rupert Harwood (2006)

London: Public Interest Research Unit

Public Interest Research Unit (PIRU)

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- increased UK Government compliance with the European Convention for the Protection of Fundamental Rights and Freedoms and the Human Rights Act;
- the legal protection in the Disability Discrimination Act 1995 (at present, with the exception of victimisation, restricted to those who meet the Act's narrow definition of disabled) being extended to include protection against discrimination which is 'on grounds of impairment';
- the 'legal representation' level of Community Legal Service funding becoming available for cases in the Employment Tribunals; and
- effective enforcement of the equality enactments - and, in addition, the Human Rights Act - by the Commission for Equality and Human Rights.

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TEETH AND THEIR USE: enforcement action by the three equality commissions

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ABBREVIATIONS

CEHR Commission for Equality and Human Rights
CRE Commission for Racial Equality
DDA Disability Discrimination Act 1995
DRC Disability Rights Commission
DRCA Disability Rights Commission Act 1999
EOC Equal Opportunities Commission
FIA Freedom of Information Act 2000
HRA Human Rights Act 1998
NAO National Audit Office
RRA Race Relations Act 1976
SDA Sex Discrimination Act 1975

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0. INTRODUCTION

This report looks at the use that the three equality Commissions (Commission for Racial Equality, Disability Rights Commission, and Equal Opportunities Commission) made of their direct enforcement powers between 1 January 1999 and 1 June 2006; considers the impacts that the Equality Act 2006 could have on enforcement of the equality enactments; and proposes changes designed to improve the effectiveness of the future Commission for Equality and Human Rights (CEHR).

In focussing on direct enforcement powers, we are not suggesting that the Commissions' other powers are of little importance or that the Commissions have not made good use of them. In particular, it seems that the power to advise Ministers was instrumental in the Government addressing some of the major weaknesses in the individual equality Acts; and might still, in the last gasps of the current Commissions, help in bringing about a more fundamental transformation (including, in particular, through Commission influence upon the drafting of a Single Equality Bill). In addition, the Commissions have

performed an important role in commissioning research (such as, for example, the Disability Rights Commission's monitoring reports); in providing information, guidance, and some support, to the public and organisations; and in helping to keep discrimination and equality issues on the political agenda.

This report, however, is about direct enforcement - about what might be described as a question of ‘teeth and their use’.

0.1 findings

The findings include the following.

- The three equality Commissions (between 1 January 1999 and 1 June 2006) made no use of five of the direct enforcement powers studied and little use of the other five. For example, none of the Commissions presented 'instructions and pressure to discriminate’ complaints to the Employment Tribunals; and the Commissions, between them, applied for just one persistent discrimination injunction (applied for by the Equal Opportunities Commission in 2004).

- Our study of the use of one power by one Commission over a longer period of time - the Commission for Racial Equality’s use of formal investigations between 1980 and 2005 - found that it completed over 800% more formal investigations in the first half of the 1980s than in the first half of the current decade (25 against 3). It currently (July 2006) has no formal investigations ongoing.

- There remain serious and widespread problems - including unlawful discrimination - which the existing Commissions have a duty to address, and which the direct enforcement powers might have made an effective contribution to addressing. For example, we identified a substantial number of 'repeat discriminators' (including large corporations and local authorities) against whom persistent discrimination injunctions might usefully have been applied for.

- The Equal Opportunities Commission (EOC) and the Disability Rights Commission (DRC) appeared to have a good knowledge of how they had used their enforcement powers, and, on receipt of Freedom of Information Act letters, quickly provided the information requested. The Commission for Racial Equality (CRE), however, argued that it did not have the information requested and strongly resisted our attempts to obtain it. For example, most of the information requested from the CRE - in our letter

dated 7 December 2005 - was not provided until the middle of March 2006 (under the Freedom of Information Act, information should normally be provided within 20 working days); and, at the time of writing (July 2006 - over seven months after the request), some has still not been provided. Their approach seemed to raise questions about organisational effectiveness, openness, and accountability.

- The Equality Act 2006 strengthened some of the direct enforcement powers, but weakened or removed others. For example, the Commission for Equality and Human Rights (CEHR), unlike the CRE and the EOC, will not have the power to present to an employment tribunal a complaint that a person has done an act of unlawful discrimination (except in relation to 'discriminatory advertisements' and 'instructing or causing' someone else to discriminate).

- The Equality Act 2006 has weakened the rights of individuals seeking legal assistance in discrimination cases. In particular, the CEHR, unlike the EOC and CRE, will not be required to consider all the applications for assistance which each is empowered to grant. In addition, the Act appears to give the Lord Chancellor excessive power to determine the situations in which the CEHR will be able to support cases under the Human Rights Act.

- The Government appears, from its statements during debate in Parliament, to expect the new Commission for Equality and Human Rights to use its enforcement powers as rarely as the existing Commissions have used theirs.

0.2 recommendations

The recommendations include the following.

- The CEHR to attempt to determine, including through commissioned research, which approaches to achieving its duties are likely to be the most effective; and, in particular, to consider whether the past neglect of direct enforcement was misguided.

- The equality Commissions to be more transparent and to be made more accountable; and Parliament, the National Audit Office, and others, to be more robust in scrutinising Commission activities.

- The Equality Act to be strengthened and otherwise improved. Our list of recommended changes includes, for example, the CEHR having the power to apply

for an order requiring revision of a first proposed action plan.

0.3 the future

Despite the missed opportunities highlighted in this report, the Commissions have, we believe, made an invaluable contribution to tackling prejudice and discrimination. The CEHR will need to build on the good work the Commissions have done and begin the essential work the Commissions should have done. In particular, it is, we would argue, time to begin meaningful enforcement of laws which, in the case of the SDA and RRA, have been on the statute book for 30 years.

1. SUMMARY

1.1 METHODOLOGY

1.1.1 questions addressed

Drawing upon a 'weak' (Schwandt, 2003: 308) social constructionism (itself enabling more positivistic perspectives), the research addressed the following questions:

- how, and with what effects, did the three equality Commissions use their direct enforcement powers between 1 January 1999 and 1 June 2006?
- how have the Commissions presented, and appeared to perceive, their use of these powers?
- to what extent have the Commissions been transparent, scrutinised and accountable?
- what impact is the Equality Act 2006 likely to have on enforcement of the equality enactments?
- what changes might improve the effectiveness of the future Commission for Equality and Human Rights in enforcing the equality enactments and in meeting its other duties?

1.1.1(a) direct enforcement powers

By ‘direct enforcement powers’ we mean the statutory powers which permit the Commissions to take enforcement action in their own names, as opposed to, in particular, the power to assist an individual in taking legal action. The direct enforcement powers we investigated were those relating to:

- formal investigations;
- non-discrimination notices;
- persistent discrimination injunctions;

- binding agreements;
- discriminatory advertisements;
- instructions and pressure to discriminate; and
- the race equality duty.

1.1.2 data collection and analysis

Data collection and analysis was primarily conducted between 1 December 2005 and 1 June 2006, and included:

- Asking the three Commissions, through a series of Freedom of Information Act requests (PIRU, 2005a-d; 2006a-e), about their use of the direct enforcement powers.
- Analysis of documents from the Commissions, including annual reports, strategic and corporate plans, reports of formal investigations, corporate policies and procedures, parliamentary briefings, transcripts of speeches, news releases, and minutes of meetings; and analysis of the Commission websites.
- Analysis of the Disability Discrimination Act, Disability Rights Commission Act, Race Relations Act, Sex Discrimination Act, Equality Bill, Equality Act, White Papers, what has been said in Parliament about the Commissions, the Parliamentary debates on the Equality Bill, National Audit Office reports, recent Employment Appeal Tribunal judgements, and media coverage of the Commissions.
- Conducting a limited number of interviews with employers, employees, claimants/ complainants, and lawyers.

1.2 USE MADE OF THE DIRECT ENFORCEMENT POWERS

During the period studied, the Commissions made little use of five of the direct enforcement powers studied and no use of the other five (see tables 1-15 below).

1.2.1 use of powers common to all three commissions

Between 1 January 1999 and 1 June 2006, the three Commissions (between them):

- Served one non-discrimination notice (served by the CRE on the London Borough of Hackney in 2000).
- Applied for one persistent discrimination injunction (applied for against Lidl UK GMbH by the EOC in 2004).
- Presented no ‘discriminatory advertisements’ complaints to the Employment Tribunals.
- Presented no ’instructions and pressure to discriminate’ complaints to the Employment Tribunals.

- Completed seven formal investigations.
- Served no notices requiring information for a formal investigation.

We looked at the CRE's use of formal investigations over the last 25 years, and found that it:

- completed 39 formal investigations in the 1980s;
- completed 20 in the 1990s;
- completed just three between 2000 and 2005 (inclusive);
- and completed over 800% more in the first half of the 1980s than in the first half of this decade (25 against 3).
- had not, at the time of writing (July 2006), conducted any during 2006.

1.2.2 DRC binding agreements and CRE enforcement of the Race Equality Duty

Between 1 January 1999 and 1 June 2006:

- The DRC entered into three 'binding agreements' (under section 5 DRCA).
- The CRE -
  - Did not challenge, by means of a claim for judicial review, any failures to meet the general race equality duty; but
  - did intervene in one such judicial review action (R (Elias) v Secretary of State for Defence (2005) EWHC 1435).
  - Served four compliance notices in relation to alleged failures to meet one or more of the race equality specific duties (on Conwy Borough Council, West Midlands Police, West Mercia Constabulary, and a fourth party which the CRE declined to name); but
  - made no applications for a court order requiring compliance with the specific duties.

1.3 SHOULD GREATER USE HAVE BEEN MADE OF THE DIRECT ENFORCEMENT POWERS?

We would argue, including for the reasons outlined below, that the equality enactments have not been adequately enforced.

1.3.1 the nature and extent of the problems which the Commissions have a

duty to address

There remain serious and widespread problems - including discrimination, unequal opportunities, and non-compliance with public duties - which the Commissions have a duty to address, and which, in some cases, appear to have got worse. Berthoud and Blekesaune (2006), for example, found, according to the recently published interim report of the Equalities Review Panel (Equalities Review Panel, 2006: 23), that "penalties associated with ethnicity, disability and age were higher in the 1990s than in the 1970s".

The Commissions would have had a general awareness of the nature and level of such problems and would have known about many of the individual instances. In addition, a substantial percentage appear to have been of the kind at which the direct enforcement powers were designed to be targeted. Arguably, therefore, the Commissions should have used their enforcement powers (unless, of course, they believed the powers to be ineffective or themselves to be ineffective in their use).

Our brief search of recent Employment Appeal Tribunal judgments, for example, identified a considerable number of repeat discriminators. Among these were large companies, and local authorities, with the potential to discriminate against thousands of employees and tens of thousands of customers or constituents. BT, for example, has been found against in a handful of recent judgements, including in *Reid*, in *Pousson* and in *Pelling*. In *Reid*, Judge Prophet stated that "what the Employment Tribunal clearly found was a weak approach by BT management in dealing effectively with the transgressor when there was clearly sufficient evidence to indicate race discrimination occurring ..." (paragraph 12).

It appears that 'persistent discrimination' injunctions (which 'restrain' the committing of unlawful acts of discrimination) could, and perhaps should, have been applied for in the case of a good number of these identified repeat discriminators (although we do not have enough information about BT to know whether it should have been one such case). All met the first legal prerequisite - that there had already been a finding of unlawful discrimination against the person concerned; and many, we assume, would have met the second - that it appeared to the Commission that, unless restrained, the person concerned was likely to do one or more unlawful acts of discrimination. During the period studied (1999-2006), however, the only 'persistent discrimination' injunction applied for was the one which the EOC applied for against Lidl UK in 2004.

1.3.2 the potential of the direct enforcement powers to help in addressing these problems.

1.3.2 (a) potential effectiveness of the direct enforcement powers

The direct enforcement powers appear to have the potential, demonstrated on rare occasions, to be relatively effective. According to the CRE (CRE, 2005b:25-26), for example, its formal investigation into the Police Service (2005d) found that 14 of the 15 police forces surveyed, and all five police authorities surveyed, had non-compliant race equality schemes; but, according to Trevor Phillips, chairman of the CRE (2005b: 3), "As a result of" the CRE's "subsequent enforcement action, by the end of the year they all had compliant schemes in place...".

1.3.2 (b) insufficiency of other approaches

There appears to be little evidence to support what seems - including from Commission strategic plans and annual reports - to have been an overwhelming reliance upon 'promoting good practice'. It might be working but it might not be. In addition, it might be wondered whether there has been a failure to realise the central role that enforcement could have in promoting good practice - with, for example, well publicised cases informing other companies and organisations of what is required.

We also have concerns about some of the specific approaches to promoting good practice. In particular, there appears to have been, in some cases, a problematic exposition of the business case for not discriminating and a failure to highlight the moral case. Even the title of one document, *Employing Disabled People - top tips for small businesses* (DRC, 2004c), might well be interpreted as suggesting that employing 'disabled' people is difficult, as 'top tips' tend to be offered when there are particular problems to deal with (along the lines of, for example, 'Tackling Damp - top tips for householders').

There is, we believe, great potential for the equality acts to be effectively enforced through the mechanism of individual claims. First, however, there would, in particular, need to be major improvements in complainant assistance. PIRU's last report (Harwood, 2005: para. 3.2.3.1), for example, noted that "the 'legal representation' level of Community Legal Service funding is not available for cases in employment tribunals"; and found that, according to the DRC, the DRC supported just 12 individuals in taking employment

cases to tribunal or court in 2004-2005.

1.4 HAVE THE COMMISSIONS BEEN TRANSPARENT, SCRUTINISED AND ACCOUNTABLE?

1.4.1 transparent?

1.4.1(a) reports, accounts and plans

Commission annual reports and accounts do not appear to provide an adequate basis on which to assess Commission activities and effectiveness; and, of particular relevance to our research, do not say how often the direct enforcement powers have been used (hence our need to make Freedom of Information Act requests) or how much their use has cost. None of the CRE annual reports, for example, refer to its intervention in the land mark High Court case of *Elias*. Furthermore, while the strategic plans set out some of the Commission objectives, neither these plans, nor the annual reports, tell us whether the objectives have been met.

1.4.1(b) Freedom of Information Act requests

There will be those who do not realise that information can be obtained under the Freedom of Information Act or will not know how to go about making an effective request. The Act, therefore, does not provide a sufficient means for individuals to obtain information about the Commissions.

Even when a request is made, there will tend to be a significant delay before the information is received; information might not be provided or might be inaccurate; and a fee might be required first. With the exception of the last point about a fee, we experienced all of these problems when we made a request to the CRE. While the DRC, for example, took under a week to provide all the information requested in our letter sent to the three Commissions on 7 December 2005 (and the EOC took a couple of weeks), the CRE, in a letter dated 11 January 2006, answered just two of the questions asked, and stated that "the Commission simply does not capture information in the manner you request. To provide the information in the manner requested would necessitate extensive research/ analysis in order to compose such data and to do this goes beyond that required by the FOIA 2000 (section 1(4))".

This appeared to raise a number of serious concerns about organisational effectiveness, accountability, and transparency. Firstly, if the CRE does not keep a record of how often

it has used different enforcement powers, how is it able to monitor and assess the effectiveness of different approaches to achieving its organisational objectives? Secondly, if the CRE doesn't 'capture' this basic information, it has to be wondered what other important information it doesn't keep a record of. Thirdly, the information requested was just the sort of information which, in our opinion, the public have a right to know, and which should be made available pro-actively, or, at least, as soon as someone asks for it.

After we sought advice from the office of the Information Commissioner, and made several complaints, the CRE finally provided, in a letter dated 17 March 2006 (CRE, 2006c), most of the information requested in our letter of 7 December 2005 (under the Freedom of Information Act, information should normally be provided within 20 working days). At the time of writing (July 2006 - over seven months after the request), we were still waiting for the remainder.

1.4.2 **scrutinised and accountable?**

1.4.2 (a) Parliament

Government grants to the Commissions are included in the Estimates, which are approved by Parliament; and the Secretaries of State are required to lay the Commission annual reports before Parliament. It is not clear, however, that any of this results in much Parliamentary scrutiny or debate (although it does help ensure that information on the Commissions is made available in a timely fashion). We were unable to find instances when debates on the Estimates included some debate on allocations to the Commissions. As regards the annual reports, the 'laying before' involves the report being placed in the Commons and Lords libraries and a record being made in Votes and Proceedings.

Furthermore, our look at references to the CRE (selected at random from the three Commissions) in the Lords and Commons Hansards found little which seemed to constitute scrutiny. In the majority of cases, for example, the CRE is referred to in support of, or against, particular proposals. Arguably, the potential for 'using' the CRE in this way will - unless there are strong countervailing pressures - make Parliamentarians reluctant to criticise its action. For example, it will be harder for an opposition MP to attack the Government with CRE figures, or opinions, if previous criticisms of the CRE have made its research and findings appear unreliable or its opinion appear biased and

interested.

1.4.2 (b) the National Audit Office

The National Audit Office (NAO) appears to have the remit, experience and competencies to usefully investigate - through its 'value for money' audits - the enforcement activities of the three equality Commissions. It also appears to feel able to make quite forthright recommendations for stronger law enforcement. An NAO press office notice (2005e), for example, states that Sir John Bourne, head of the National Audit Office, "recommended that Customs and the Department for Environment, Food and Rural Affairs (Defra) take further action to prevent and deter people from illegally importing meat and other products by building on existing campaigns to raise public awareness of the restrictions on imports both in Great Britain and abroad. In addition, Customs should prosecute more cases and should consider introducing on-the-spot-fines".

There appear, however, to have been no 'value for money' audits of any of the equality Commissions. Some reports, produced during the period 1999-2006, include references to the Commissions (in particular, NAO, 1999, 2000, 2004b), and some of these references include suggestions as to things that the CRE might do, or that other organisations might do with the involvement of the CRE. None of these suggestions, however, appear to have been intended as significant criticisms of the CRE. In 'The Medical Assessment of Incapacity and Disability Benefits' (2000), for example, after strong criticisms of the Medical Services company, the NAO recommends (appendix 9, page 59, paragraph k) that "Medical Services monitor the service received by claimants from ethnic minority groups through targeted surveys and other means; and that the Commission for Racial Equality be invited to review the work of Medical services in relation to its treatment of claimants from ethnic minority groups". There is no suggestion that the CRE should have acted earlier or should now act proactively. This is despite the CRE clearly having the power to investigate without being invited to do so; and it appearing likely that the failure to act resulted in some of the most vulnerable people in the country being discriminated against.

1.4.2 (c) the public, media and campaigns

The public, media and campaigns do not, in general, appear to have subjected the Commissions to a great deal of scrutiny or influence. We found, for example, that:

- In our sample of newspaper articles, the Commissions, in general, appear to have been regarded and framed as comparable to large and quite useful charities (both in terms of their work and as a source of information and opinion).
- There was, however, some media criticism; and, in particular, in relation to Trevor Phillips' (chair of the CRE) controversial comments about multiculturalism.
- A brief look at the websites (including press releases) of 10 charities, whose remit includes disability equality (selected at random from disability, gender equality and 'race' equality), suggested that there might be little public criticism of the DRC coming from these charities (and, perhaps, from charities as a whole). This, in turn, raises the question - which would require in-depth interviews to even begin addressing - of whether these charities think that there is little or nothing to criticise, or whether, for example, it is felt that public criticism would be counter-productive - damaging the DRC (and, therefore, the good work it does) and the charity's relations with the DRC.
- We did not systematically look at campaign/ charity criticisms of the CRE, but suspect that there may well be growing criticism from black and minority ethnic groups (see, for example, www.blink.org.uk).
- The Commissions appear to have been fairly conscientious (at least compared to other commissions) in their use of public consultation, but there appeared, in some cases, to have been insufficient effort to involve disadvantaged and harder to reach groups.
- All the Commissions had complaints procedures, but each placed important restrictions on their application. Of particular note, their procedures do not cover complaints about a decision not to provide legal assistance.

1.5 WHAT IMPACT IS THE EQUALITY ACT 2006 LIKELY TO HAVE ON ENFORCEMENT OF THE EQUALITY ENACTMENTS?

1.5.1 changes in enforcement powers and duties

While the enforcement powers are "closely modelled on those of the existing commissions" (Baroness Ashton, Lords Hansard, 19 October 2005: col. 813), there are some important differences (in addition to those which are the inevitable consequence of combining Commissions and equality strands).

When taken as a whole, there appears to have been some strengthening of those powers in the Equality Act (EA) which are equivalent, or comparable, to the direct

enforcement powers currently available to the existing commissions. Some powers, however, appear to have been weakened or lost. Therefore, rather than the Minister stating (Meg Munn, HC Standing Committee, 2005: col. 88) that “we had to ensure that there was no regression in their powers and duties ...”, it might have been fairer to have indicated that it had ensured no overall regression in the sum of their powers.

1.5.1(a) examples of the strengthening of powers

- Extension - to matters under the Sex Discrimination Act, Race Relations Act and EA - of the power to make binding agreements. At present, the comparable power is restricted to the DRC.
- A notice requiring that information be provided, for the purpose of an inquiry, may be issued without the authorisation of the Secretary of State. The existing Commissions may only issue an information notice with the authorisation of the Secretary of State (except when the investigation is a 'named person' investigation and the person being served is one of the named persons).
- The CEHR may, it appears, investigate whether a person has committed unlawful act X if it suspects that he or she has committed, for example, unlawful act Y or, indeed, any act which is unlawful within the meaning of section 34 EA. The DRC, in contrast, may only investigate (unless Schedule 3, Part 1, paragraph 3(3)(b) Disability Rights Commission Act (DRCA) applies) whether a person has committed an unlawful act if it has reason to believe that the person may have committed ‘the act in question’.
- The CEHR may apply for an injunction (restraining a person from committing an unlawful act) if it thinks that the person is likely to commit the unlawful act. In the case of the existing Commissions, there is an additional requirement that, in the preceding five years, the person concerned has been served with a 'non-discrimination notice' or been found by a court or tribunal to have committed an act of unlawful discrimination.

1.5.1(b) examples of the weakening of powers

- The CEHR will not have the power, which the CRE and EOC possess, to take 'preliminary action in employment cases' (except in relation to 'discriminatory advertisements' and 'instructing or causing' someone else to discriminate).
- The CEHR may only investigate whether or not a person has committed an unlawful act if it suspects that the person concerned may have committed an unlawful act. The DRC, however, may investigate whether or not a person has committed an unlawful act, even if it does not have ‘reason to believe’ that the person concerned may have

committed the unlawful act, if the question is investigated in the course of a formal investigation into compliance with a requirement in a non-discrimination notice or an undertaking in a binding agreement. It would appear to be at variance with the purpose of such investigations to not allow the CEHR to check or confirm that the problem which necessitated the unlawful act notice, or the agreement, had been properly resolved (irrespective of whether it suspected that it had not been)

- The CEHR does not appear to have the power to require, in an unlawful act notice, that the person concerned not commit any further unlawful acts of the same kind. The existing Commissions, however, may do so in a non-discrimination notice (upon which the unlawful act notices are modelled).
- There is no provision in the EA to include, in an unlawful act notice, a requirement that a person take action specified in an action plan. The DRC, however, may so require in a non-discrimination notice.
- The CEHR will not be able to apply for an order requiring revision of the first proposed action plan served on it. The DRC may do so, however, if the conditions in Schedule III, Part 3, paragraph 17(2) DRCA (concerning first inviting the person to serve a revised plan) are met. It might be wondered whether this means that a person will be able to lawfully stick to his/ her first proposed action plan (however inadequate it may be), so long as he/ she does not respond to any request from the CEHR for a first revision.
- There appears to be a higher threshold, in the EA compared to that which exists under the DRCA, for being able to enter into a binding agreement (the CEHR must think that the person has committed an unlawful act rather than just having 'reason to believe' that such is the case).

1.5.1 (c) changes in legal assistance powers and duties

- The EOC and CRE are required to consider all the applications for assistance which each is empowered to grant, but can decide which, if any, applicants to provide assistance to. The EA (at section 28) provides the discretion, to provide or not provide assistance, but does not require that the CEHR consider all such applications. Consequently, it might be far more likely to miss cases in which the need of the applicant is so high that it would be inequitable for the Commission not to provide some legal assistance.
- The CEHR will not have some of the powers, possessed by the EOC, to provide

assistance outside the equality enactments. In relation to this, concern was expressed in the Lords debate that if the EOC's "remit is interpreted strictly according to the enactments listed in Clause 35, then key elements of its work would not be covered" (Baroness Gould, 11 July 2005: col. 979).

- The Lord Chancellor may (under section 28(7)), by order, enable the CEHR to give legal assistance in respect of proceedings which related when instituted, but no longer relate, to a provision of the equality enactments, if the proceedings relate to any of the Convention rights within the meaning given by section 1 of the Human Rights Act.
- Bearing in mind the Government's ambivalent attitude towards the Human Rights Act and the likelihood that it will quite frequently find itself the subject of actions under the Act, section 28(7) might be thought to give the Lord Chancellor too much power over the circumstances in which the CEHR may assist individuals in respect of proceedings which relate to human rights.

1.5.2 possible changes in the use of the enforcement powers

Since the Commissions have made little use of their direct enforcement powers, differences in powers or duties - between the existing Commissions and the CEHR - might well prove of less consequence than differences in organisational attitude and intent. These, in turn, will depend, to a significant degree, upon the extent and nature of external influences, including those outlined below.

1.5.2 (a) <u>expression of government preferences</u>

During debates on the Equality Bill, the Government appeared to congratulate the existing Commissions on having used their enforcement powers only rarely; and indicated that it expects the CEHR to use its powers in a similar manner. It might, indeed, be interpreted as having suggested that the CEHR provide even less legal assistance.

Baroness Ashton, for example, stated (consistently with others for the government) - "I believe we all agree that the primary approach of the Commission is to promote and support good practice. Therefore, we are talking about a situation that will arise only rarely when it resorts to its regulatory powers - and when attempts to secure improvement through providing advice and guidance have failed. It will support cases brought by individuals only in a very few cases.... The Commission's powers are modelled on those of the existing commissions, who have used them sparingly and

strategically. We expect the new Commission to do no less" (Lords Hansard, 19 October 2005: col. 811). Arguably, of course, by 'no less' she means 'no more'.

1.5.2 (b) other potential influences

The impact of government preferences, however, will partly depend upon government control, and upon the strength of other, possibly countervailing, influences. In this respect, it is notable that, despite some differences - such as a statutory requirement to consult on its strategic plan - the EA does not appear to provide that the CEHR, compared to the existing commissions, will be much more, or much less, independent from government, transparent, or accountable to the public and Parliament. For example:

- The Secretary of State's power to appoint and dismiss CEHR commissioners is similar to that possessed in relation to the existing Commissions. There are, however, significant changes, including, for example, the requirement to appoint one commissioner with the consent of the Scottish Ministers and one with the consent of the National Assembly for Wales.
- There is a requirement on the CEHR (Schedule 1, Part 2, paragraph 32(2)), but not on the existing Commissions, that 'matters addressed by an annual report shall, in particular, indicate in what manner and to what extent the Commission's performance of its functions has accorded to the plan under section 4' (the Strategic plan). Whether this significantly increases accountability, however, might depend upon whether the sub-paragraph is taken to include the extent to which the Commission has been successful in meeting objectives in a strategic plan or just the extent to which it has carried out planned activities.
- While the existing Commissions produce strategic plans, they do not appear to review them on the relatively frequent basis required under the EA; and, perhaps more importantly, their consultation practices appear to be somewhat haphazard, and restricted, compared to those specified in section 5 of the EA.
- In addition, the CEHR is required to send the strategic plan, and each revision, to the Secretary of State, who is required to lay a copy before Parliament; with there being no such requirements on the existing commissions. However, since laying the annual reports of the existing Commissions before Parliament did not lead to debate, it might be wondered why some MPs appear to assume that this will.

1.6 RECOMMENDATIONS

Some of the recommendations in our report are outlined below.

1.6.1 improvements to enforcement powers

1.6.1(a) investigations

(i) The CEHR to be empowered to investigate whether a person has committed an unlawful act, even if it does not suspect that the person concerned may have committed an unlawful act, if that matter is to be investigated in the course of an investigation into compliance with a requirement under an unlawful act notice or an undertaking under a section 23 agreement (see 1.5.1(b) above).

(ii) So as to capitalise on the potential monitoring role of the public, and help ensure that the worst cases of discrimination do not go unaddressed, the Commission to be required to record, and undertake an initial assessment of, all requests that it conduct an investigation into a 'named person'.

(iii) When a request to investigate comes from the National Assembly for Wales, the Scottish Parliament, or a Committee of the House of Commons or Lords, the Commission to be required to conduct, as a minimum, an investigation which is sufficient to determine whether or not there is reasonable cause to conduct a full investigation. If there appears to the Commission to be reasonable cause, or the requesting body declines to withdraw its request, the Commission to be required to conduct a full investigation.

1.6.1(b) unlawful act notices

(i) The CEHR to have the power - comparable to that possessed by the DRC - to require, in an unlawful act notice, that the person concerned take any action which is specified in an action plan which has become final (see above 1.5.1(b)).

(ii) The CEHR to have the power to apply for an order requiring revision of the first proposed action plan served on it (if the person concerned has not, within the period specified, served a revised plan in response to a notice inviting him/ her to do so) (see above 1.5.1(b)).

1.6.1(c) presenting complaints in its own name

(i) The CEHR to have the power - which the CRE and EOC possess in the case of action preliminary to seeking a restraining injunction - to present to an employment tribunal a complaint that a person has done an act of unlawful discrimination (see above 1.5.1(b)).

(ii) The employment tribunal, if it considers that such a complaint is well-founded, to make a finding to that effect; and, if it thinks it just and equitable to do so, to make a declaration of the rights of the complainant and the respondent, and/ or a recommendation that the respondent take action for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.

(iii) The tribunal to also have the power to recommend changes to those policies, procedures and practices which it considers contributed to the act of discrimination to which the complaint relates or which it considers are likely to contribute to further acts of unlawful discrimination (whether or not of the same kind).

1.6.1(d) legal assistance

(i) The CEHR - as is currently the case with the EOC and CRE - to be required to consider all applications for assistance which it is empowered to grant (see above 1.5.1(c)); and the Commission's complaints procedure to be applicable in relation to a decision about granting assistance (except in so far as a complaint relates to a decision which the complainant accepts as having been fairly and properly arrived at) (see above *1.4.2(c)).*

(ii) Unless and until a human rights commission comparable to the CEHR is established, the CEHR to have similar discretion to provide legal assistance in relation to the HRA as it currently possesses in relation to the equality enactments (see above 1.5.1(c)).

1.6.1(e) a possible role for local authorities

(i) The Government, and others, to consider whether it would be desirable to provide some equality enforcement powers to local authorities.

1.6.2 more effective use of the enforcement powers

1.6.2 (a) research on effectiveness

(i) As a priority, the CEHR to attempt to better determine - including through commissioned research - which approaches are likely to be the most effective in reducing discrimination and in helping to encourage and support the development of the society specified in section 3 of the Equality Act (see above 1.3.2) .

(ii) The CEHR to, in particular, test the assumptions - upon which the existing Commissions appear to have based (or justified) their approach - that strong enforcement action is counter-productive or otherwise damaging, and that efforts to promote good practice have been effective.

1.6.3 improving transparency and accountability

1.6.3 (a) record keeping and requests for information

(i) The CEHR to systematically record all relevant information on the use of its enforcement powers; to do so in a way that enables it to be easily accessed and effectively analysed; and to make this information available without the need for Freedom of Information Act requests.

(ii) The CRE to address the serious problems that it appears to have with regard to record keeping, transparency, and openness.

1.6.3 (b) plans and reports

(i) The CEHR to be required (including through amending section 4 EA) to include objectives in its strategic plan; and to report, in its annual report, on the extent to which these have been achieved, explain the reasons why any objectives have not been achieved, and indicate what it intends to do to address these reasons. It should not be enough for annual reports to highlight successes.

(ii) The annual report to include information, in a standardised format, on the use of each enforcement power. It should, for example, be possible to quickly determine how many complaints about 'discriminatory advertisements' the Commission received during the year, how the Commission responded (including, in particular, action taken under section 25 EA), and what the outcomes were (albeit, of course, with the confidentiality of the complainant being properly protected).

1.6.3 (c) Parliament and the National Audit Office (NAO)

(i) Parliament could consider taking a more robust role in scrutinising the CEHR than it has taken in relation to the existing Commissions.

(ii) There should be regular investigations (in the form of 'value for money' audits) by the NAO. This would appear to be justified on the grounds that the CEHR will have responsibility for equality issues across all the strands covered in domestic legislation,

and, therefore, could make a substantial difference to life in the UK, and also, of course, will have a substantial budget. It also seems that Committee of Public Accounts investigations might usefully follow some of these audits (perhaps once in each Parliament).

- summary ends -

2. TABLES

2.1 sources and validation

The information in these table comes, with a number of exceptions, from the letters (CRE, 2005a; CRE, 2006 a-d; DRC 2005a and 2006h; EOC 2006a and c) which the three Commissions sent in response to our Freedom of information Act requests and follow-ups (PIRU, 2005a, b, c, and d; and 2006a, b,c,d, and e). The exceptions arise from our attempts to validate the information, in the letters, through studying other Commission documents, and, in particular, annual reports. The main exceptions are:

- The CRE letter (2006a) states that the CRE did not issue any non-discrimination notices during the period 1999-2005. The CRE's annual report (2005b: 25), however, states that "In December 2000 we issued a statutory five-year non-discrimination notice against the London Borough of Hackney". On the grounds that the person writing the letter is more likely to have been unaware of a notice that had been issued, than those producing the annual report were to record one which had not, we have included the CRE's non-discrimination notice in our tables.
- The CRE - perhaps understanding the term 'conducted', in our request, to mean completed - did not provide information on Formal Investigations which were instigated but suspended or discontinued. We have, therefore, recorded those that we came across in their annual reports. It should be noted, however, that the suspended investigations reported in the letter from the EOC (2006a) do not, as far as we could establish, appear in their annual reports. Consequently, and assuming comparable practices in writing annual reports, there could be a number of suspended CRE investigations which we have not recorded in table 4.

We would suggest that the results in our tables would benefit from further validation. This is, in particular, because we were unable to compare Commission answers with relevant documents in their possession (such as any internal records of enforcement action); and because the annual reports, against which we tried to compare the answers, do not provide anything like a complete record of Commission activities. We are

relatively confident, however, that any mistakes (including any omissions) are likely to be minor; and that our tables present a reasonably accurate account and might provide a highly accurate one.

coverage

Please note that the figures in the tables are for the whole of Britain (N. Ireland has its own Commission), except where it specifies that the figures are for Scotland (tables 15 (a) and (b)) or Wales (tables 12 (a) and (b)).

Table 1(a): total use by CRE, DRC and EOC of powers common to all three Commissions

	1999	2000	2001	2002	2003	2004	2005	2006*	total
formal investigations completed i.e. report published	none	none	1	none	1	1	4	none	**7**
notices served requiring information for a formal investigation	none	none	none	none	none	none	none	none	**0**
non-discrimination notices served	none	1	none	none	none	none	none	none	**1**

persistent discrimination court injunctions applied for	none	none	none	none	none	1	none	none	**1**
discriminatory advertisements complaints to Tribunals	none	none	none	none	none	none	none	none	**0**
instructions and pressure to discriminate complaints to Tribunals	none	none	none	none	none	none	none	none	**0**

Table 1(b): use of DRC's power to making binding agreements and CRE's powers to enforce the Race Equality Duty

	1999	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006***	**total**
DRC binding agreements in lieu of enforcement action •								none	**3**
CRE claims for judicial review of failure to meet race equality general duty #	N/A	N/A	none	none	none	none	none	none	**0**
CRE race equality specific duties compliance notices issued	N/A	N/A	none	none	1	2	1♦	none	**4**

CRE application for court orders requiring compliance with duties	N/A	N/A	none	none	none	none	none	none	**0**

notes on Tables 1(a) and 1(b)

*(1) Up to 1 June 2006.

(2) See Table 4(a) for information on investigations which were suspended or discontinued between 1999 and 2006 and Table 4(b) for information on investigations which were ongoing in June 2006.

•(3) The DRC has entered into three binding agreements in lieu of enforcement action. It declined, however, 'for confidentiality reasons' (DRC 2005a), to provide further information. We do not know, therefore, in which years the agreements were entered into (except that none were entered into between 1 January and 1 June 2006).

#(4) The CRE did intervene in one such judicial review action (R (Elias) v Secretary of State for Defence (2005) EWHC 1435).

♦(5) The CRE (CRE, 2005a) declined to provide information about one of the compliance notices, on the grounds that it related to an 'ongoing matter'. It seems likely, however, that it would have been issued in 2005, and, therefore, we have included it in the 2005 column in Table 1(b).

(6) See the other Tables (2 to 14), and the notes to those tables, for details of each instance recorded in Tables 1(a) and (b).

Table 2: 'formal investigations' completed each year

	1999	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**total**
CRE	none	none	1	none	1*	none	1	**3**
DRC	none	none	none	none	none	1	none	**1**
EOC	none	none	none	none	none	none	3	**3**

notes on table 2

(1) See Table 4(a) for information on investigations which were suspended or discontinued between 1999 and 2006 and Table 4(b) for information on investigations which were ongoing in June 2006.

*(2) The CRE's investigation into HM Prison Service, which it completed in 2003 (CRE, 2003b), consisted of two parts, with each part appearing to constitute a substantial investigation in its own right.

Table 3: details of 'formal investigations' completed (1999-2006 inclusive)

1. CRE	**(a)** Employment investigation of the Crown Prosecution Service, Croydon branch (CRE, 2001a).	**(b)** Services and employment investigation of HM Prison Service of England and Wales (CRE, 2003b). Report published in two parts in 2003.	**(c)** Employment investigation of the Police Service in England and Wales. Interim report (CRE, 2004a) published in 2004 and final report (2005d) in 2005.

2. DRC	**(a)** Services, 'general', investigation into the access for, and inclusion of, 'disabled' people on the web (DRC, 2004a).		
3. EOC	**(a)** Employment, 'general', investigation, during 2003-2005, into discrimination towards new and expectant mothers in the workplace (EOC 2005a).	**(b)** Employment, 'general', investigation, during 2003-2005, into occupational segregation in IT, childcare, engineering, construction and plumbing (EOC, 2005b).	**(c)** Employment, 'general', investigation, during 2004-2005, into part-time and flexible working and women working below their full potential (EOC, 2005c).

Table 4(a): details of suspended and discontinued 'formal Investigations' (1999-2006 inclusive)

1. CRE	**(a)** Investigation into employment practices at Ford Motors PLC. Instigated in 2000; suspended 'shortly thereafter'; and discontinued in 2004 (CRE, 2005b).	
2. DRC		
3. EOC	**(a)** Employment, 'named person', investigation, into the Royal Mail, concerning alleged sexual harassment of female staff. Instigated in 2003. Currently suspended on basis of agreement between Royal Mail and EOC (EOC, 2006a).	**(b)** Employment, 'named person', investigation into Ministry of Defence, concerning alleged sexual harassment of female Armed Forces personnel. Instigated in 2005. Currently suspended on basis of agreement between MOD and EOC (EOC, 2006a).♦

notes on table 4(a)

♦(1). The EOC announced in a press release (EOC, 2006b), dated 25 May 2006, that the MOD and EOC had agreed a new action plan (forming phase three of the agreement referred to in this table) "to prevent and deal with sexual harassment in the Armed Forces". The press release also announced the results of research "completed by the MOD as part of the first phase of its Agreement with the EOC", including, for example, the finding that 67% of service women who responded had had sexualised behaviours “directed at them personally“.

Table 4(b): details of ongoing ‘formal investigations’ at 1 June 2006

1. CRE			
2. DRC	**(a)** Ongoing investigation (instigated in 2004) into the health inequalities experienced by people with mental health problems and learning disabilities. Interim report published as 'Equal Treatment: closing the gap' (DRC 2006a).	**(b)** Ongoing investigation (instigated in May 2006) into 'public sector fitness standards' (DRC, 2006g).•	
3. EOC	**(a)** Ongoing investigation (2005-06) into pay and progression of BME women in Great Britain. Entitled 'Moving up?' (EOC, 2006a).	**(b)** Ongoing investigation (2005-06) into new models of organising work to enable men and women to balance work and caring responsibilities. Entitled 'Transformation of Work' (EOC, 2006a).	**(c)** Ongoing investigation (launched on 23 January 2006). A general formal investigation into the role and status of classroom assistants in Scottish primary schools. Entitled 'Valuable assets' (EOC, 2006c).

notes on table 4(b)

•(1) The DRC states (DRC, 2006g) that this "12-month Formal Investigation will look into how training, qualifying and working practices within these professions may be posing challenges to the entry and progress of disabled people".

Table 5: notices served requiring the production of information for the purposes of a 'formal investigation'

	1999	2000	2001	2002	2003	2004	2005	total
CRE	None	none	none	none	none	none	none	**0**
DRC	None	none	none	none	none	none	none	**0**
EOC	None	none	none	none	none	none	none	**0**

Table 6: 'non-discrimination notices' served

	1999	2000	2001	2002	2003	2004	2005	total
CRE	none	1*	none	none	none	none	none	**1**
DRC	none	none	none	none	none	none	none	**0**
EOC	none	none	none	none	none	none	none	**0**

notes to table 6

*(1) The one notice was served against the London Borough of Hackney (CRE, 2005b: 25).

Table 7: 'persistent discrimination' injunctions applied for

	1999	2000	2001	2002	2003	2004	2005	total
CRE	none	none	none	none	none	none	none	**0**
DRC	none	none	none	none	none	none	none	**0**
EOC	none	none	none	none	none	1*	none	**1**

notes on table 7

*(1) The EOC sought an injunction against Lidl UK GMbH in the county court under section 71 of the SDA in December 2004. The case has now been settled (EOC, 2006a).

Table 8: complaints presented to the Employment Tribunals under 'discriminatory advertisements' provisions

	1999	2000	2001	2002	2003	2004	2005	total
CRE	none	none	none	none	none	none	none	**0**
DRC	none	none	none	none	none	none	none	**0**
EOC	none	none	none	none	none	none	none	**0**

Table 9: complaints presented to the Employment Tribunals under 'instructions and pressure to discriminate' provisions

	1999	2000	2001	2002	2003	2004	2005	total
CRE	none	none	none	none	none	none	none	**0**
DRC	none	none	none	none	none	none	none	**0**
EOC	none	none	none	none	none	none	none	**0**

Table 10: challenges - by means of a claim for judicial review - to alleged failures

to pay 'due regard' to the Race Equality Duty

	1999	2000	2001	2002	2003	2004	2005	total
CRE applications for 'due regard' judicial review	none	none	none	none	none	none	none	**0**
CRE interventions in 'due regard' judicial reviews	none	none	none	none	none	none	1*	**1**

notes on table 10

*(1) The judicial review which the CRE intervened in was the High Court Case of R (Elias) v Secretary of State for Defence (2005) EWHC 1435. The judge held that the Far Eastern Prisoner of War Ex-Gratia Scheme was unlawful and discriminated indirectly against those of non-British national origin.

(2) The DRC will have a comparable power when the Disability Equality Duty comes into force. In addition, the Equality Bill provides for a Gender Equality Duty to be inserted in the Sex Discrimination Act.

(3) The three Commissions are able to make applications for judicial review in relation to a number of other matters. For instance, Schedule 3, Part 1, paragraph 2(2), DDA 1995, states that Sub-paragraph (1), which concerns limits to the bringing of civil or criminal proceedings, 'does not prevent the making of an application for judicial review ...'.

Table 11: 'compliance notices' issued by the CRE (pursuant to s. 71D of the RRA 1976) in relation to alleged failures to meet the race equality specific duties

	1999	2000	2001	2002	2003	2004	2005	total
compliance notices served	N/A	N/A	none	none	1	2	1*	**4**

notes on table 11

(1) Only the CRE has the power to issue compliance notices in relation to alleged failures to meet the race equality specific duties.

(2) The 2003 notice was issued to Conwy Borough Council; and the 2004 notices were issued to West Midlands Police and West Mercia Constabulary. All three notices related to non-compliant race equality schemes; and the Commission has said (CRE, 2005a) that "all these matters were resolved to" its "satisfaction". The CRE has also told us (ibid) that "The final Notice issued relates

to an ongoing matter” and that, in accordance with its policy "to retain from unassociated third parties the names of those listed public authorities" that have been or are subject to its compliance process, it declines to provide further details.
*(3) For the reasons given at (2) above, we have had to make an informed guess that the notice was, as shown in this table, issued in 2005.

Table 12(a): combined use (by CRE, DRC and EOC) in Wales of powers common to

all three Commissions

	1999	2000	2001	2002	2003	2004	2005	2006*	total
completed (i.e. report published) 'named person' formal investigations	none	none	none	none	1•	none	none	none	**1**
notices served requiring information for a formal investigation	none	none	none	none	none	none	none	none	**0**
non-discrimination notices served	none	none	none	none	none	none	none	none	**0**
persistent discrimination court injunctions applied for	none	none	none	none	none	1°	none	none	**1**
discriminatory advertisements complaints to Tribunals	none	none	none	none	none	none	none	none	**0**
instructions and pressure to discriminate complaints to Tribunals	none	none	none	none	none	none	none	none	**0**

Table 12(b): CRE use in Wales of Race Equality Duty powers

	1999	2000	2001	2002	2003	2004	2005	2006*	total
CRE claim for judicial review of failure to meet race equality general duty#	N/A	none	none	none	none	none	none	none	**0**
CRE race equality specific duties compliance notices issued	N/A	none	none	none	1♦	none	∞	none	**1**
CRE application for court orders requiring compliance with duties	N/A	none	none	none	none	none	none	none	**0**

notes on tables 12(a) and (b)

*(1) Up to 1 June 2006.

(2) Formal Investigations -

(a) 'named person' investigations are based on suspicion of unlawful acts by one or more named persons, and have different procedural requirements to 'general' investigations.

•(b) The 'named person' investigation was into HMP Prison Service of England and Wales. Parc prison in South Wales was among the three prisons included in the investigation.

(d) There were also, during this period, 'general' formal investigations with consequences for individuals in Wales, such as, for example, the EOC's investigation of part-time and flexible working and women working below their full potential; the DRC's investigation of the accessibility of the web; and the CRE's investigation of the Police Service in England and Wales.

°(3) The EOC sought a persistent discrimination injunction against Lidl UK, some of whose branches are in Wales.

♦(4) The compliance notice was issued to Conwy Borough Council.

(5)(a) The CRE did intervene in one such judicial review action (R (Elias) v Secretary of State for Defence (2005) EWHC 1435). (b) A claim for judicial review, of a failure to meet the Race Equality Duty, can also be made by a person or group of persons with an interest in the matter.

∞(6) The CRE declined to provide details on one of its compliance notices - on the grounds that it was 'an ongoing matter'. We do not know, therefore, whether it relates to Wales.

Table 13: changes in number of completed CRE 'formal investigations' over a 25 year period

1980	**1981**	**1982**	**1983**	**1984**	**1985**	**1986**	**1987**	**1988**	**1989**	**80s total**
4	3	2	8	8	5	1	1	4	3	**39**
1990	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**90s total**
4	3	3	3	1	2	3	none	1	none	**20**
2000	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**				**000s total**
none	1	none	1	0	1	0*				**3**

notes on table 13

*(1) Figure at 1 June 2006.

Table 14: update on use of powers during 2006 (1 January to 1 June)

	CRE	DRC	EOC	combined use
formal investigations instigated or completed	none	*1	1•	**2**
notices served requiring information for a formal investigation	none	none	none	**0**
non-discrimination notices served	none	none	none	**0**
persistent discrimination court injunctions applied for	none	none	none	**0**
discriminatory advertisements complaints to the Employment Tribunals	none	none	none	**0**
instructions and pressure to discriminate complaints to the Employment Tribunals	none	none	none	**0**
Race Equality Duty judicial reviews applied for by CRE	none	none	none	**0**
CRE race equality specific duties compliance notices issued	none	none	none	**0**
applications for court orders requiring compliance with race equality specific duties (CRE)	none	none	none	**0**

notes on table 14

*(1) The DRC, in May 2006, instigated a formal investigation into 'public sector fitness standards' (DRC, 2006g). The press release (DRC, 2006g) states that its "12-month Formal Investigation will look into how training, qualifying and working practices within these professions may be posing challenges to the entry and progress of disabled people".

•(2) The EOC, on 23 January 2006, launched a general formal investigation into the role and status of classroom assistants in Scottish primary schools (EOC, 2006c), entitled 'Valuable assets'.

Table 15(a): combined use (by CRE, DRC and EOC) in Scotland of powers common to all three Commissions

	1999	2000	2001	2002	2003	2004	2005	2006*	total
completed (i.e. report published) 'named person' formal investigations	none	none	none	none	none	none	none	none	**0**
notices served requiring information for a formal investigation	none	none	none	none	none	none	none	none	**0**
non-discrimination notices served	none	none	none	none	none	none	none	none	**0**
persistent discrimination court injunctions applied for	none	none	none	none	none	1•	none	none	**1**
discriminatory advertisements complaints to Tribunals	none	none	none	none	none	none	none	none	**0**
instructions and pressure to discriminate complaints to Tribunals	none	none	none	none	none	none	none	none	**0**

Table 15(b): CRE use in Scotland of Race Equality Duty powers

	1999	2000	2001	2002	2003	2004	2005	2006*	total
CRE claim for judicial review of failure to meet race equality general duty#	N/A	N/A	none	none	none	none	none	none	**0**
CRE race equality specific duties compliance notices issued	N/A	N/A	none	none	none	none	∞	none	**0**
CRE application for court orders requiring compliance with duties	N/A	N/A	none	none	none	none	none	none	**0**

notes on tables 15(a) and (b)

*(1) Up to 1 June 2006.

(2) formal investigations -

(a) 'Named person' investigations are based on suspicion of unlawful acts by one or more named persons, and have different procedural requirements to 'general' investigations.

(b) There were, during this period, 'general' formal investigations with consequences for individuals in Scotland, such as, for example, the EOC's investigation into part-time and flexible working and women working below their full potential.

(3) The CRE did intervene in one such judicial review action (R (Elias) v Secretary of State for Defence (2005) EWHC 1435).

•(4) The persistent discrimination injunction was applied for against Lidl UK GMbH by the EOC. We have included this in the Scotland report on the grounds that Lidl has branches in Scotland, and, therefore, the action may well have had a beneficial knock on effect for some of their employees in Scotland.

∞(5) The CRE declined to provide details on one of its compliance notices - on the grounds that it related to 'an ongoing matter' (CRE, 2005a). We do not know, therefore, whether it relates to Scotland.

3. METHODOLOGY (for more details, see appendix (c))

Ethics, we believe, should be at the heart of research. We tried, therefore, to ensure that this research project was ethically conducted and achieved some ethical outcomes (including, in particular, helping to inform, and influence, the practice of a future Commission for Equality and Human Rights).

3.1 questions addressed

Drawing upon ontological agnosticism and a 'weak' (Schwandt, 2003: 308) social

constructionism (itself enabling more positivistic perspectives), we addressed the following questions:

- how, and with what effects, did the three equality Commissions use their direct enforcement powers between 1 January 1999 and 1 June 2006?
- how have the Commissions presented, and appeared to perceive, their use of these powers?
- to what extent have the Commissions been transparent, scrutinised and accountable?
- what impact is the Equality Act 2006 likely to have on enforcement of the equality enactments?
- what changes might improve the effectiveness of the future Commission for Equality and Human Rights in enforcing the equality enactments and meeting their other duties?

By 'direct enforcement powers' we mean the statutory powers which permit the Commissions to take enforcement action in their own names, as opposed to, in particular, the power to assist an individual in taking legal action. The direct enforcement powers we investigated were those relating to:

- formal investigations;
- non-discrimination notices;
- persistent discrimination injunctions;
- binding agreements;
- discriminatory advertisements;
- instructions and pressure to discriminate; and
- the race equality duty.

As we only looked at the use made of these direct enforcement powers, our report does not attempt to reach (but might be used to contribute towards) conclusions about the overall effectiveness of the Commissions. The DRC, for example, has completed just one formal investigation (an enforcement power), but has also conducted a large number of influential research projects (using, in particular, its non-enforcement power, at section 2(2)(c) DRCA).

3.2 data collection and analysis

Data collection and analysis was conducted between 1st December 2005 and 1st June 2006, and included:

- attempting to identify, and take proper account of, some of the assumptions, motivations, and prejudices, which might influence/ distort our data collection and analysis.
- asking the three Commissions, in Freedom of Information Act letters (dated 7 December 2005), about their use of direct enforcement powers (example of letter reproduced at appendix (d)).
- receiving a response from the DRC, in a letter dated 9 December 2005 (DRC, 2005a), which provided all the information requested, except for declining, for 'confidentiality reasons', to reveal with whom the three binding agreements were made.
- receiving a full response from the EOC in a letter dated 6th January 2006 (EOC, 2006a).
- subsequent to initiating action under the Freedom of Information Act, receiving a partial response from the CRE in a letter dated 17 March 2006 (CRE, 2006c).
- analysing the equality acts (RRA, DRCA, DDA, SDA), and other relevant acts (such as, for example, the Equal Pay Act), with a view to better understanding the nature of the Commissions' duties and powers.
- analysing Commission documents - including annual reports, strategic/business plans, briefings, newsletters and magazines, press releases and web pages - to gain insights into their presentations, and (much more speculatively) perceptions, of their enforcement powers and enforcement actions.
- analysing parliamentary debates, National Audit Office reports, press articles, and campaign group websites, to gain insights into how others might regard the Commissions and their use of enforcement powers, and to what extent, and in what ways, the Commissions are scrutinised and accountable.
- analysing Green and White Papers, the Equality Act, and the Equality Bill and parliamentary debates about the Bill, to help determine some of the impacts that the Equality Act is likely to have on direct enforcement.
- asking the CRE (in a letter dated 27 April 2006) to provide the small amount of information - requested in the December 2005 FIA request - which had still not been provided and to check some of the information which it had provided (on account of it appearing to be inconsistent with information in its annual report); and offering it the opportunity to include, in our report, an unexpurgated CRE statement on the use of its enforcement powers.
- offering the DRC (in a letter dated 27 April 2006), and the EOC (in a phone

conversation with their London office a couple of days later), the opportunity to include unexpurgated statements.

- writing to all three Commissions (in letters dated 31 May 2006), asking them to inform us whether or not they had used any of their direct enforcement powers during 2006 i.e. to help us bring our information up-to-date.
- receiving, in June 2006, the information requested (in the letters dated 31 may 2006) from the EOC and DRC; and receiving, in a letter dated 11 July 2006, the information requested from the CRE (CRE, 2006d).

3.2.1 limitations

We have tried to ensure that our findings are honest and robust. The research, however, has important limitations, including, in particular, the epistemological and practical problems of accessing other people's perceptions, difficulties in validating information from the Commissions, and the relatively small number of corporate documents analysed.

4. USE MADE OF THE DIRECT ENFORCEMENT POWERS

The Commissions have made little use of their direct enforcement powers (see summarising tables 1-15 above); despite there appearing to have been frequent, and widespread, breaches of the provisions which the powers were designed to help enforce (see appendix (a) for descriptions, with reference to the relevant enactments, of each of the studied direct enforcement powers).

4.1 use of powers common to all three Commissions

Between 1 January 1999 and 1 June 2006, the three Commissions (between them):

- issued one non-discrimination notice (served by the CRE on the London Borough of Hackney in 2000);
- applied for one persistent discrimination injunction (applied for against Lidl UK GMbH by the EOC in 2004);
- presented no 'discriminatory advertisements' complaints to the Employment Tribunals;
- presented no 'instructions and pressure to discriminate' complaints to the Employment Tribunals;
- completed seven formal investigations, suspended a further two, and discontinued a further one (but see above, 2.1, for uncertainties about completeness of the relevant information from the CRE);

- had, at the end of the period, three ongoing formal investigations (ditto); and
- served no notices requiring information for a formal investigation.

4.1.1 formal investigations

By far the most frequently used direct enforcement power was the power to conduct a formal investigation (see tables 3, 4(a) and 4(b), and 14 for more details on specific investigations). Some of the investigations were into issues of pressing public concern; were widely reported in the media; and appear to have had a significant or substantial impact on policy or practice. For example, according to the CRE's annual report (2005b: 25-26), its formal investigation into the Police Service (2005d) found that 14 of the 15 police forces surveyed, and all five of the police authorities surveyed, had non-compliant race equality schemes; and, according to Trevor Phillips, chairman of the CRE, "As a result of" the CRE's "subsequent enforcement action, by the end of the year they all had compliant schemes in place..." (2005b: 3).

None of the Commissions, however, used their power to serve a notice requiring that a person give information for a formal investigation; and, arguably, some of the investigations would have benefited if they had done so. For example, while information gathering for the Police Service investigation (2005d) appears, in some respects, to have been relatively thorough, the use of the power might have encouraged, and better enabled, the taking of evidence from those who did not respond to general invitations to come forward; and facilitated the effective pursuit of important leads. In addition, some personnel might have been afraid to 'whistle-blow', but have welcomed the opportunity of being required to answer questions. It might also be wondered whether some of the formal investigations could have been as well conducted in the absence of the formal investigation powers, and might be better described as 'major research projects'. As far as we can tell, for example, the DRC's formal investigation into web accessibility (DRC, 2004a) could have been similarly conducted under section 2(2) of the DRCA, which provides that 'The Commission may, for any purpose connected with the performance of its functions - ...
(c) undertake, or arrange for or support (whether financially or otherwise), the carrying out of research ...'

It is also worth noting what appear to be significant changes in the way in which the CRE (we didn't look in detail at the EOC) has used the formal investigation power over a

longer time period. In particular, it completed 39 formal investigations in the 1980s (CRE, 1980 a-d; 1981a-c; 1982 a and b; 1983 a-h; 1984 a-h; 1986; 1987; 1988 a-e; 1989a-c); 20 in the 1990s (CRE, 1990 a-d;1991 a-e; 1992 a-c; 1993 a-c; 1994; 1995a and b; 1996 a-c; 1998); just three so far this century (CRE, 2001; 2003; 2005); and, at the time of writing (15 July 2006), had not conducted any investigations during 2006. It is not clear to us, but might be to others, where the time and resources, freed up from formal investigations during the 1990s, were reallocated. It is also, perhaps, notable that the steepest decline has been in the number of investigations into named private sector companies - with 19 in the 1980s, 5 in the 1990's, and one so far this century (if you count the Prison Service investigation on the grounds that it included a private prison).

4.2 DRC binding agreements and CRE enforcement of the Race Equality Duty

We also looked at a number of direct enforcement powers restricted, in law or in practice (see 4.2.1 below), to particular Commissions, and found that, between 1 January 1999 and 1 June 2006:

- The DRC entered into three 'binding agreements' (under section 5 DRCA).
- The CRE -
  - Did not challenge, by means of a claim for judicial review, any failures to meet the general race equality duty; but
  - did intervene in one such judicial review action (R (Elias) v Secretary of State for Defence (2005) EWHC 1435).
  - Served four compliance notices in relation to alleged failures to meet one or more of the race equality specific duties (on Conwy Borough Council, West Midlands Police, West Mercia Constabulary, and a fourth party which the CRE declined to name); but
  - made no applications for a court order requiring compliance with the specific duties.

4.2.1 claim for judicial review

While only the DRC can make binding agreements (although the CEHR will be able to do so), and only the CRE can serve compliance notices for failures to meet the race equality specific duties, we wonder whether the DRC and EOC could, in theory, make a

claim, in a matter in which they had an interest, for judicial review of a failure to meet the race equality general duty. The DRC, for example, might be able to do so if the DTI turned down its request for additional funding, for a particular project, without taking any account of the significant contribution that the project appeared likely to make to promoting good race relations.

5. SHOULD GREATER USE HAVE BEEN MADE OF THE DIRECT ENFORCEMENT POWERS?

The extent to which the direct enforcement powers should have been used might reasonably be said to depend, in particular, upon the following factors:

- the nature, and extent - and, therefore, impact - of problems which the Commissions have a duty to tackle. For instance, discrimination against 'disabled' people is relevant to the DRC's duty, at section 2(1)(a) DRCA, 'to work towards the elimination of discrimination against disabled people'.
- the potential of the Commissions, using their direct enforcement powers, to effectively tackle these problems. Potential is, of course, a complex and slippery concept. In particular, there is likely to be a considerable difference between the potential of an unchanged Commission and the potential of one with improved working practices and culture, and greater resources.

5.1 the nature and extent of the problems which the Commissions have a duty to address

The problems might, for convenience, be divided into -
(1) macro-outcomes to be addressed, such as, in particular, levels of substantial disadvantage, inequalities, and discrimination (both measured in relation to particular groups and for all groups); and
(2) individual acts (including failures to act) which contribute towards these macro-outcomes - but might also constitute problems in their own right (i.e. have a negative impact upon particular individuals) - and which can, again for convenience, be divided into lawful and unlawful acts.

There appears little doubt that there remain serious problems which the Commissions have a statutory duty to address; some of which are highlighted in the recently published interim report of the Equalities Review Panel (Equalities Review Panel, 2006). It reports (ibid: 24), for example, a Department for Education and Skills study (Department for

Education and Skills, 2005) as having found that "Disabled 16 year olds are twice as likely to be out of work, education or training as their non-disabled peers". It also appears that some problems could be getting worse. Berthoud and Blekesaune (2006), for example, found, according to the Equalities Review Panel (Equalities Review Panel, 2006: 23), that "penalties associated with ethnicity, disability and age were higher in the 1990s than in the 1970s".

Unfortunately, the Review is much less informative about the nature and level of discrimination. It does, however, refer to some of the more severe and willful forms; such as, for example, noting (Equalities Review Panel, 2006: 26) River's finding (2001) that 60% of lesbian and gay adults reported having been hit or kicked at school. Furthermore, there is sufficient research, not referred to in the Review, to strongly indicate that discrimination, including in the 'strands' covered by the three equality Commissions, remains a serious problem. PIRU's last report, for example, notes (Harwood, 2005: para. 1.2), albeit without critical review, some of the studies which found significant levels of disability discrimination in staff recruitment (e.g. Ravaud et al, 1992; Meager et al, 1999; Duckett, 2000; Edwards et al, 2000; Jackson, 2000; Bunt et al, 2001); and in staff development, retention and dismissal (e.g. Ravitch, 1994; Kennedy and Olney, 2001; Holzbauer, 2002; Stefan, 2002: 113-115; Baldwin and Schumacher, 2002; Hirst et al, 2004: para. 3.5; Roberts et al, 2004).

5.1.1 'race' related crimes

Discriminatory attitudes and behaviour can, of course, lead to, constitute, or aggravate criminal acts. The DRC and Capability Scotland, for example, have reported on hate crime against people with disabilities (Capability Scotland and DRC, 2004). While all three commissions should, we would suggest, attempt to address the factors which appear to contribute to crimes with a discriminatory element, there is, perhaps, a particularly clear requirement on the CRE to do so, on account of its explicitly laid down duty (in the Race Relations Act) to encourage good race relations.

Furthermore, there is plenty of evidence that 'racial' factors play a significant part in a substantial number of crimes, and that some types of 'race' related crime have increased in recent years. For example, according to Home Office figures (Walker et al., 2006: table 2.04), the police recorded 2,687 racially aggravated less serious woundings in 1999/2000; 5,423 in 2004/05; and 6,108 in 2005/06 (an increase of 13% between

2004/05 and 2005/06). In addition (ibid), between 2004/05 and 2005/06, there was an increase in recorded offences of racially aggravated harassment (14%); racially aggravated criminal damage to a building other than a dwelling (12%); and racially aggravated criminal damage to a vehicle (16%). There was, however, a decrease of 6% in recorded offences of racially aggravated damage to a dwelling (the only reduction in recorded racially aggravated crime that we were able to find for the period 2004/05 to 2005/06).

At present, the recorded crime figures for Scotland only provide information on racially aggravated harassment and racially aggravated conduct (Scottish Executive, 2005a: table A7). Both these measures, however, have shown a considerable increase. Recorded offences of racially aggravated harassment increased from 230 across Scotland in 2000/2001 to 550 in 2004/2005 (the 2005/06 figures were not out at the time of writing); and recorded offences of racially aggravated conduct increased from 806 in 2000/01 to 3,306 in 2004/05.

Some of the increases in recorded racially aggravated crimes across the UK are partly the result of changes in how crimes are recorded. This has involved both improvements in recording procedures and mechanisms, which ‘capture’ more incidents; and changes in how crimes are defined, and, therefore, in what is included or excluded from a particular category. In the case of Scotland, the introduction of the Scottish Crime Recording Standard in 2004 appears to have pushed up overall crime figures, as the Standard means that 'no corroborative evidence is required initially to record an incident as a crime if it is perceived by the victim to be a crime' (Scottish Executive, 2005b); and we suspect that this may well have increased the recording of incidents of racial harassment.

However, not only do changes in recording practice only explain part of the increases, it is notable that the increases in racially aggravated crimes have, in general, been greater than the increases in any associated larger category. For example, recorded offences of criminal damage to a building other than a dwelling, in England and Wales, decreased by 8% between 2004/05 and 2005/06 (Walker et al., 2006: table 2.04); whereas, as referred to above, the figure for racially aggravated criminal damage to a building other than a dwelling was an increase of 12% (ibid).

It is also appears that the number of recorded racially aggravated crimes may well be considerably less than the number of committed racially aggravated crimes. Our basis for saying this is that, according to the 2001/02 and 2002/03 British Crime Surveys (Salisbury and Upson, 2004), people "with a mixed race (sic) background and black people were less likely to report an incident to the police than people from the white, Asian and 'Chinese or other' ethnic groups". Further, it seems likely (and would appear consistent with the relevant findings in the British Crime Surveys) that those with mixed, black, and minority ethnic backgrounds are more likely than the population as a whole to be the victims of racially aggravated crimes. The British Crime Surveys, for example, found that the "risk of racially motivated victimisation was higher for people from black and minority ethnic backgrounds than for white people in general" (Salisbury and Upson, 2004). In other words, those most likely to be the victims of racially aggravated crimes may be the least likely to report racially aggravated crimes to the police. We do not know, however, whether the under reporting of crime among particular groups is apparent for racially aggravated crimes or just for crime as a whole.

It also seems that some racially motivated or aggravated crimes may not have been recorded as racially motivated or aggravated (see, for example, the Institute of Race Relation's documentary record of "racially motivated murders (known or suspected) 2000 onwards" at www.irr.org.uk).

5.2 the potential of the direct enforcement powers to help in addressing these problems

The direct enforcement powers appear (including for the reasons set out below) to have had the potential to make an important contribution to addressing these problems.

5.2.1 high number of relevant behaviours

A substantial percentage of the acts of unlawful discrimination, and public authority failures to meet the equality duties, appear to be of the kind at which the direct enforcement powers were designed to be targeted.

Our brief search (conducted in May 2006) of recent Employment Appeal Tribunal judgments, for example, identified a considerable number of repeat discriminators. Among these were large companies, and local authorities, with the potential to discriminate against thousands of employees and tens of thousands of customers or

constituents. BT, for example, has been found against in several recent discrimination judgements, including in *Reid*, in *Pousson* and in *Pelling*. In *Reid* (Appeal No. EAT/0913/02 ILB), Judge Prophet stated that “what the Employment Tribunal clearly found was a weak approach by BT management in dealing effectively with the transgressor when there was clearly sufficient evidence to indicate race discrimination occurring ...” (paragraph 12).

It appears that ‘persistent discrimination’ injunctions (which ‘restrain’ the committing of unlawful acts of discrimination) could have been applied for in the case of a good number of these identified repeat discriminators (although we do not have enough information about BT to know whether it should have been one such case or whether the problems were, for example, isolated and aberrational). All the repeat discriminators, of course, met the first legal prerequisite - that there had already been a finding of unlawful discrimination against the person concerned; and many, we assume, would have met the second - that it appeared to the Commission that, unless restrained, the person concerned was likely to do one or more unlawful acts of discrimination. During the period studied (1999-2006), however, the only ‘persistent discrimination’ injunction applied for was the one which the EOC applied for against Lidl UK in 2004.

5.2.2 knowledge of relevant behaviours

It also appears that the Commissions knew, or could reasonably have been expected to have found out, about relevant adverse behaviours i.e. those it had the powers to address. The Commissions, for example, could, themselves, have looked at ET and EAT judgments, and conducted more detailed investigations of those repeat discriminators which appeared, from the information in the judgements (such as evidence of systemic failures in HR practice), to be the most likely to commit further unlawful acts. It also appears likely that many instances of adverse behaviour would have been brought to the attention of the Commissions by those who had suffered, or otherwise witnessed, them. With one exception, however, there appears to be no record in the annual reports (and might or might not be in internal Commission documents) of incidents being brought to their attention.

The one exception is the CRE recording, in some of its annual reports, the number of complaints it received relating to the provisions on ‘pressure and instructions to discriminate’ and ‘discriminatory advertisements’. It says, for example, that it "received

83 written complaints about advertisements in 2001" and 100 "formal complaints about advertisements" in 2002. However, despite only the CRE being able to take legal action under the RRA's ‘pressure and instructions to discriminate’ and ‘discriminatory advertisements’ provisions, no action appears to have been taken; we could find no explanation, in the annual reports or elsewhere, as to why none had been taken; and it is not at all clear that such complaints were investigated properly or at all.

Furthermore, it seems likely that the number of complaints would be much greater if the general public knew that the Commissions have powers in relation to ‘discriminatory advertisements’ and ‘instructions and pressure to discriminate’. The CRE, for example, reports (2001b: 22) that the majority of cases concerning ‘pressure and instructions to discriminate‘, received during 2001, were referred to them by the Employment Service and dealt with job vacancies. Since only a percentage of job vacancies will go through the Employment Service, and since the majority of cases of ‘pressure and instructions to discriminate’ will presumably concern behaviour towards those already employed, it seems to follow that the great majority of potential cases are probably not being reported to the CRE.

5.2.3 effectiveness against such behaviours

Finally, we would suggest that the direct enforcement powers have the potential, demonstrated on rare occasions, to be quite effective against such behaviours. The CRE, for examples, states (CRE, 2005a) that, subsequent to issuing compliance notices to three public authorities, for reasons relating to non-compliant race equality schemes, "matters were resolved to its satisfaction".

It also seems probable that the unused powers would have been effective (if the Commissions had got round to using them). For example, the enforcement powers in section 17B DDA could well have proved effective in stopping, deterring, or punishing, ‘discriminatory advertisements’ and ‘instructions and pressure to discriminate’. In particular, most employers - including for the sake of their reputation with potential recruits - would not, we assume, want to be the subject of an adverse employment tribunal declaration. Among those who are unconcerned about damage to their reputation, there would, we imagine, still be a strong reluctance to break an injunction obtained under section 17B(4). Indeed, if the Government did not have faith in the unused powers, it presumably would not have used them as the model for enforcement

powers in the 2006 Equality Act.

In addition to the forms of unlawful discrimination at which the statutes direct them, the direct enforcement powers could also be effective in reducing other forms of unlawful discrimination; equalising opportunities for different groups; and encouraging good practice. Assume, for instance, that the DRC issues a local authority with a non-discrimination notice, requiring it not to commit further acts of section 4A discrimination (failure to make reasonable adjustments). The issuing of the notice might well serve as a wake-up call to senior officers, and the council leadership; and lead to a review of all policies and procedures of relevance to employment discrimination (including sex, 'race', and other forms of discrimination). Furthermore, the issuing of a notice to one council, especially if well publicised, might tend to prompt pre-emptive action on the part of other councils.

6. HOW THE COMMISSIONS PRESENT, AND MIGHT PERCEIVE, THEIR DIRECT ENFORCEMENT POWERS AND ACTIONS

It is, of course, easier to 'establish' how the Commissions present themselves, at least in specific documents, than to 'establish' how they perceive themselves, their powers, and their actions. Does, for example, a stated belief, in an annual report, better represent the beliefs of most Commissioners; the beliefs of the staff who produced the report; or is it a belief that neither group holds, but both would like the Commission to be associated with?

Despite these inevitable problems, insights into Commission beliefs could, if confirmed and further developed, be of significant practical relevance. For instance, if a Commission conceives the non-use of a power as a problem, it might be relevant for the Commission to focus on the administrative and resource matters which are preventing it from using that power. If, however, a Commission is opposed to the use of most direct enforcement powers, it might be useful for others, outside the Commission, to look at - and, if appropriate, challenge - the organisational beliefs, culture, and ethos which might be supporting such a standpoint.

6.1 Disability Rights Commission

We looked at *Five Years of Progress* (DRC, 2005b); the DRC's Strategic Plan (DRC, 2004b); the DRC's website (www.drc-gb.org) in February 2006; the DRC's Legal Bulletins

(DRC 2001; 2002 a and b; 2003; 2004d); *Employing Disabled People - top tips for small businesses* (2004c); and randomly selected DRC press releases from 2005 and 2006 (DRC 2005 c-g, 2006 b-f).

The DRC's preferred self-presentation appears to be that provided in the 'notes to editors' in its press releases. It states (2005c) that "The Disability Rights Commission is an independent statutory body responsible for advising government on the effectiveness of disability discrimination legislation and in promoting good practice in the public and private sectors". Its other presentations, and apparent presentational tendencies, appear, in general, to be consistent with the aim of achieving this self-presentation. Some of these apparent tendencies, and associated beliefs, are outlined below.

6.1.1 high-lighting the problem not the possible problem makers

The DRC tends to highlight unacceptable givens, presents these as challenges to government and others, and quite often refrains from stating that government or others might be partly to blame. For example, the DRC's Chief Executive, B. Niven, in a press release (DRC, 2005f), suggests that John Hutton could "liberate the one million disabled people from a system which writes them off rather than invests in them".

Furthermore, these givens tend to be, or to be framed as, often quite abstract, outcomes rather than as actions or behaviours. For instance, section 3 ('Our Vision') of the Strategic Plan (2004b: 11) states that "Today disabled people face extreme inequality and social exclusion... ". The 'Our Vision' section, however, makes no reference to people facing discrimination. Indeed, apart from in the phrase 'Disability Discrimination Act', the terms 'discriminate', and 'discrimination', are used infrequently in the most of the documents. The exceptions are the Legal Bulletins; perhaps, not surprisingly, since these appear to be particularly aimed at lawyers involved in discrimination law.

6.1.2 blaming social constructs more than corporate bodies.

Where blame is apportioned, it is often directed at broad conceptual entities, such as the 'system' in the previous quote about John Hutton (DRC, 2005f). Similarly, another press release (2005d) states that "the absence of disabled people in judicial roles .... was cited by the Commission as another 'shameful example of a society which fails to consider them as equal citizens'". The release, however, makes no reference to the roles - which would appear to be more direct, influential and obvious - of the Lord Chancellor and the

Prime Minister in judicial appointments.

6.1.3 restrained criticisms of named groups.

There are criticisms (some of which appear important and might well have been influential) of government and others. These, however, are quite rare; and are often implied (such as in suggestions for changes to proposed legalisation), placed amongst compliments, and ambiguous. For instance, after noting that "we have had new legislation which has strengthened disabled people's rights....", B. Massie, DRC Chair, goes on to state (DRC, 2005b: 1) that "Government, employers and other organisations are beginning to take disability seriously", which might, of course, be taken to imply that they had not been doing so previously.

6.1.4 the role of benign ignorance.

The DRC appears to present lack of knowledge - whether of the law, good practice, or business benefits - as the main cause of discrimination. In contrast, there is little or no suggestion, in the documents studied, that discrimination might be deliberate and knowing, and might result from, for example, self-interest, lack of concern, or anti-social attitudes and behaviour. The strategic plan (DRC, 2004b: 11) does state that disabled people are “still likely to encounter demeaning attitudes and assumptions - that they are less capable, mere 'recipients' of support, not able to contribute fully to British life.“. Even here, however, ignorance/ lack of knowledge - albeit framed as active, deep-rooted, and less than benign (especially in the case of "mere 'recipients' of support") - appears to remain the dominant and superordinate concept.

6.1.5 focussing on guidance and persuasion, and working with others.

Consistent with this presented belief in, what might be called, benign ignorance, the DRC appears to focus its self-presentation on its role in providing guidance and gentle persuasion, and in working with others; as opposed to, in particular, on its enforcement powers and actions. For instance, *Employing Disabled People - top tips for businesses* (DRC, 2004c) states, in the first paragraph, that “This guide will give you information to help you meet your duties as an employer under the Disability Discrimination Act (DDA) 1995". There is, however, no use of terms such as ‘must'; no indication that the failure to meet duties could result in legal action; and nowhere, in the document, does the DRC refer to, or even hint at, its role in enforcing the DDA.

6.1.6 legal support as a reactive duty.

Most of the references, in *Five Years of Progress* (DRC, 2005b), to what is, in fact, enforcement action concern the DRC supporting individual claimants (although the term 'enforcement' is not used in these references), rather than to the DRC taking direct enforcement action in its own name. Legal cases are, of course, conflictual; and are, therefore, to some extent, discordant with an emphasis on guidance and persuasion. There appears little attempt, however, to present the DRC as proactive in its legal assistance - in the sense of looking for bad practice and legal trouble - or of intending to make an example of the worst offenders.

It does, however, state (ibid: 1) - "We have won ground-breaking legal cases for people who have been unfairly discriminated against, clarifying the law and promoting wider change as a result"; and also states (ibid: 23) - "We have supported some important cases relating to the legal definition of disability ..". To some extent, the message appears to be that an important reason for the DRC's involvement in cases is to help ensure that there are less cases in future; on account of, in particular, the judgements making it clearer what is and what is not lawful, and the publicity communicating this to employers and others. Furthermore, the DRC appears to present itself as, first and foremost, a champion of conciliation, as opposed to court action (even though, of course, conciliation rules out a contribution to case law); stating (ibid: 23), for example - "We are committed to giving parties a real alternative to litigation by building upon and improving the high standards of conciliation we make available".

The strategic plan (2004b), however, seems a bit more bullish about the DRC's power to support cases; and, in particular, states (at paragraph 7.2.3) that it aims "To support the enforcement of the DDA in up to 75 individual cases each year ....".

6.1.7 direct enforcement played down.

Words with 'enforce' as their stem, such as 'enforce' and 'enforcement', make just three appearances between them in the 35 page *Five Years of Progress* report (2005b: 22-23). This is, perhaps, surprising, and significant, in a five year self-report on the activities of an enforcement agency.

At the first appearance (paragraph 6, page 22), the report states - "We have set up a dedicated 'know your rights' area on the DRC website, which provides advisors and

disabled people with information on all aspects of employment-related discrimination, work place resolution and enforcement of legal rights". Here, the report doesn't appear to be specifically, if at all, talking about enforcement action by the Commission. With the second and third appearances (both at paragraph 2, page 23), it clearly is. It states - “We have created a Strategic Enforcement Unit to undertake formal investigations and enforce other legal powers on discrimination. The Unit has been responsible for developing guidelines on the use of Section 5 agreements under the Disability Rights Commission Act 1999 and has secured the first such agreement”. Direct enforcement, however, does not make it to the succeeding paragraph on page 23, where its inclusion would appear to have been natural and appropriate. The paragraph begins - "We have produced two draft statutory Codes of Practice on the forthcoming Disability Equality Duty for the public sector" and goes onto discuss its wide ranging consultation; but it does not mention that the Commission is empowered to enforce the General Duty nor that it is the only body empowered to enforce the specific duties.

There is a further reference to a direct enforcement power - ‘formal investigations‘ (albeit without the use of the term ‘enforce’). Specifically, at paragraph 2, page 12, it states - “We launched our first formal investigation, into website accessibility in 2004. This initiative found that 8 out of 10 websites are almost impossible for disabled people to use. We are currently working with the British Standards Institute to develop guidance to improve access to the Web”. Here, it seems, even discussion of an enforcement power leads away from any discussion of enforcement.

The strategic plan (2004b) includes a greater number of references to direct enforcement powers. The only such powers specifically mentioned, however, are formal investigations (except for one reference to agreements in lieu of a formal investigation). It indicates, for example, that one of its objectives over the next three years will be to “Consider a formal investigation into the area of employment ...” (paragraph 6.2(B)); and to “Strategically enforce the new Part 3 DDA requirements in respect of reasonable adjustments: through at least one formal investigation or agreement in lieu of such an investigation in 2005 ....” (paragraph 6.3(C)). Despite including the term ‘at least’, we imagine that many service providers would read this as indicating that just one provider in the UK (and no more than two) would become the subject of such action; and that, therefore, there was effectively no chance of it being them.

The failure to refer, in *5 Years of Progress* and the strategic plan, to direct enforcement powers other than formal investigations and section 5 agreements is, perhaps, understandable in the light of the DRC not having used these other powers. However, not having used them might be said to require some explanation, and some indication as to whether the DRC intends to ever use them. It might also be thought to suggest the possibility that the DRC is ambivalent about its other direct enforcement powers and/ or about being perceived as an agent of enforcement. In deed, even when it refers to ‘a formal investigation’, it tends to prefix the term ‘consider’ (such as in the quote above) or suffix the term ‘where needed’. Paragraph 6.2 (under ‘the DRC’s Role and Focus‘), for example, refers to “using strategic legal powers, like formal investigations, where needed”. It does not, in contrast, appear to feel the need to use the contextually vestigial term ‘where needed' at the end of, for example, “Raise service providers’ awareness of their DDA duties ...” (paragraph 6.3 (A)).

6.1.8 problematic exposition of business case

Playing down its enforcement role might, and might well be intended to, make it easier to work with employers, and, in particular, to persuade them of the business case for diversity and non-discrimination. However, in addition to this approach, perhaps, failing to adequately realise the potential of deterrence, the DRC's exposition of the business case appears, in some of the documents studied, to be problematic.

Even the title of one document, *Employing Disabled People - top tips for small businesses* (DRC, 2004c), might well be interpreted as suggesting that employing 'disabled' people is difficult, as 'top tips' tend to be offered when there are particular problems to deal with (along the lines of, for example, ‘Tackling Damp - top tips for householders‘). Furthermore, the references to disabled people in the guide - and, indeed, the use of the term 'disabled' - seems to frame people with disabilities as a group separate from, and different to, normal workers (see, for example, the hints on identification in section 4, 'Who are Disabled People?'); which, in turn, might increase concerns that there is particular risk associated with employing them.

The guide (ibid), in section 1, does state that "Disabled people want to get a job and do it well". This, however, is a statement purely about assumed intent. There appears, we would suggest, to be a patronising, if not damning, faint praise in the guide's assessments of how well the job might actually be done. For example, in the

introduction, it refers to the 'considerable knowledge, skills and experience that disabled people have to offer'. Using 'considerable', in this context, might appear to place all 'disabled' people at the same place on a spectrum of competence; somewhere a good deal short of 'great' and a good deal better than 'minimal'.

It also has to be wondered whether the focus on the business case, with its appeal to self-interest, might, at times, push out or obscure the moral case. To return to, and complete, the previous quote, the introduction states that the guide will: "enable you to take advantage of the considerable knowledge, skills and experience that disabled people have to offer", but does not refer to the benefits to people with disabilities, or indeed, to society as a whole.

6.1.9 (a) little or no indication of planned increase in enforcement action

With the Disability Equality Duty due to come into force in December, it might be expected that the DRC would be considering, and publicising, its central role in enforcing the Duty. The press release of December 2005 (DRC, 2005h), however, makes no reference to this duty. Instead, it appears to focus on a 'campaign' to inform, remind, and persuade reluctant CEOs. It states, for example, that "Ensuring 'buy in' from CEOs and senior managers to implement the Disability Equality Duty (DED) will be the aim of a campaign in the New Year ...".

Even the information in the press release, however, might be said to raise concerns as to whether such an approach (i.e. one with teeth hidden) will be sufficient. In particular, it notes that a DRC survey revealed that "Senior public sector managers had low levels of interest in the DED and, unlike the race equality duty, lacked the personal commitment to see it through... ".

6.1.9 (b) Disability Rights Commissioner for Wales (Dr Kevin Fitzpatrick)

Statements from the Commissioner for Wales (DRC 2006d and e), which reflect and reiterate earlier statements (2006f) from Bert Massie, DRC Chairman, appear to contain messages which are significantly different from some of the dominant messages in the other DRC documents we studied (and which are referred to above, 6.1.1-6.1.9(a)). It is not clear to us, however, to what extent this represents a shift in direction or, for example, a passing change in tone and emphasis; and, if it is such a shift, what motive and intent lies behind it. Is it, for example, the exasperated culmination of long term

disappointment with government policies? Is there an element of death-bed radicalism? Is it the product of a careful, wide-ranging, and philosophical re-assessment of established hopes and assumptions?

Fitzpatrick's comments appear to paint a bleaker, and more mixed, picture of progress to date. For instance, one press release (2006d) reports that he will tell delegates that "Levels of income poverty have grown amongst disabled people during the past 10 years"; and that "In important areas the distance between the living standards, opportunities and life chances between disabled people and the rest of the population has widened". In contrast, the DRC's *Five Years of Progress* states (DRC, 2005b: 7) that "The gap in employment rates between disabled people and non-disabled people has narrowed in the five years of the DRC's life ..."; and that (ibid: 1) "We have begun to see a real change in the way that disabled people are treated throughout Britain... ". The statements, of course, might not be incompatible, but the intended impressions appear to be quite different.

Fitzpatrick also appears to explicitly, and with some detail, criticise the role of both parts of Whitehall (although it is not clear if he primarily means ministers or civil servants) and Cardiff Bay (ditto). The press release (DRC, 2006d) states, for example, that he "will tell delegates .... that a lazy fatalism and a low expectations culture has been running rife through parts of Whitehall. He will also point to a lack of adequate policy co-ordination in Cardiff Bay ...". Again, in contrast, the *Five Years of Progress* (DRC, 2005b) report tends to focus on what bodies have done right rather than what they could do better; stating (ibid: 7), for example, that "many organisations and individuals have contributed to the improved employment rate".

Finally, Fitzpatrick appears prepared to speculate about possible, fundamental, obstacles to change. He states (DRC, 2006d), for example, - "I do not really believe we accept that disabled people have the capacity to be truly equal. And for this reason we do not fully recognise disabled people's circumstances as issues of injustice and equality". *The 5 Years of Progress* report does, in the preface (DRC, 2005b: 1), recognise that "There is as still a long way to go"; but the report doesn't provide a great deal of analysis as to why this might be the case.

The education section of *5 Years of Progress*, for example, under the sub-heading

'Where we were in 2000', begins (2005b: 3): "Education wasn't covered by the Disability Discrimination Act ... It was legal ..... to exclude students on the grounds of disability". Then, in the next paragraph, under the sub-heading 'Moving things forward', it continues: "All aspects of education at school, college and university, plus bodies awarding qualifications, are now covered by the DDA". These statements, we would suggest, might tend to give the impression that non-applicability of the DDA was the cause of discrimination in education, and that the Act's extension will provide most of the solution (although there is, for instance, reference to "helping to ensure that children learn more about disability equality").

6.2 Equal Opportunities Commission

To gain a better idea of how the EOC presents itself, in relation to direct enforcement powers, we looked, in particular, at the EOC's annual report (2005d), Wales Review (2005e), corporate plan 2005-2008 (undated), and website (www.eoc.org.uk, accessed during March and April 2006). We also, however, tried to take proper account of the other EOC documents we had studied in the course of researching this report, such as, for example, an EOC Parliamentary briefing (2005f).

6.2.1 slightly less abashed than DRC about its use of direct enforcement powers

The EOC appears to present conducting formal investigations as being one of its most noteworthy and successful activities. For instance, the first paragraph of its annual report (2005d) notes that it "ran three major investigations into key gender equality issues"; while, in the second paragraph, it appears to suggest that the existence of these had an important influence on government decision making, stating that - "Even before our three general formal investigations were complete, the Government agreed during the year to take forward some key recommendations".

It also, in one instance in its annual report, links together concepts which suggest that investigations can be an important part of enforcement rather than, for example, a form of detached, general, academic research. Specifically, among its 'targets', it includes (2005d: 6) - "Use the EOC's legal powers to investigate organisations or areas of life where sex discrimination is persistent or happens frequently". The implication, in this context, appears to be that enforcement action could follow. In addition, under 'eliminating discrimination', in section 6 of the corporate plan (EOC, undated), it refers to the "EOC's formal investigations and other enforcement powers".

6.2.2 but the terms ‘enforcement’ and ’enforce’ are, in general, avoided and important enforcement powers are not referred to

The EOC, however, tends, in the documents studied, to refer to ‘formal investigations’ without the terms 'enforce', 'enforcement', ‘legal‘, or ‘power‘, and quite often without the term 'formal'. The section on ‘Equal choice, not stereotypes’ (2005d: 10-11), for example, refers (ibid: 11) to the “Successful launch of the report on Occupational Segregation ..”, but nowhere in the section does the EOC explain that it was the report of a formal investigation.

Furthermore, the EOC appears to be almost silent on the subject of its other direct enforcement powers. For example, in the first paragraph, section one, of its corporate plan (EOC, undated), it states: "We have unique powers to support individuals in obtaining justice and to tackle systemic inequality through our powers to investigate organisations or issues". It also, of course, has 'unique' powers to tackle systemic inequality through, for example, issuing ‘non-discrimination notices‘; applying for 'instructions and pressure to discriminate' injunctions; seeking judicial review; and so on. Its annual report (2005d: 6), however, does state - “Our legal work has been particularly innovative this year, with a new use of powers and interventions afforded us under section 71 of the Sex Discrimination Act".

It is, perhaps, particularly surprising that the EOC does not appear to refer on its website to having applied for a persistent discrimination injunction against Lidl UK in 2004. Being the only persistent discrimination injunction that any of the Commissions appear to have applied for, during the seven and a half years studied, it arguably merits some kind of mention. The EOC, however, does refer, in its interim report *Tip of the Iceberg* (EOC, 2004: page 16, foot note 9), to the case (Bond v Lidl UK GmbH, ET case no. 1400967/03) which, we assume, provided part of the basis for the application.

6.2.3 framing enforcement as an act of persuasion and itself as an agent of persuasion

While the term 'enforcement' makes quite a few appearances in the corporate plan (EOC, undated), it seems, to some extent, to have been framed as a form of persuasion. In particular, in paragraph 3, section 1, it states - “We work with others to achieve our mission through ACE.

- **A**genda setting

- **C**apacity building, and
- **E**nforcement”

It then states, “We work by using persuasion.
• persuasion of others is our key task, using ACE”

Since ‘ACE’ includes enforcement, it might be wondered whether ‘persuasion’ is a term which can be informatively, rather than misleadingly, used to encompass education and discussion but also, for example, a non-discrimination notice *requiring* a person not to commit any further acts of the same kind? In fact, the EOC’s powers, duties and functions, might be taken to suggest that, in addition to ‘using persuasion’, it also works, or should work, by using deterrence, punishment, and insistence.

6.2.4 Wales review (EOC Wales, 2005e)

6.2.4 (a) more recognition of multiple-discrimination

This was the only document, amongst those looked at from all three Commissions, which highlighted the interactions between different forms of discrimination. In particular, under the heading ‘Equality for All’, it states (page 14, paragraph 2) - “It’s clear that tackling inequality on a single strand basis - gender or disability for example - is not good enough. None of us are single dimensional people. Our gender, race (sic), sexuality, age and so on combine to determine our needs and influence how we are treated. We’ve also discovered that whilst one form of discrimination is bad enough, if further prejudice is added the result may be unbearable”.

In contrast, the EOC’s annual report (EOC, 2005d), apart from twice in the name 'Disability Rights Commission' (pages 33 and 47), uses the word 'disability' just once (in ‘disability symbol‘), and uses the word 'disabled' just twice (pages 9 and 20); and there appears to be no acknowledgement, in the usage of these terms, that individuals can suffer from multiple discrimination. The paragraph which contains three of the four disability/ disabled references (page 20) states - "Policy in relation to disabled employees. The EOC displays the Two Ticks disability symbol in recognition of the commitment demonstrated towards the recruitment, training and retention of disabled employees". The fourth reference (page 9) puts forward the goal that people "accept that caring makes a huge contribution to Britain's economic and social welfare, as well as to children, elderly and disabled people". In deed, there doesn’t appear to be a recognition,

in these references, that people with disabilities experience even ‘single’ discrimination.

It is not clear, however, that the other Commissions do much or any better. The CRE’s annual report (2005b), for example, does not use the terms ‘gender’, ‘sexuality’, or ‘sexual orientation’, but it does note, in Appendix 1 (which provides brief biographies of the commissioners), that Gloria Mills “pioneered equal rights campaigns covering women, race, disability, lesbian and gay rights ....” (page 39). The DRC’s annual report does, perhaps, do slightly better, in that it notes (2005b: 26) that it “held a conference in Leeds to establish the issues faced by disabled people from ethnic minorities....“.

With the exception of the EOC’s Wales Review, however, the annual reports suggest a significant degree of ‘intersectionality’. Drawing upon Crenshaw (1991), Stefan (2002: page 134, footnote 240) states that "Intersectionaility describes the way in which the experiences of individuals who belong to two or more marginalized or minority groups are not reflected in the paradigms that describe discrimination for any one of the groups. These individuals are doubly or triply burdened by being subjected to dominant practices of several different hierarchies, without legal recourse or even narrative description of their experiences”. The need to address multiple discrimination was, of course, one of the arguments for a Commission for Equality and Human Rights. The failure to highlight this need, in the annual reports, might be regarded as suggestive of another.

6.2.4 (b) also plays down enforcement; and focuses on partnership working and assistance, and providing information on rights and responsibilities

The preface to the Wales Review (EOC, 2005e), and 7 of the 8 sections, do not use the term ‘enforce’ (or words derived from it), even though, in places, one might reasonably expect enforcement to be a dominant, almost unavoidable, theme. The preface (ibid: 2), for example, states that “Today the EOC is looking forward to the introduction of a new legal duty to promote gender equality in both employment and public service provision”; and the ‘Looking to the Future’ section (ibid: 16) states - "We are working with a broad range of public bodies in Wales to pilot the new duty and we hope the lessons from the pilots will help other service providers to prepare for the duty". It nowhere notes, however, that it is responsible for enforcing the duty. The one reference to ‘enforcement’ in the Wales Review is in the ‘Making a difference’ section (ibid: 18), where, in its list of what the EOC does in Wales, it includes - "Uses legal powers of enforcement to investigate organisations or areas of life where sex discrimination is persistent".

As with the EOC annual report, the emphasis in the Wales Review appears to be on partnership, assistance, and the business benefits of being fair. The 'Equal Pay' section (EOC, 2005e: 6), for example, states that "Over 30 predominantly private sector employers .... attended a joint EOC event with ACAS - it pays to be a fair employer - and focused on the benefits of partnership working in taking forward an equal pay review". It continues (in the next paragraph) - "Over 80 public sector bodies in Wales will be contacted and offered assistance in progressing their equal pay activity and encouraged to share best practice and practical solutions".

6.3 Commission for Racial Equality

At the time of researching this report, the CRE's current and previous strategic plans were not on its website (which we checked through March 2006 and the first two weeks of April); and, in addition, the CRE told us, when we phoned their main office several times in March, that they could not send copies. Consequently, this section has been written without having seen the CRE's strategic plan. We were, however, sent a copy of the annual report (CRE, 2005b) and the annual report Wales (CRE, 2005c).

The consultation draft of the corporate plan for 2006-09 had appeared on the CRE website by the time we accessed it on 3 May 2006 (and might have been there for several weeks). We are not entirely clear, however, why the CRE are consulting, in 2006, on a draft of a plan covering 2006; and do not know whether or not it is currently working to a finalised corporate plan.

6.3.1 a greater focus on discrimination

The CRE appears to refer more often to 'discrimination' in its annual report (CRE, 2005b) than the DRC does in its 5 year report (DRC, 2005b); and also appears to present discrimination as a more serious problem, including in terms of the impact it can have on individuals, the number of individuals it impacts upon, and the difficulties involved in addressing it. For example, the forward to the CRE annual report (CRE, 2005b), by CRE chair Trevor Phillips, refers to "individuals whose lives are blighted by racism ... " (ibid: 3), "the Iraqi woman trapped in her own home by stone-throwing yobs" (ibid: 4), and "victims of racial discrimination" (ibid: 3); and asserts that "Ridding the work place and public services of discrimination is an enormous task" (ibid: 4).

In contrast, the focus in the DRC documents appears to be more on unequal outcomes,

to which discrimination might contribute, than on the immediate suffering and disbenefit that often accompanies, and constitutes, an act of discrimination. It is surprising, for instance, that the DRC does not refer to its joint report, 'Hate Crime Against Disabled People in Scotland - a Survey' (Capability Scotland and DRC, 2004). The EOC, arguably, on some points at least, takes an intermediate position. For instance, the introduction to the annual report (EOC, 2005d) does not refer to discrimination; but 'Theme 2' focuses on discrimination, and 'Theme 7' on violence against women.

The CRE also appears to suggest that particular types of 'racial' discrimination, and inequalities, are getting worse. It refers, for instance, to 'the threat of extremism ..' and 'the tendency towards racial segregation' (CRE, 2005b: 6); and Trevor Phillips is reported in the media (Ferguson, 2004) as comparing the plight of gypsies and travellers to 'black folk' in the deep south of the United States 40 years ago. In partial contrast, the EOC does not appear to suggest, in the documents studied, that any matters have got worse; and indicates that a few have stayed the same, and that many have improved (although it does make clear its view that considerable improvement is still needed). Its corporate plan states (EOC, undated: 11), for example, that "Thirty years after the Equal Pay Act the full-time pay gap has halved, but remains at 18%". Similarly, the DRC 5 year report states (DRC, 2005b: 1) - "We have begun to see a real change in the way that disabled people are treated ....." but adds, in the next paragraph, "There is still a long way to go".

6.3.2 and a greater focus on enforcement

The CRE, compared to the EOC and the DRC (see above, 6.1 and 6.2), appears to focus more on its enforcement role; something which is, perhaps, consistent with its greater focus on discrimination, and on discrimination as the result of malicious intent (force being to malicious what inform is to benign). Chapter 4 ('Using our legal powers') of its annual report (2005b: 24-31), for example, includes 'formal investigations', the 'non-discrimination notice' against the London Borough of Hackney, compliance action in relation to the police service, a formal agreement with the MOD, intervention in a court of appeal case, and seeking the 'right' judicial review; while, in chapter 1 ('Legislating for equality'), it states (ibid: 6) that, because of a 'major flaw' in the proposals for a Commission for Equality and Human Rights, it was 'concerned that' its 'existing law enforcement powers would be weakened'.

Furthermore, the CRE seems to make it clearer, than the other Commissions, that

formal investigations can be directed at particular transgressors. For instance, the CRE states (CRE, 2005b: 24) - “We began a named formal investigation into employment practices at Ford Motors PLC ... The investigation was suspended shortly thereafter on agreed terms... “. In contrast, the EOC‘s annual report, while referring to some of its general investigations, such as into flexible working (EOC, 2005d: 9), makes no mention of its 2005 formal investigation into sexual harassment of female Armed Forces personnel.

The contrast, however, is not, we would suggest, great; since the CRE also appears to play down the importance, or potential importance, of its enforcement role. For example, there is one use of the term ‘enforce’ (or words derived from it) in chapter 1; none in chapter 2; three in chapter three; and none in chapter 5. The inclusion of chapter 4 (’Using our legal powers’), which is discussed above, might, of course, provide a partial explanation - in that this is where the reader will go to find out about the CRE’s enforcement activities. It could also be argued, however, that enforcement is, or should be, of substantial potential relevance, and perhaps integral, to achieving most of the CRE’s major objectives; and should, therefore, as with persuasion and guidance, be considered in all the subject chapters. For instance, it might be wondered how it manages to avoid the term in chapter two, which covers, among other issues, extremist violence (ibid: 14); incitement to religious hatred (ibid); and anti-Semitism (ibid: 12).

6.3.3 CRE annual report (CRE, 2005c) Wales

6.3.3 (a) more forthright, in places, in its criticisms; and highlights enforcement action aimed at the public sector (albeit presented as regulation)

Whereas the CRE's annual report (CRE, 2005b) begins quite introspectively, stating (in paragraph 2 of the forward) - "Commissioners and staff were rightly preoccupied with putting our own house in order"; the forward to the Wales report begins (CRE, 2005c) - "This was the year in which the CRE in Wales moved decisively to assert its role as a regulator of racial equality in the public sector". During the rest of the 10 page Wales report, it returns a number of times to its role, and actions, in regulating the public sector. It states (CRE, 2005c: 4), for example, that "we agreed to use our regulatory powers and other means of influence to work with the (Welsh) Assembly to ensure adequate racial equality work by other public bodies in Wales". It is notable, however, that it uses, in these passages, the terms 'regulator' and 'regulatory', and does not refer to enforcement - even though, as we understand it, it is talking about its enforcement powers.

The Wales report, in some respects, also seems to be more forthright in its criticisms of public bodies. The UK annual report highlights specific problems in particular public authorities, such as the high percentage of police forces with non-compliant race equality schemes (CRE, 2005b: 26). The Wales report, however, seems to suggest that there are serious problems across the whole public sector. It states (CRE, 2005c: 3), for instance, that "There is no point in ducking the fact that in Wales, people in positions of public leadership and authority have found it easy to talk about racial equality, but have often shied away from the practical task of actually achieving it"; and that (ibid: 6) "Few public bodies in Wales have addressed their responsibility to promote good race relations in effective ways".

6.3.3 (b) but, arguably, neglects its role in relation to the private sector

The focus on public authorities (see above, 6.3.3 (a)) might result, and understandably so, from the opportunities provided by the general Race Equality Duty, and from the apparent widespread non-compliance of public authorities with the Duty. However, it is not clear that this is sufficient reason to not properly address what might be equally serious problems in the private sector.

The Wales report does not state that the CRE's enforcement/ regulatory powers have been, or will be, used in relation to the private sector or a particular named private sector organisation. When, in places, it refers to organisations, it might reasonably be assumed that it means both private and public sector ones; such as, for example, in its statement (page 8) that the CRE used its 'law enforcement powers to ... remind those running organisations of their obligations to act within the law". When, however, it specifically refers to 'business' or the 'private sector', the talk is of guides and codes rather than enforcement or regulation. Under 'employment', for instance, it states (page 5) - "We consulted widely on our revised employment code, which helped private sector networks to develop their understanding of racial equality practices".

7. HOW, AND TO WHAT EXTENT, IS THEIR USE OF DIRECT ENFORCEMENT POWERS SCRUTINISED AND CONTROLLED?

To better understand why the Commissions operate as they do, including in relation to their direct enforcement powers, it is, we would argue, necessary to include an examination of influences external to them. In particular, it might be useful to address the

following questions:

- to what extent are the actions of the Commissions transparent?
- to what extent are the Commissions independent of the Government?
- to what extent are the Commissions accountable to Parliament?
- what role, if any, does the National Audit Office play?
- to what extent are the actions of the Commissions influenced by - (a) the media; (b) the public; and (c) campaigns, charities, academics, and others?

We have, therefore, tried to take a preliminary look at aspects of these questions. There are also, of course, other questions which appear relevant, but which we do not address in this report, including, for example, the extent to which Commission management processes and procedures, and organisational culture, facilitate robust internal scrutiny and reflection, and the extent to which staff regard whistle-blowing as a viable option.

7.1 transparent?

7.1.1 reports and accounts

The Commissions are required by statute to produce annual reports and accounts. The ones that we have seen, however, don't appear to provide an adequate basis on which to monitor and assess Commission activities. As with the annual reports and accounts of most organisations, information appears, in general, to have been selected and presented so as to illustrate and support particular (mostly positive) points, rather than with the dominant aim of providing as comprehensive and informative a picture as possible. Consequently, a good deal of highly relevant information appears to be missing, and much of the information included is neither aggregated nor where the reader would expect to find it.

7.1.1(a) the accounts

The published accounts provide a good deal of information on staff costs, depreciation, and running costs; but far less, or none, on the costs of particular initiatives and programmes (which is the kind of information, we would suggest, which indicates what the money was spent on trying to achieve). For example, the EOC's accounts for 2004-05 (2005d) allocates, from a total expenditure of over £9 million, just £1,992,000 to programme costs (with £2,275,000 allocated to running costs and £4,862,000 to staff costs). Programmes costs are, themselves, allocated to three broad categories (£370,000 to legal services, £432,000 to research services, and 1,190, 000 to publicity

and information services), which are not further broken down.

This information does not, as far as we understand it, enable the reader to calculate how much was, for example, spent in relation to enforcement or particular enforcement activities, as there is little indication of which categories such enforcement expenditure has been allocated to and no way of retrieving it. For example, is expenditure on direct enforcement primarily accounted for under 'Legal services' or does 'Legal services' consist almost entirely of expenditure on legal assistance and representation; does 'Legal services' account for the majority of the expenditure on legal services, or is much of it accounted for in categories other than programme costs, such as, for example, in the £560,000 spent on 'office services and supplies' under 'running costs'; and how would you find out how much had been spent on formal investigations?

7.1.1(b) the annual reports

The reason why we had to make Freedom of Information Act requests to all three Commissions was because their annual reports simply did not tell us how often, if at all, particular powers had been used. None of the CRE annual reports, for example, refer to its intervention in the landmark High Court case of *R (Elias) v Secretary of State for Defence* (2005) EWHC 1435. Where an annual report does refer to the use of a particular power, there tends to be no indication as to whether the instance referred to was the only time that the power had been used. For example, the CRE's 2005 annual report notes (2005c: 25) that it issued a 'non-discrimination notice' in 2000, but does not indicate whether it has issued any since.

Part of the problem with annual reports seems to be their function as a central marketing tool, and the degree of, often not dishonest, spin that this entails. For example, the DRC's *5 Years of Progress* report (2005b), which includes the 2004-2005 accounts at the back and appears to be often sent out when an the annual report is requested, notes (ibid: 22) - "Our independently evaluated CLS accredited case work service has accepted 8,033 cases since April 2000." This might reasonably be understood to indicate that the DRC is helping substantial numbers - perhaps dozens or hundreds - to fight their cases at tribunal or court. Figures obtained using the Freedom of Information Act, however, present a different picture. In particular, according to the DRC's response (DRC, 2005g) to an FIA request, the DRC, during 2004-05, "supported 12 clients who complained about discrimination in the employment field to bring their cases to Employment

Tribunals, the EAT, Court of Appeal or House of Lords".

7.1.2 strategic/ corporate plans and business plans

Commission corporate/ strategic plans are intended to provide the rolling medium term framework for their annual plans. The current EOC corporate plan (EOC, undated), for example, covers the period 2005-2008. The DRC's Management Statement with the Department for Work and Pensions states (DRC and DWP, 2005: para. 5.9) that the "Commission's Corporate Plan includes statements of:
the Commission's mission, vision, corporate aims and overall strategic direction;
the Commission's objectives and strategies for achieving them over the period of the Plan ... together with key performance measures and targets;
the Commission's forecast of income and expenditure and projected staffing requirements, including planning assumptions;
the Commission's progress in meeting objectives set out in previous Corporate Plans".

Such information should, of course, substantially contribute to the transparency of the Commissions; and, indeed, the corporate plans we've looked at (EOC, undated; DRC, 2004b) contain much useful information. A particular weakness, however, is the apparent failure, in the EOC's and DRC's plans, to include - to borrow the last sentence from the 'Management Statement' quoted above - "statements of ... the Commission's progress in meeting objectives set out in previous Corporate Plans". In each successive plan, the Commissions say what they intend to achieve, how they intend to achieve it, and how they intend to measure the extent to which they've achieved it. The corporate plans do not, however, tell us what, if anything, has been achieved. There are also other significant problems, including, in particular, unclear distinctions between aims, objectives, performance measures, and targets; and a general lack of specificity. The EOC, for example, includes (EOC, undated: 16), among its 'specific measures' of success, 'Enforcement work remains active and effective', which, to us, appears to be a general objective rather than a specific measure.

It seems that the business plans are expected to include more detail. The Management Statement, for example, states (DRC and DWP 2005: para. 5.11) that "on being notified of its grant-in-aid and approval of the strategic objectives in the Corporate Plan, the Commission will prepare a business plan for the year ..." . Further, it states (ibid: para. 5.12) that the "Commission will continue to develop its system of output measures and

performance indicators to enable it to measure performance against stated objectives and to gauge its efficiency, effectiveness and economy"; and (ibid: 5.14) that the "Commission will also monitor and evaluate implementation of its Corporate and Business Plans, including through quantitative and qualitative surveys, and will publish the results annually. The work will include stakeholders' assessments of the Commission's performance". This sounds extremely usefully, and might well be so. At the time of writing, however, we had been unable to get hold of copies of business plans from any of the Commissions; which, of course, might be relevant to issues of transparency and accountability. The DRC's website, for example, included, what it called, a business plan 'narrative' - a six page document which appeared to summarise elements of the business plan, but did not include the kind of detail that, we assume, will be in the business plan itself. The 'narrative' document did have a link to 'the key DRC deliverables agreed by the Commission', but, at the time of looking, this link led to 'page unavailable'.

7.1.3 websites and helplines

7.1.3 (a) websites

Some of the information we sought, which was not available in annual reports, was available on Commission websites. The CRE's site, for instance, has a long list of its completed formal investigations; and the CRE and EOC sites include copies of a quite high percentage of the reports of their completed investigations (with the DRC site including a copy of the report of its one completed investigation). Commission websites, however, did not take us a great deal further in our research into the use of direct enforcement powers. The list on the CRE's site, for instance, omits some completed investigations, and the EOC's site does not list 'formal investigations'. Furthermore, there was limited information (on the three Commission sites) about the other 9 or so direct enforcement powers which we were attempting to research. A search of the CRE's website (conducted on 28 May 2006 using the site's search engine), for example, found no mention of the case of *Elias* (referred to above, 'notes on table 10').

7.1.3 (b) helplines

The DRC helpline was unable, or unwilling, to provide information on the use of enforcement powers. Indeed, when a PIRU trustee phoned up, she was told that the helpline was for 'disabled people not for people doing research' (which was similar to a response given during research for PIRU's last report). This seems unfortunate, both in

that DRC staff, of all people, should realise that someone might be disabled and a researcher, and in that its statutory functions include supporting the carrying out of research. When I phoned the EOC helpline, the call, it seems, was automatically diverted to EOC Wales (on account of having phoned from a number in Wales). In partial contrast to the trustee's experience with the DRC, the people I spoke to at EOC Wales were friendly, and appeared eager to help, but didn't have much of the information requested (which we assume is kept more centrally).

7.1.4 Freedom of Information Act requests

Arguably, basic information about the actions of the Commissions, and other public bodies, should be available without having to make requests under the Freedom of Information Act. Annual reports, for instance, could systematically set out the use made of each enforcement power during the year in question; and a great deal of detail could, of course, be provided on the Commission websites.

There will be those, with a genuine need for information about the Commissions, who will not realise that it might be obtained under the Freedom of Information Act; or will not know how to go about making an effective request. It seems notable, for instance, that another trustee, who phoned the DRC helpline, was told that the DRC wouldn't be able to provide the information being requested (about the number of tribunal cases supported). The helpline worker did not, however, explain that a request could be made under the Freedom of Information Act.

Even when a request is made, there will tend to be a significant delay before the information is received; information might not be provided or might be inaccurate; and a fee might be required first (albeit one not exceeding the maximum specified in the regulations). With the exception of the last point about a fee, we experienced all of these problems when we made a request to the CRE. While the DRC, for instance, took under a week to provide all the information (DRC, 2005a) we had requested in our letter sent to the three Commissions on the 7 December 2005 (PIRU, 2005b-d), the CRE, in its response (CRE, 2006a), dated 11 January 2006, answered 2 of the 18 questions asked (in so far as it provided a list of completed 'formal investigations'). It also stated that "the Commission simply does not capture information in the manner you request. To provide the information in the manner requested would necessitate extensive research/ analysis in order to compose such data and to do this goes beyond that required by the FOIA

2000 (section 1(4))".

This raises a number of serious concerns; and, in particular, in relation to organisational effectiveness, accountability, and transparency. Firstly, if the CRE does not keep a record of how often it has used different enforcement powers, how is it able to monitor and assess the effectiveness of different approaches to achieving its organisational objectives? Secondly, if the CRE doesn't 'capture' this basic information, it has to be wondered what other important information it doesn't keep a record of. Thirdly, the information requested was just the sort of information which, in our opinion, the public have a right to know, and which should be made available pro-actively, or, at least, as soon as someone asks for it. It certainly did not appear to be 'exempt information', under Part II of the Act, such as, for example, 'relating to, bodies dealing with security matters' (section 23).

As we felt that the CRE had not given a proper reason, within the terms of the Act, for not supplying the information, we requested, in a letter dated 22 January 2006 (PIRU, 2006a), that they now provide the information (see appendix (d)(2) for a copy of the letter). In her reply, dated 9 February 2006 (CRE, 2006b), the CRE officer said that she 'could only reiterate all that' was said in the previous letter (although she didn't go onto do so); and ended "Other than what has been stated above, there is nothing further to add". Arguably, however, section 17(7) of the Act required that she should, at least, have added information on 'particulars of any procedures provided by the public authority for dealing with complaints about the handling of requests ... '; and 'particulars of the right conferred by section 50', which is the right to make an application for a decision to the Information Commissioner.

On receiving their refusal, we initially concluded that the CRE probably wasn't contravening the Act (since the FIA responsible officer of an official agency would be well placed to know); and that it would, in any case, be difficult for us to prove otherwise. We assume that individual members of the public (rather than someone writing on behalf of a charity and with some access to legal advice) would, in general, have been even more reluctant to challenge such a refusal; and, therefore, it might be wondered whether the CRE, and similar public authorities, are quite frequently deflecting attempts to obtain information.

Despite our reservations, however, we decided to pursue the matter - on account of the requested information being central to our report, and because we thought it would be useful to further explore how the Commission interacted with what we understood to be its legal duties under the Freedom of Information Act. After several phones calls, and discussion about contacting the Information Commissioner, the CRE provided, in a letter dated 17 March, most of the information requested in our letter dated 7 December 2005 (under the Act, information should normally be provided within working 20 days). At the time of writing, 12 July 2006, we were still waiting for the remainder (i.e. if it arrived the next day, it would have taken over seven months).

7.2 independent of Government?

All three Commissions appear to emphasise their independence from Government. For example, under the heading “What is the CRE?”, the CRE’s website (accessed on 7/04/06) states that the CRE "receives a grant from the Home Office, but works independently of government“; under 'notes to editors' (2005d), the DRC's press release states that “The Disability Rights Commission is an independent statutory body ...”; and, under the heading “Our Status”, the EOC’s website (accessed on 07/04/06) states that it is “an independent, non-departmental public body”.

7.2.1 constraints on independence

There are, however, substantial constraints on this independence from Government, including with regard to:

(a) Government Acts setting out Commission constitutions;
(b) Management agreements with the Government and Financial Memoranda;
(c) Government Acts prescribing Commission powers, and Government Acts defining unlawful actions, and, therefore, those actions which the Commissions might take enforcement action in relation to;
(d) Government policy and its other expressed preferences;
(e) the possibility of the Government using, or not using, its power to legislate; and
(f) Government control over finances.

7.2.1(a) constitutions

The establishing Acts appear to provide for considerable latitude in relation to constitutional arrangements. In particular, each Commission is able (at least after its first

meeting and within normal limits) to regulate its own procedure. Furthermore, Commission duties and functions are defined quite broadly; making it relatively hard to stray beyond them or to be convincingly accused of having done so. The Government, however, has considerable power over Commission appointments. The Secretary of State appoints the Chair of each Commission and (usually after consultation with the Chair) appoints the other commissioners; each Commission's appointment of its chief executive is subject to the approval of the Secretary of State; and if satisfied that a commissioner is unable or unfit to carry out his/ her functions as a commissioner, the Secretary of State may terminate his/her employment.

We are unclear, however, as to the extent to which these arrangements provide opportunities for Government to influence the work of the Commissions, and the extent to which such opportunities have been successfully taken. We suspect that Governments would be extremely reluctant to dismiss a sitting commissioner, as the media would be likely to report it as inappropriate political interference. The exception, we assume, would be cases of serious misconduct, when - as with Gurbux Singh being found guilty of abusing police officers at Lord's (Alibhai-Brown, 2002) - the commissioner is likely to jump before being pushed. In relation to appointments (including re-appointments) the Government will, undoubtedly, avoid appointing a commission chair who takes, on relevant matters, a fundamentally different position from theirs or who appears likely to give them a particularly hard and damaging time. There also, however, appears to be a, generally lived-up-to, tradition of appointing individuals who are knowledgeable, experienced, and widely respected; and who are prepared, on occasions, to criticise aspects of government policy. In addition, any filtering out of potential trouble makers might well be less thorough during selection of commissioners than during selection of the Commission chair.

The Fourth Report of the Select Committee on Public Administration (Select Committee on Public Administration, 2003) casts some useful light on the matter of appointments. It reports (paragraph 60), for instance, that it "found no evidence of any systematic subversion of Nolan principles and practice, nor of the OCPA *(Office for the Commissioner for Public Appointments)* code". This, of course, might be understood as suggesting that it found evidence of some, albeit unsystematic, subversion. The Committee also (at paragraph 65) considers the case of Trevor Phillips, whose appointment, it states, "was greeted by a chorus of newspaper allegations of cronyism".

It goes on to quote (ibid) the recruitment agent, involved in the middle part of the selection process, as having told them that "the process used for the CRE appointment was one of the most rigorous we have done". The Committee also notes (ibid: paragraph 66), however, that neither the recruitment agent, nor the appointments commissioner, is "privy of course to any private, political or official discussions that may or may not have taken place elsewhere".

7.2.1(b) Management Statements with the Government and Financial Memoranda

Agreements/ joint statements between the Government and the Commissions appear to entail considerable additional control on the part of the Government, including, in relation to the setting of strategic and other objectives. The DRC/ DWP Management Statement, for example, notes (DRC/DWP, 2005: para. 4.5) that "Each year, the Secretary of State will send a remit letter to the Commission, setting out key strategic objectives the Government expects the Commission to meet. Each year, the Commission shall submit to the Secretary of State for his approval, a Corporate Plan ... setting out its strategic objectives and its plans for achieving them".

This Management Statement also provides for departmental oversight of Commission spending, financial planning and accounting, and performance. It states (ibid: 4.6), for example, that the Permanent Secretary at the DWP "is responsible for ensuring ... that the Commission spends" the grant-in-aid "in the exercise of its statutory functions properly and with due regard to efficiency, effectiveness and economy". It continues, at paragraph 4.8, that "the Department may, from time to time, require the Commission to provide information about its financial planning systems and performance against its targets and objectives ...". We do not know, however, the extent to which, if at all, the Department does so.

7.2.1(c) Acts prescribing their powers and Acts defining unlawful actions

Statute, of course, defines the Commissions enforcement powers; which can be increased, reduced, or otherwise changed, as the result of amendments. The combined powers of the Commissions have, in general, increased over-time; with additional powers being provided to enable the enforcement of additional legal requirements and prohibitions. For example, the 2005 amendments to the DDA 1995 provide for (at section 49A DDA) a new Disability Equality Duty on ‘public authorities‘, and (at sections 49E and 49F) a new power to enforce the Disability Equality specific duties.

It might be wondered whether the relatively limited nature (both in terms of number and strength) of Commission direct enforcement powers has acted as a substantial constraint on their actions. The infrequent, or non use, of those possessed, with the partial exception of formal investigations, seems to argue against this. It is possible, however, that the Commissions would have made more, and better use, of differently constituted powers. In addition, there have been occasions on which statute, and its interpretation in the courts, has prevented a Commission from using its direct enforcement powers in the manner it apparently would have preferred. In particular, as Monaghan notes (2005: 392), "In Re *Prestige* the House of Lords held that it is 'a condition precedent to the exercise by the CRE of its power to conduct named person investigations that the CRE should in fact have already formed a suspicion that the persons named may have committed some unlawful act of discrimination and had at any rate some grounds for so suspecting.'"

7.2.1(d) Government policy and its other expressed preferences

The Government has provided a relatively clear idea of how, in general terms, it would like to see the Commissions using their direct enforcement powers. This has been communicated through, among other means, Green and White papers; parliamentary debates; speeches; and presumably in the course of meetings, and informal chats, with the Commissions.

For example, replying to a proposal that Respondents be eligible for legal aid in discrimination cases brought by a future CEHR, Baroness Ashton of Upholland, for the Government, stated (19 October 2005: col. 811) - "I believe we all agree that the primary approach of the commission is to promote and support good practice. Therefore, we are talking about a situation that will arise only rarely when it resorts to its regulatory powers - and when attempts to secure improvement through providing advice and guidance have failed. It will support cases brought by individuals only in a very few cases. ... The commission's powers are modelled on those of the existing commissions, who have used them sparingly and strategically. We expect the new commission to do no less".

Arguably, such statements, while specifically aimed at the future CEHR, also send a message about how the Government expects the existing Commissions to use their powers. Similarly, Green and White Papers might well act as immediate Government

guidance. *Fairness for All* (UK Government, 2004), for example, includes (paragraph 4.15) - among other expressions of Government opinion, the substance of which will not be transposed into statute - the statement that "The CEHR will take a strategic approach to the use of its enforcement tools relating to unlawful discrimination and harassment. It will use these tools as a lever for broader change".

7.2.1(e) the possibility of the Government using, or not using, its power to legislate

We are not suggesting, of course, that improvements to discrimination law, often involving an extension of Commission powers, are ever an award for services to the Government. However, it seems possible that the Government's willingness to listen to Commission legislative proposals will depend, to some extent, upon the state of their working relationship; which might, in turn, depend, perhaps to a quite small degree, upon how publicly critical a Commission has been. The DRC, for instance, apparently through working quite closely with the Government, has been successful in helping to persuade it to implement some of the unimplemented recommendations from the Disability Rights Task Force's final report (Disability Rights Task Force, 1999). It is not clear that such close collaboration would have been possible if the relationship between the DRC and the Government had been similar to the more abrasive one which existed between the CRE and the Government in the 1980s (although there were, of course, other important contextual differences between the two situations).

The ultimate legislative sanction is, perhaps, abolition. Fear of this might have marginally helped to concentrate Commission minds onto matters other than forthright criticism (although we have no evidence that it did). Certainly, abolition was a theoretical possibility from the moment of their establishment; and became a probability with the EU requirement to extend protection to additional strands. It is also notable that the DRC/ DWP Management Statement, quoted earlier, states (DWP/ DRC, 2005: Para. 7.1) that "The Department will review the activities and need for the Commission every five years".

7.2.1(f) Government control over finances

The great majority of the Commissions' income comes from central government grant, as grant-in-aid voted by Parliament in the Supply Estimates. For instance, for the period 2004-2005, the CRE received (according to provisional unaudited figures in its financial accounts) £17,360,550 from government grant, and £541,860 from other sources (CRE,

2005b).

We have not looked, other than very briefly, into the question of finances; and cannot, therefore, draw any reasonably reliable conclusions. We would certainly not suggest that the Government could withdraw finance as a punishment for something a Commission had done or said. We assume, however, that the Commissions will be aware that maintenance of, or an increase in, the level of grant could be jeopardised if the Government became deeply unhappy about its approach or performance. Furthermore, it appears that the success of bids for additional resources (which Commissions may make during any year) tend to be quite strongly dependent upon the purpose of the bid being consistent with government objectives and priorities. According to the DRC/ DWP Management Statement (DRC, DWP 2005: para. 5.1), for example, "Any such bid would depend upon a number of factors, including:
The quantum of resources available overall to the Department.
The Commission's bid matching Ministers' policy priorities.
The bid receiving Ministerial approval."

7.2.2 the benefits/ disbenefits of independence

Independence (albeit quite limited) from Government brings substantial benefits; including, in particular, making it easier for the organisation to express its opinions and for it to act in support of its mission rather than in the interests of the Government. It also, however, brings some potential problems.

7.2.2 (a) effectiveness in achieving organisational goals.

Independence from Government also means independence from some civil service procedures and resources - from HR job reviews to elements of Treasury oversight - which are designed to improve individual and departmental performance in implementing Government policies. It is not clear to us, however, whether - in comparing the Commissions and Government departments - economies of scale outweigh diseconomies of scale (and whatever other problems might be characteristic of, or particular to, central government). It is also seems, as discussed above (*7.2.1(b)*), that the Commissions are, in fact, subject to a considerable degree of Departmental input, oversight and control.

7.2.2 (b) removing ministers and commissioners

It might, in general, be easier to remove, in mid-term, an underperforming Minister than an underperforming Commissioner. Shuffling Ministers tends to be regarded as a normal activity of government, and sometimes as a sign of effectiveness, and of responsiveness to events and public concern. Dismissing a Commissioner, however, would - exceptional circumstances aside - tend to be treated with considerable suspicion.

That Commissioners feel secure does, of course, contribute to the independence of their approach. There remains the possibility, however, that this relative security allows a poor choice for Commission chair to act autocratically, idiosyncratically, and even ineptly; and that this, in turn, could allow a Commission's efforts to become counterproductive. We are not suggesting that this has necessarily happened. We would suggest, however, that the most controversial, and surprising, CRE policies and assertions - concerning what it calls a debate on multiculturalism - appear to also be the personal beliefs of Trevor Phillips, the CRE's chair; and are, we would suggest, at variance with, or at least discordant with, some of what we understood to have been the CRE's core values. As Dean wrote in the Guardian (2004) - "Clearly there is an urgent need for more integration, but Phillips' recipe sounded more like a call for assimilation, which is not what is needed."

Of course, our analysis might be far off the mark. Phillips, who is arguably quintessentially New Labour (Damien Green in the Commons on 13 March 2003, for example, said that Phillips was 'as new Labour as it is humanly possible to be'), might, to some extent, be flying a kite for radical Government ideas. In other words, the surprising opinions from the CRE could be the product of too little de facto independence rather than too much.

7.2.2 (c) independence in a critical vacuum

The benefits/ disbenefits of independence from government will, to some extent, depend upon the extent to which the Commissions are under the scrutiny of, and can be influenced by, other individuals and organisations (a subject we further consider below: 7.3 - 7.4). This, in turn, will depend upon, among other factors, the extent to which the degree of independence from government affects the influence of these others. For instance, the opposition and media will scrutinise the actions of a Departments of State, in the hope of finding a reason to criticise, and perhaps damage, the Government. The same incentive, however, will not exist if an organisation is regarded as being

independent of Government.

7.3 **scrutinised by Parliament and the National Audit Office?**

7.3.1 Parliament

Government grants to the Commissions are included in the Estimates of the relevant Department (such as the Home Office for the CRE), which are approved by Parliament. Furthermore, as soon as practicable after the end of each accounting year, each Commission is required to submit to the Secretary of State a report on its activities during that year; and the Secretary of State is required to lay the report before Parliament.

It is not clear, however, that this results in much Parliamentary scrutiny or debate (although it does help ensure that information on the Commissions is made available in a timely fashion). We have been unable to find instances when debates on the Estimates included some debate on allocations to the Commissions. As regards the annual reports, the ‘laying before’ involves the report being made available in the Commons and Lords libraries and a record being made in Votes and Proceedings. For example, Votes and Proceedings for 21st July 2004, Appendix 1, 'Other Papers', at number 9, reports: "Disability Rights Commission, - Report and Accounts of the DRC for 2003-04, with the Report of the Comptroller and Auditor General (by Act) to be published (no. 880)..".

In a rather unsophisticated attempt to identify any Parliamentary scrutiny which the CRE (selected at random from the three Commissions) might have been under, we used the search engine on Parliament's website to search the Commons and Lords Hansard, and Select and Standing Committee reports, for appearances, for the period 1988 to 2006, of the exact phrases shown below:

scrutinised the Commission for Racial Equality; scrutinise the Commission for Racial Equality; scrutiny of the Commission for Racial Equality; scrutinised the work of the Commission for Racial equality; scrutinised the work of the Commission for Racial equality; scrutinise the work of the Commission for Racial Equality; scrutiny of the work of the Commission for Racial equality; scrutinised the CRE; scrutinise the CRE; scrutiny of the CRE; scrutinised the work of the CRE; scrutinised the work of the CRE; scrutinise the work of the CRE; scrutiny of the work of the CRE; criticised the CRE; criticise the CRE; criticism of the CRE; criticised the work of the CRE; criticise the work of the CRE; criticism of the work of the CRE; criticised the Commission for Racial

Equality; criticise the Commission for Racial Equality; criticism of the Commission for Racial Equality; criticised the work of the Commission for Racial Equality; criticise the work of the Commission for Racial Equality; criticism of the work of the Commission for Racial Equality.

No results were found for any of these exact phrases. This does not, of course, necessarily mean that there was no Parliamentary scrutiny of the CRE. It might well have occurred without the words scrutinise/ criticise (or their derivatives) having been used at all or in any of the exact combinations shown above. There might, for example, have been reference to 'scrutinise the Commission', with it having been indicated earlier in the text that the speaker was talking about the 'CRE'. The lack of ‘hits’, however, did seem to suggest that there is unlikely to have been a great deal of debate which constituted scrutiny of the CRE.

To gain some confirmation/ disconfirmation as to whether this was, in deed, the case - and also to get a better idea of what Parliament has had to say in relation to the CRE - we carried out a search of all references (again in the Commons and Lords Hansards and the Committee reports) to the 'Commission for Racial Equality' and the 'CRE' during 2003 (picked at random from the last 5 years). The number and nature of the results did suggest that the CRE might be having a significant impact upon Parliamentary debate; but did not suggest that Parliament regarded itself as having, or having fulfilled, a scrutiny role in relation to the CRE.

References appear to be based upon an assumption that the CRE is properly, and energetically, fulfilling its role (including as a watchdog over government), as opposed to questioning whether or not it is doing so. For example, the Minister is asked whether he thinks that "the Government will be safe from ..... an investigation by the Commission for Racial Equality" (Dr E. Harris, House of Commons Second Standing Committee on Delegated legislation, 25 March 2003: col. 014). It is not clear, however, that Dr Harris would be aware that the CRE, in its almost 30 years of existence, has not carried out a formal investigation of a government department (unless the formal investigation of the MOD (Household Cavalry) is included); has only carried out a formal investigation of two government agencies (the police and prison services); and would, we imagine, be unlikely to undertake the kind of investigation referred to in Dr Harris’s question.

In the majority of instances, the CRE is referred to in support of, or against, a particular proposal. In some cases, the CRE is said to support or oppose the proposal. In the

Lords debate on the Anti-social Behaviour Bill, for example, Lord Avebury stated (7 October 2003: col. 276) that the Commission for Racial Equality "has written to Andrew Ryder of the Traveller Law Reform Coalition supporting all these amendments...". In other cases, information said to be from the CRE is quoted in support of, or in opposition to, a particular matter (whether or not the CRE has given its opinion on the matter itself). In the Commons debate on the Criminal Justice Bill, for example, Simon Hughes stated (18 November 2003: col. 670) that "The Commission for Racial Equality has advanced strong arguments in favour of the jury system ....".

Arguably, the potential for 'using' the CRE in these ways will make some Parliamentarians reluctant to scrutinise its actions. For example, it will be harder for an opposition MP to attack the government with CRE figures, or opinions, if previous criticisms of the CRE have made its research and findings appear unreliable, or its opinion appear biased and interested. The Government - in addition to presumably being reluctant to criticise commissioners which it appointed - also appears to 'use' the CRE in support of its approach, and, in particular, to show that it properly consults on its policy proposals. In a Lords debate on 'Gypsies and Travellers', for example, Lord Evans of Temple Guiting, stated (5 June 2003: col. 1581) that "The Government continue to develop policy in conjunction with key players such as representatives from the gypsy and traveller community, the Institute of Public Policy Research and the Commission for Racial Equality .... "

It is worth noting, however, that, in supporting the idea of a combined Commission, some members appear to have made a number of more or less implicit, and more or less unintended, criticisms of the CRE and the other existing Commissions (see, for example, Gidley at 8.4.2 below). Furthermore, during the debates on the Equality Bill in 2005 and 2006, a few more explicit, and more clearly intended, criticisms were made. In the Commons debate, for example, Phillip Davies 'asked' (21 November 2005: 1245) - "Will the Minister comment on the fact that in the past 10 years the Commission for Racial Equality has faced about 20 claims of racial discrimination from its employees, some of which have been settled out of court with tax payers' money? Does she think that that record justifies using even more tax payers' money to bolster that organisation". Trevor Phillips' ideas on multiculturalism, discussed above (7.2.2(b)), also came in for comment - with Keith Vaz stating (16 January 2006: col. 595) - "I certainly do not agree with his views on multiculturalism, which is very much alive in places like Leicester,

Wolverhampton and other parts of the country".

7.3.2 The National Audit Office

The website of the National Audit Office (www.nao.org.uk) states that "The role of the Comptroller and Auditor General (C& AG), as Head of the National Audit Office (NAO), is to report to Parliament on the spending of central government money. We conduct financial audits of all government departments and agencies and many other public bodies, and report to Parliament on the value for money with which public bodies have spent public money. Our relations with Parliament are central to our work, and we work closely with the Committee of Public Accounts."

Financial audit by the NAO should help ensure that transactions in the Commission accounts have appropriate Parliamentary authority and that grant is not misappropriated; that the accounts are free from material mis-statements; and that their accounting systems are adequate. It should, therefore, also help ensure that the accounts can usefully feed into Government and Commission decision making. Financial audit, however, does not, in general, give much idea as to whether money is being spent effectively; which is the role of 'value for money audit'. The NAO website states - "Around 60 reports to Parliament are presented each year by the Comptroller and Auditor General on the value for money with which Government departments and other public bodies have spent their resources. Under the 1983 National Audit Act, the National Audit Office can examine and report on the economy, efficiency and effectiveness of public spending".

A brief look at NAO reports suggests that it has the remit, experience, and competence to usefully investigate the enforcement activities of the three equality Commissions. Reports published, in 2004-2006, for example, include: 'The Office of Fair Trading: enforcing competition in markets' (2005a); 'Stopping Illegal Imports of Animal Products into Great Britain' (2005b); and 'Reducing Crime: the Home Office working with Crime and Disorder Reduction Partnerships' (2004a) (see also, for example, 2005c, d and e). It also appears to feel able to make quite forthright recommendations for stronger law enforcement. An NAO press office notice, for example, states (2005e) that Sir John Bourne, head of the National Audit Office, "recommended that Customs and the Department for Environment, Food and Rural Affairs (Defra) take further action to prevent and deter people from illegally importing meat and other products by building on

existing campaigns to raise public awareness of the restrictions on imports both in Great Britain and abroad. In addition, Customs should prosecute more cases and should consider introducing on-the-spot fines".

There appear, however, to have been no value for money audits of any of the equality Commissions. Some reports, during the period 1999-2006, include references to the Commissions (in particular, NAO, 1999, 2000, 2004b), and some of these references include suggestions as to things that the CRE might do, or that other organisations might do with the involvement of the CRE. None of these suggestions, however, appear to have been intended as significant criticisms or assessments of the CRE. In 'The Medical Assessment of Incapacity and Disability Benefits' (2000), for example, after strong criticisms of the Medical Services company, the report recommends (appendix 9, page 59, paragraph k) that “Medical Services monitor the service received by claimants from ethnic minority groups through targeted surveys and other means; and that the Commission for Racial Equality be invited to review the work of Medical services in relation to its treatment of claimants from ethnic minority groups”. There is no suggestion that the CRE should have acted earlier or should now act proactively. This is despite it seeming likely that some claimants, or their advisors, would have drawn the problems to the CRE's attention; it clearly having the power to investigate without being invited to do so; and it appearing likely that the failure to act resulted in some of the most vulnerable people in the country being discriminated against.

7.4 **scrutinised by the media, public and charities?**

7.4.1 the media

To gain a better idea of the extent to which, and manner in which, the media might have provided scrutiny of the Commissions, we looked at articles containing references to the CRE or DRC (the EOC having been randomly deselected) filed on the online Guardian (www.guardian.co.uk) and Telegraph (www.telegraph.co.uk/news) during November and December 2004.

7.4.1(a) reporting on the DRC

There were relatively few references to the DRC; and these mostly involved reporting, without much comment, that the Government planned to replace the DRC, and the other two equality Commissions, with the CEHR. For example, Sparrow (2004) in the Telegraph writes that “The new commission will replace the three existing equality

bodies - the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission". Neither the DRC's existence, nor its possible demise, appeared to have been presented as particularly problematic. Indeed, in the one reference to the DRC's position on the proposed CEHR, the impression given is that the DRC, itself, does not have strong feelings on the matter. Specifically, in the Guardian, Brindle (2004) writes - "The Disability Rights Commission (DRC) is not exactly enthusiastic, but has been mollified by a guarantee of at least one disabled person on the board and a disability committee ..."

There are, however, a couple of articles in which positive or negative incidental judgements of, or feelings towards, the DRC might be deduced. In particular, one article in the Telegraph (Marston, 2004), entitled 'BAA told to pay up for wheel assistance', seems to demonstrate that the DRC has a significant purpose and an opinion worth quoting. It refers to the DRC in the last line of the article, stating that "The Disability Rights Commissions, which helped Mr Ross bring the case, said the decision signals that 'disabled people will no longer put up with a second class service'". However, in another Telegraph article (Telegraph, 2004), headed 'and they go about it by creating all these new bodies', the DRC is one of several hundred organisations named in support, it seems, of the argument that there's too many government financed bodies.

7.4.1(b) reporting on the CRE

While the DRC is little reported, and the references appear to be quite positive or neutral; the CRE is quite frequently reported, and the references, in places, constitute a degree of substantive critique. The most common part that the CRE appears to play (in the articles as in Parliament) is as a provider of what is assumed to be relatively authoritative opinion and relatively objective information (which can be quoted in support of a point being made); and, relatedly, as an investigator of iniquitous, and often scandalous, events and practices. An article (Kessel, 2004) about 'Monkey chants at England's game', for example, refers to a CRE commissioned report of Premiership and football league clubs; and there are several references to the CRE's investigation of the murder in prison of Zahid Mubarek (Bright, 2004; Batty and agencies, 2004; and Batty 2004).

There is also an impression that the CRE successfully pushes for changes to government policy, such as amendments to the Housing Bill (Press Association, 2004); and that it has been relatively outspoken in its attacks on government plans for the

CEHR, with Brindle, for example, reporting (2004) that "There is speculation that the new body might go ahead without, at least initially, involvement of the Commission for Racial Equality, the biggest critic of the plan".

It is notable, however, that much of the controversial, and headline grabbing, comment coming from the CRE is attributed to Trevor Phillips. The Telegraph reports (Steele 2004), for example, that "Moderate leaders of Britain's Muslim Community must persuade the rest that they are against terrorism and such practices as forced marriages to help the process of integration into British society, according to the chairman of the Commission for Racial Equality". Further, such comments - perhaps partly because they appear to be statements of personal belief - result in some critical media analysis, which, while primarily directed at Phillips, inevitably involve or imply some criticism of the CRE. We noted earlier, for example, Dean's criticism (2004) of Phillips' stance on multiculturalism (7.2.2(b)).

Even away from Phillips' more controversial statements, the CRE appears to have attracted criticisms during this period. For example, the article about the murder of Mubarek notes (Bright, 2004), perhaps pointedly, that "17 November 2000 - Commission for Racial Equality launches probe. It does not report for three years". The strongest criticism (in our sample), however, comes in a comment piece in the Guardian by the Chief Executive of the 1990 Trust (Chouhan, 2004). She notes that the "CRE is already reducing its case workload" and states that "The CRE has rarely been popular, or particularly effective, but is by far the most influential organisation in putting race issues on the national agenda ..".

In general, however, the media appear to have regarded themselves as having bigger, or uglier, ethnic relations related fish to fry than Phillips or the Commissions - whether it be, for example, the Government (e.g. Johnston, 2004), racist football fans (Kessel, 2004), inequalities (e.g. Hinsliff, 2004); particular companies (e.g. Marston, 2004); friction between ethnic groups (e.g. Ferguson, 2004; Burke, 2004; Asthana, 2004); failing prison officers (e.g. Pallister, 2004); or terrorism (e.g. Steele, 2004). Indeed, in our sample, the Commissions appear to have been regarded, and framed, as comparable to large and quite useful charities (and, in particular, as a source of research, information and opinion); and there appears to have been almost no attempt - with the Chouham piece (2004) being a notable exception - to analyse, or comment upon, their effectiveness in performing their

duties.

7.4.2 the public and campaigns

The public and campaigns have a number of opportunities to attempt to influence the work of the Commissions, including, for example, through:

- making an individual complaint or otherwise feeding back to a Commission.
- responding to a Commission consultation.
- becoming a commissioner or an advisor to a Commission.
- individually writing to the media.
- campaigning in relation to a Commission.
- producing research which relates to a Commission or the work of a Commission.

We discuss, below (7.4.2(a) - 7.4.2(c)), some of these opportunities to influence.

7.4.2 (a) complaints

All the Commissions have some sort of complaints procedure in place. A search of their websites, however, failed to find any figures on complaints, such as, for example, number received and number satisfactorily resolved. Until we've seen this sort of information, assuming that it exists, it's hard to draw useful conclusions about the extent to which the complaints procedures might facilitate a degree of public accountability.

What was clear, however, was that all the Commissions appear to place substantial restrictions on the application of their procedures. The CRE, for example, states (www.cre.gov.uk/about/complaints.html.pr) that its "complaints procedure does not cover", along with two other exempt categories, "dissatisfaction with the CRE's policies or decisions about individual cases or grants". The meaning of this, however, appears to be unclear; and, to the extent that the meaning can be discerned, it appears problematic. In particular, organisational policies often contribute to individual problems - such as receiving poor service as a consequence of a policy on what help Commission staff will and will not provide - and, therefore, dissatisfaction with policies should, we would argue, not be excluded from consideration. In addition, it is not clear what not covering 'individual cases' is intended to mean, as most complaints to organisations tend to concern individual cases.

The DRC appears to be clearer about what its procedure does not cover. Specifically, it states that "It does not cover complaints about a refusal by the Commission to provide

legal assistance in connection with a claim under the Disability Discrimination Act. The DRC will take decisions on whether or not to provide legal representation. The decisions will not be reconsidered unless there is new evidence". There are, we would suggest, a number of possible problems with this approach. First, it excludes those DRC actions, and failures to act, which are likely to have the greatest negative impact on individuals (such as, for example, being refused legal assistance to get a job back as compared to a DRC helpline worker being less than polite). Second, the Commission appears to have leaped from the premise that it has discretion to decide straight to the conclusion that it need not answer for the manner in which it makes the decision. Indeed, it appears to draw upon a quasi-judicial perception of itself - stating that "These decisions will not be reconsidered unless there is new evidence". Even a court or tribunal, of course, might reconsider a case on other grounds, relating, for example, to apparent judicial bias during the original hearing.

It is, perhaps, notable that, in one of the small number of cases we looked at, the DRC refused to provide information to the complainant on its procedures for making such decisions (other than to reproduce, from its corporate plan, its strategic priorities); and indicated that there was no further action that the complainant could take in relation to the Commission's decision to refuse legal assistance. The letter states (DRC, 2004e) - "It is entirely at the Commission's own discretion as to which cases we decide to support and we do not provide copies of internal guidance documents to members of the public". The letter concludes - "You should be aware that my decision is final ...". In fact, the Commission appears to be wrong on both points. First, it is not entirely at its discretion. Someone could, for example, take a case under the Race Relations Act if he or she believed that the DRC had discriminated in deciding not to provide assistance; and could also seek judicial review of the decision. Second, the DRC is likely to be required under the Freedom of Information Act to provide, if requested, copies of the relevant internal guidance documents.

He would also have had the option of asking his MP to refer the matter to the Parliamentary and Health Service Ombudsman (the Ombudsman). The Ombudsman's website (home page, www.ombudsman.org.uk, accessed in April 2006) states - "We carry out independent investigations into complaints about UK government departments and their agencies, and the NHS in England - and help improve public services as a result". The websites of the equality Commissions appear to make it quite clear that this option is

available to anyone who is dissatisfied with the outcome of an investigation of a complaint. None, however, appear to indicate that it might be an option for those who are dissatisfied with the way in which they decided not to provide legal assistance.

A search for Ombudsman investigations, involving the DRC (selected at random from the three Commissions), found just one (Parliamentary Commissioner for Administration, 2002). Completed in 2002, it partially upheld a Mrs S's complaint that the DRC wrongly failed to release information about its refusal to provide her with legal assistance. It is, perhaps, surprising, therefore, that, two years later, with the Freedom of Information Act having come more fully into force, the Commission was (as discussed above) refusing to provide basic information on its decision making criteria and guidelines. Without such information, it is not clear how those seeking help from the Commission can be confident that its decisions are either properly considered or fair.

7.4.2 (b) consultation

There have been some consultation exercises in relation to some of the Commission corporate/ strategic plans. The CRE's website (accessed on 3/05/06), for example, states that "We are inviting you to comment on the CRE's draft three-year corporate plan", and provides a feedback questionnaire. Arguably questionnaires simplify the consultation process and, therefore, make it more accessible. On the other hand, the choice and wording of the questions will, of course, influence the responses given (such as, for example, through more leading questions); and, in addition, a question and answer format can discourage individuals and groups from commenting on matters of greatest salience to them (comments that can also be of the greatest potential relevance to the organisation conducting the consultation).

The Commissions also consult on draft Codes of Practice and in relation to possible changes to Government policy. Under "Definition of Disability - a DRC consultation", for example, the DRC's website states - "We at the DRC would like to hear from you about your view of the best way forward". While the DRC does not appear to be specifically asking what its position should be on the definition (and it might well have already decided), the results of the consultation could, we imagine, influence the details of its position and the force with which it is able to present it to the Discrimination Law Review and the Government.

7.4.2 (c) individual and group campaigning

It seems that campaign messages providing a critique of the equality Commissions rarely appear in the media. We were far from clear, however, of the extent to which this is because campaigns are not sending out such messages or because such messages are not being reported. We, therefore, decided to look a bit further into the matter in relation to one of the Commissions.

A brief look at the websites (including news releases) of 10 charities, whose remit includes disability, suggested that there might be little public criticism of the DRC coming from them (and perhaps from charities as a whole). This, in turn, raises the question - which would require in-depth interviews to even begin addressing - of whether these charities think that there is little or nothing to criticise, or whether, for example, it is felt that public criticism would be counter-productive - damaging the DRC (and, therefore, the good work it does) and the charity's relations with the DRC.

8. WHAT ARE SOME OF THE DIFFERENCES THAT THE EQUALITY ACT 2006 WILL MAKE TO THE DIRECT ENFORCEMENT POWERS AND MIGHT MAKE TO THEIR USE?

The Equality Bill received Royal Assent on 16 February 2006; and the Commission for Equality and Human Rights (CEHR) will come into being (in the sense of 'opening its doors') in 2007, with the DRC and EOC joining in October 2007 and the CRE by the end of March 2009 (www.womenandequalityunit.gov.uk, accessed 5/5/06). We have tried, below, to assess what these and related developments might mean for those 'strands' studied so far in this report i.e. disability, 'race', and gender.

<u>discrimination on grounds of sexual orientation and age discrimination</u>

It should be noted, however, that these developments will also have consequences for the other strands. In particular, the CEHR will be empowered to enforce the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661); the regulations made under Part 3 (Discrimination on Grounds of Sexual Orientation) of the Equality Act; the Employment Equality (Age) Regulations (SI 2006/1031); and Part 2 (Discrimination on Grounds of Religion and Belief) of the Equality Act.

Our findings on enforcement of the disability, 'race', and gender enactments, and the governments assertion that it expects 'the commission to use its regulatory powers only

rarely' (Baroness Ashton, Lords Hansard, 19 October 2005: col. 811), suggests, however, that - unless there is considerable pressure and scrutiny (including from campaigning groups) - there might well be little enforcement in relation to discrimination on grounds of sexual orientation or age discrimination.

8.1 overview

There appears to have been a good deal of uncertainty in the media as to whether the new Commission was likely to result in stronger or weaker enforcement of the equality enactments. Johnston in the Telegraph (2004) wrote that "no sooner does one lot of rules go out the door than another comes in. There is to be a new super-quango ...". There are, he added, "concerns that its powers are too wide". Brindle in the Guardian (2004) reported that Kate Nash, chief executive of Radar, "said getting the CEHR's approach right would not only protect disabled people's rights but enhance them", and reported that she said - "Get it wrong and it could set back not just the disability agenda but the human rights agenda, and all the separate strands, not just by years but by decades". Ashley, also in the Guardian (2004), wrote that "The big concern has been that the new body wouldn't have enough muscle - that the forced merger by ministers is an attempt to draw the teeth of the most effective campaigners and produce a blander, more reticent organisation which goes around England, coughing politely and emphasising education, not law enforcement."

While the enforcement powers are "closely modelled on those of the existing commissions" (Baroness Ashton, Lords Hansard, 19 October 2005: col. 813), there are some important differences (in addition to those which are the inevitable consequence of combining Commissions and strands). When taken as a whole, there appears to have been some strengthening of those powers in the EA which are equivalent, or comparable, to the direct enforcement powers currently available to the existing Commissions. This has included, for example, the extension, to matters under the SDA and RRA, of the power to make 'binding' agreements; and the provision that a notice requiring information, for the purposes of an inquiry, may be issued without the authorisation of the Secretary of State, whereas, under the existing equality acts, a notice may only be issued, without the authority of the Secretary of State, when the investigation is a 'named person' investigation and the person being served is one of the named people.

Some other powers, however, appear to have been weakened or lost. The Commission, for example, will not have the power, which the CRE and EOC posses under s.64 RRA and s.73 SDA ('preliminary action in employment cases'), to present to an employment tribunal a complaint that a person has done an act of unlawful discrimination (except in relation to 'discriminatory advertisements' and 'instructing or causing' someone else to discriminate). There also appears to have been some increase in some of the rights which will be enjoyed by those who face action from the Commission. The EA, at Schedule 2, paragraph 11, for example, provides that the recipient of an information notice may apply to a county court (or the sheriff in Scotland) to have the notice cancelled, whereas the DRCA, for example, does not. While the Minister stated (Meg Munn, HC Standing Committee, 2005: col. 88) that "we had to ensure that there was no regression in their powers and duties ...", it might have fairer to have indicated that it had ensured "no overall regression in the sum of their powers".

Since, however, the Commissions have made quite limited or no use of existing powers, we suspect that any difference in powers will be of less consequence than any difference in attitude and intent; and, relatedly, in external pressures and control. In this respect, it is notable that, during the debates, Baroness Ashton of Upholland (consistently with others for the Government) appeared to congratulate the existing Commissions on having used their powers "sparingly and strategically" (19 October: col. 811) and added that "We expect the new commission to do no less" (ibid). Arguably, of course, by 'no less' she means 'no more'. It is also notable that, despite some differences - such as, for example, a statutory requirement to consult on its strategic plan - the CEHR does not appear to be much more, or much less, independent from Government, transparent, or accountable to the public and Parliament, than the existing Commissions.

8.2 **the Parliamentary debates**

8.2.1 opposition in principle

There appears to have been little, in principle, opposition in Parliament to the creation of a single equality Commission or to most of the other substantive matters in the Equality Bill; and only relatively limited disagreement on the details. Reflecting this, Dr Evan Harris, in the Commons debate, stated (16 January 2006: col. 658) - "The fact that there were no Divisions in the Standing Committee and only one on Report - not on principle, but on the timing and speed of the promotion of transgender equality and non-

discrimination - shows a spirit of collegiality and a shared sense of purpose in bringing the Bill to the statute book."

One of the most significant instances of opposition to a substantive matter in the Bill was, perhaps, the Lords amendment removing harassment on the grounds of religion or belief, which Sir Patrick Cormack called 'a very wise move' (House of Commons Hansard, 21 November, 2005: 1247). In response to Cormack's request (ibid) for "an assurance that the Government will not seek to re-insert" the provision, the Minister stated (Munn, 21 November, 2005: 1248) that "the strength of feeling in the other place, the current work of the discrimination law review in fundamentally examining issues of inequality and discrimination, and the subsequent opportunity to re-introduce the provision before Parliament in a single equality Bill have persuaded us not to seek to re-introduce those provisions in the House at this time".

The only example of in principle opposition to the Bill as a whole, that we came across (albeit in a fairly restricted search), was from Gerald Howarth. He said (21 November 2005: 1244) - "as a white, Anglo-Saxan, Anglo-Scot, middle-class male heterosexual, I feel that we are increasingly becoming the persecuted who might be in need of protection"; and he asked the Minister (it seems rhetorically) whether the exemption of Parliament and the security services, "from all this absurdity", undermined "the whole case for this absurd and ridiculous Bill, which should be consigned to the dustbin now?".

8.2.2 amendments

Others were more specific in their criticisms, and combined these criticisms with tabled amendments. Several Conservatives peers, for example, argued that some small businesses, and small charities, might suffer an inequality of arms if the Commission took action against them (e.g. Baroness O'Cathain, HL, 19 October, 2005: col. 813), and should, therefore, be eligible for legal aid (Baroness Miller of Hendon, HL, 19 October 2005: col. 810); and a number of Labour members argued that there should be a Race Committee (eg Michael Wills, 16 January 2006: col. 603; Dr Roger Berry, 16 January, 2006: col. 616), so that, according to Keith Vaz (16 January, 2006: col. 601), "black and Asian people, it is to be hoped, will be able to decide on policy that affects black and Asian people"; and the Liberal Democrat Lord Lester wished, as discussed below (8.3.4), to remove some of the 'barnacles' (Lord Lester, 11 July, 2005: col. 945) from the existing system.

The Government resisted some of the amendments on the grounds of being largely superfluous, such as, for example, Munn arguing (HC Standing Committee, 2005: col. 96) that there was no need to insert ‘or body’ after ‘person’ (proposed in amendment 76), since, she said, ’person’ in legislation includes a ‘body of persons’ (“unless a contrary intention appears“); and resisted other amendments on of the grounds of being both unnecessary and potentially counterproductive, such as, for example, indicating that being too specific about how the Commission should give guidance might impose “a duty that roots our advice and guidance in today’s communication media” (Baroness Ashton, 11 July 2005: col. 934). It also, however, resisted some on grounds which, to us, appear less convincing. For example, Baroness Ashton (19 October 2005: col. 812), in response to the concerns expressed about a potential inequality of arms (see above), stated that “the great majority of cases are brought before employment tribunals where the procedures are simple and straightforward so that formal representation is not required“. It might be pointed out, however, that - in addition to procedures not, in fact, being simple - legal assistance is needed to prepare, as well as to present, the case; and that, in addition, discrimination law is particularly complex (so much so that mistakes on points of law frequently have to be corrected on appeal).

8.2.3 Government opinion on the use of enforcement powers

In the course of debate, the Government stressed that the CEHR's powers would be based, with non-regression, upon those of the existing Commissions. It also explained how it thought the existing Commissions had used their enforcement powers, and that it expected the future Commission to use its powers in a similar manner.

In particular, Munn (HC Standing Committee, 2005: col. 97) stated - “The commission will work primarily through promoting good practice and helping bodies comply with the law, ... We expect the commission to use its regulatory powers only rarely .... I emphasise that the commission will use its powers strategically, and following the precedent of the current commissions, will provide support in only a few cases”. Similarly, Baroness Ashton stated (Lords Hansard, 19 October 2005: col. 811) - “I believe we all agree that the primary purpose of the Commission is to promote and support good practice. Therefore, we are talking about a situation that will arise only rarely when it resorts to its regulatory powers - and when attempts to secure improvement through providing advice and guidance have failed“.

There are, we believe, serious flaws in these arguments; flaws which, as far as we could tell, were not addressed during the debates. There appears, for example, to have been little or no discussion of the extent to which "attempts to secure improvement through providing advice and guidance" have succeeded or failed; or of the contribution that enforcement action could make. Furthermore, we are unclear as to what is intended in the comment about resorting to regulatory powers "when attempts to secure improvement through providing advice and guidance have failed". For example, before the Commission gives legal assistance, would it first be expected to spend months attempting to change the employer through advice and guidance; even though, in the meantime, the three month time-limit for the claimant to submit an application would be missed.

8.3 changes to direct enforcement powers

8.3.1 investigations

8.3.1(a) the Secretary of State's powers

The EA provides for when the Commission may and may not conduct an investigation. However, unlike, for example, at section 3(2) DRCA, there is no requirement to conduct an investigation if directed to do so by the Secretary of State. Such a requirement had been provided for at clause 22(2) of the Equality Bill (albeit with the proviso, at 22(4), that the Secretary of State must first suspect that the person concerned may have committed an unlawful act); but - at least according to the impression the Government gave in debate - was removed in response to calls for the CEHR to have greater independence from the Government.

Arguably, however, the importance of this change has been overstated. Independence from government primarily depends, we would argue, upon the Government not being able to prevent the Commission from investigating particular matters, including, for example, those which might cause the Government embarrassment. It depends far less, if at all, upon the Government not being able to direct that the Commission investigate particular matters. The only exception would be if the Commission was kept so busy, with Government instigated investigations, that it had little or no time to investigate matters which the Government would prefer it not to investigate. Bearing in mind, however, that we found no examples, during the period studied, of the Government using its power to direct the Commissions, such a scenario seems highly unlikely.

8.3.1(b) investigative scope

While the existing Commissions may conduct a formal investigation for any purpose connected with the performance of their general duties (e.g. the EOC may do so under section 57 SDA), the EA provides (section 20(1)) that 'The Commission may investigate whether or not a person -

(a) has committed an unlawful act,

(b) has complied with a requirement imposed by an unlawful act notice under section 21, or

(c) has complied with an understanding given under section 23' ('agreements').

It appears, however, that there may be quite limited substantive difference in the range of matters which may be investigated. This is, in particular, because the Commission will be able, under section '16 Inquiries', to 'conduct an inquiry into a matter relating to any of the Commission's duties under sections 8, 9, and 10' (which concern 'equality and diversity', 'Human rights', and 'groups'). Effectively, the Equality Act has replaced general formal investigations with inquiries and belief/ named person formal investigations with investigations. The Commission may also, under section 31 EA, 'assess the extent to which or the manner in which a person has complied with' the duties on public authorities. It is notable, however, and might prove of some importance, that the EA does not expressly provide that the Commission may conduct any inquiry into matters relating to its general duty (at section 3), which appears wider than its combined duties under sections 8, 9 and 10.

8.3.1(c) investigating unlawful acts

Sections 20(1) and (2) EA provide that the Commission may investigate whether or not a person has committed an unlawful act 'only if it suspects that the person concerned may have committed an unlawful act'. This appears to differ, albeit in relatively minor ways, from the comparable powers of the existing Commissions.

To begin with, it appears to mean that the CEHR may investigate whether a person has committed unlawful act X if it suspects that he or she has committed unlawful act Y or, for example, Z (so long as the act is unlawful within the meaning of section 34 EA, which provides the definition of 'unlawful' for the purposes of the EA). In contrast, the DRC may only investigate (unless Schedule 3, Part 1, paragraph 3(3)(b) applies) whether a person has committed an unlawful act if it has reason to believe that the person may have

committed ‘the act in question’ i.e. it may only investigate whether a person has committed unlawful act X if it has reason to believe that it has committed unlawful act X.

This might be regarded as in increase in powers. However, there also appears to be a possible diminution of power in so far as the EA does not provide for the power provided for in Schedule 3, Part 1, paragraph 3(3)(b), DRCA - that the DRC may investigate whether a person has committed an unlawful act, even if it does not have ‘reason to believe’ that he or she may have committed the unlawful act in question, if the question of whether it has committed the unlawful act is to be investigated in the course of a formal investigation into compliance with a requirement in a non-discrimination notice or an undertaking in a binding agreement. On the other hand, the CEHR is, perhaps, unlikely to investigate compliance with an unlawful act notice, or an undertaking under a section 23 agreement, unless it suspects that the person in question has committed an unlawful act within the meaning of section 34; and, therefore, the ‘loss’ of this exception might prove of quite limited practical significance (but for an alternative perspective see above: *1.5.1(b)*).

Another difference, of course, is between ‘has reason to believe that the person concerned may have ....’ in the DRCA and ‘suspects that the person concerned may have’ in the EA. We wonder whether, in ordinary language, ‘suspects’ possibly implies the need for more certainty than ‘has reason to believe’. To suspect that something is the case appears to mean - to believe there to be a more than significant, or a substantial, probability that it is the case, but to have some important doubt as to whether it is the case (and usually a related awareness of having inadequate evidence). In contrast, to have reason to believe that something is the case can mean, in every day language, that - a certain matter, or matters, to which an individual gives credence, increase his or her belief that the said something is likely to be the case (even if, on balance, he or she suspects that it is not the case). For example, it seems possible to have ‘reason to believe’ that ‘A’ committed a particular act and, at the same time, to have ‘reason to believe’ that ’B’ committed the act, even with the knowledge that it could not have been both ’A’ and ’B’.

On the other hand, whereas, in everyday language, ‘suspects’ appears to encompass suspicion based upon a feeling or intuition, ‘reason to believe’ tends to refer to the possession of specific information, and to imply that, in so far as the information

supports the belief in question, it has not been invalidated by other information in the mind of the possessor. Of course, it might reasonably be argued that the inclusion of 'may', in both the DRCA and EA provisions, so reduces the requirement for certainty that any difference in meaning between 'reason to believe' and 'suspects' becomes inconsequential. In addition, there might be less difference between the requirements in the EA and the requirements on the EOC and the CRE (compared to those that might exist between the EA and the DRCA). Specifically, case law (and, in particular, the House of Lords in *R v CRE, ex parte Hillingdon London Borough Council and in Re Prestige*) seems to indicate that there needs to be material before the CRE or EOC which is sufficient to raise in their minds a suspicion that there may have been unlawful acts of the kind it is proposed to investigate.

Finally, on this matter, it is, perhaps, worth noting that the term 'suspects' was the subject of debate in Parliament, albeit (in contrast to the concern we raise above) because those raising the issue considered that suspicion should not be sufficient to trigger an investigation. In particular, Brokenshire (HC Standing Committee, 2005: col. 102), moving amendment no 78, to insert 'on reasonable grounds' after 'suspects', stated that the "amendment intends to give some assurance to the outside world that the commission will act in reasonable manner, given the strength and power that it will have with regard to resources and funding". He added that the Commission 'must consider' a complaint 'carefully before embarking on a full-scale investigation".

8.3.1(d) power to obtain information (information notices)

Schedule 2, paragraphs 9 and 10 EA provide that 'In the course of an inquiry, investigation or assessment the Commission may give a notice to any person' requiring him/ her to provide information or documents in his/ her possession or to give oral evidence. This appears to constitute, in some respects, a stronger power than the comparable powers of the existing Commissions. Under the DRCA, for example, at Schedule 3, Part 1, paragraph 4(2), an information notice 'may only be served on the written authority of the Secretary of State unless the terms of reference confine the investigation to the activities of one or more named persons and the person being served is one of those persons'.

The EA, however, provides the recipient with a right of appeal (to have the notice cancelled) which is not available under the DRCA. Specifically, the recipient of a notice

may, under Schedule 2, paragraph 11 of the EA, apply to a county court or to the sheriff (in Scotland) to have the notice cancelled on the grounds that it is unnecessary or otherwise unreasonable. It seems likely, however, that any increase in the number of notices served, as the result of the extension of the notice making power to inquiries and assessments, is likely to be greater than any decrease in the number served, as the result of the possibility that a served notice might be cancelled in court. Indeed, since the Commissions could find no instance, during the period studied, of information notices having been served, their use could not, perhaps, further decrease. The Minister, in debate, appeared to acknowledge and address this right of appeal, albeit without pointing out that it constituted a change. Baroness Ashton said (19 October 2005: col. 812) that she recognised that 'the power to compel evidence in an investigation ... could be onerous on an individual or small organisation. However, there is a safeguard to check the powers of the commission and to ensure that they are not used irresponsibly. Schedule 2 enables that a person served a notice to provide evidence may apply to a court to have the notice cancelled ... ".

8.3.1(e) enforcement

Whereas, under the EA (Schedule 2, paragraph 13(1)(a)), a ‘person commits an offence if without reasonable excuse he - ... fails to comply with a notice under paragraph 9 ...‘ to provide information, the DRCA (Schedule 3, Part IV, paragraph 24(1)) provides that a person is guilty of an offence if he/she ‘deliberately alters, suppresses, conceals or destroys a document to which’ an information notice relates or knowingly or recklessly makes a false statement. Arguably, to suppress or to conceal requires more active intent than ‘fails to comply with’ might, since the latter could encompass, for example, ‘not sending information on account of not caring whether or not it is received‘. On the other hand, of course, there is no offence under the EA if there is a ‘reasonable excuse‘.

Where the CEHR thinks that a person has failed, or is likely to fail, without reasonable excuse, to comply with a notice under paragraph 9 (an information notice), the EA provides (Schedule 2, paragraph 12) that the Commission may apply for a court order requiring the person to take such steps, to comply with the notice, as may be specified in the order. This provision appears similar to the comparable provisions under the DRCA, RRA and SDA. The DRCA, for example, provides (Schedule 3, Part 1, paragraph 5) that the DRC may apply for an order if a person has failed to comply with an information notice 'or the Commission has reasonable cause to believe that he intends not to comply

with it'. The notable difference, of course, is that the CEHR may not apply for an order if it thinks that the recipient of the notice has 'a reasonable excuse'. Presumably, however, the DRC might be acting unreasonably if acted with the belief that there was a reasonable excuse.

8.3.2 unlawful act notice

Section 21(1) EA provides that the Commission may give a person an unlawful act notice if '(a) he is or has been the subject of an investigation under section 20(1)(a), and (b) the Commission is satisfied that he has committed an unlawful act.' The notice may (under section 21(4)) '(a) require the person .... to prepare an action plan for the purpose of avoiding repetition or continuation of the unlawful act; (b) recommend action to be taken by the person for that purpose'.

The 'unlawful act notice' is similar to, and modelled upon, the 'non-discrimination notices' under the DRCA, RRA and SDA. Under section 4(1) DRCA, for example, the DRC may serve a non-discrimination notice on a person, if, in the course of a formal investigation, the Commission is satisfied that he or she has committed or is committing an unlawful act. There appear, however, to be some significant differences.

To begin with, Baroness Gibson (11 July 2005: col. 943) argued that - "Under the existing legislation, the existing commissions have the power in an anti-discrimination notice to require the discriminator to cease the discrimination in question. This power does not appear to be available to the Commission. It could therefore be argued that there is a regression issue at stake." There does appear to be substance to this argument. The DRC, for example, may (section 4(1)(b) DRCA) serve a notice which requires the person concerned 'not to commit any further unlawful acts of the same kind...'., whereas there is no such provision in section 21 of the EA. Baroness Ashton, however, in her reply (11 July 2005: cols. 943-944) to Baroness Gibson, did not address this particular point; and Baroness Gibson, subsequent to Baroness Ashton's reply, withdrew amendments 120 to 127 (which included the relevant amendment). We are, therefore, unclear of the reasoning behind this change.

The reasoning might be that the recipient of the notice is already, of course, required under law not to act unlawfully. To require him/ her 'not to commit any further unlawful acts of the same kind ..' might not only, in that sense, be superfluous, it may also, by

implication, suggest that the recipient is, in some sense, not required, or not required to the same extent, to not commit other kinds of unlawful act. Alternatively, the reasoning might be that the purpose of the action plan is to avoid ‘repetition or continuation of the unlawful act’ (section 21(4)(a) EA). Therefore, it might be regarded as unreasonable, and at variance with section 21(4)(a), and, indeed, section 22, to require that the person cease discriminating immediately or in a short space of time (which appears to be the requirement in section 4(1)(b) DRCA).

Another difference is that, under the DRCA (section 4(3)(b)), the notice may require the person to take any action which is specified in an action plan which has become final, whereas, under the EA, there is no provision to require this in the notice. Instead, under section 22(6)(c) EA, the CEHR would need to apply for an order requiring the person to ‘act in accordance with the action plan, or ... to take specified action for a similar purpose". In addition, section 21(4)(b) EA is, arguably, slightly ambiguous in that it does not appear clear whether the ‘purpose’ - in ’for that purpose’ - is ’to prepare an action plan’ or ’avoiding repetition or continuation of the unlawful act‘. If it were the former, it would mean that, unlike the DRC, the CEHR would not be specifically given the power to recommend, in the notice, action other than in relation to an action plan. We presume, however, that it would not be prohibited from so doing, whether in the notice or in a separate communication. The Explanatory Notes to the Act state that subsection (4) “allows the CEHR to recommend action that the person served the notice should take”. However, since, taken on its own, this implies no limits on the power to recommend, and since this cannot, we assume, have been the intent in passing the subsection, it is not clear that the Notes clarify the matter.

Section 21(5) EA allows the person, given the notice, to appeal to the appropriate court or tribunal on the grounds that he or she has not committed the unlawful act or that a requirement for the preparation of an action plan is unreasonable; and section 21(6) provides that, on appeal, the court or tribunal may affirm, annual, or vary a notice or a requirement under a notice. The right of appeal is similarly provided for in the SDA, DRCA, and RRA. It is notable, however, that the DRCA (we didn’t look at the RRA or SDA in respect to this matter), at Schedule 3, Part 2, paragraph 10(1), includes a right to appeal against a requirement to take action specified in an action plan. That there is no such right in the EA arises, of course, from there being no provision in the EA to require, in the notice, that the person concerned take action specified in an action plan (i.e. there

would be nothing to appeal against). However, as referred to below, such a requirement can be included in a court order.

Under section 22(6) EA, the Commission may apply for a court order requiring a first draft action plan (the preparation of which was required in an unlawful act notice); requiring a further revised draft plan in accordance with any directions about the plan's content specified in the order; or, during the five years after a plan comes into force, requiring that the person 'act in accordance with the action plan, or ... take specified action for a similar purpose'. Fairly similar provisions exist under the DRCA, SDA and RRA. Under schedule 3, Part III, paragraph 15(2), DRCA, for example, if the subject of the notice fails to serve his/ her first proposed action plan on the Commission within the specified period, the DRC may - as with the CEHR under the EA - apply for a court order directing him/her to do so within a specified period; and paragraph 15(2) allows the DRC to apply for a court order to enforce a requirement, in a non discrimination notice, to carry out any action specified in the action plan.

It might be wondered, however, why the CEHR will not able to apply for an order requiring a first revision; since this is something which the DRC may do if the conditions in Schedule III, Part 3, paragraph 17(2) (concerning first inviting the person to serve a revised plan) are met. In particular, does it mean that a person will be able to lawfully stick to his/ her first proposed action plan (however inadequate it may be), so long as he/ she ignored any request from the Commission for a first revision?

8.3.3 agreements

Section 23 agreements, under the EA, appear to be similar, albeit with some differences, to 'agreements in lieu of enforcement action', under section 5 of the DRCA (with such 'binding' agreements not having been available to the CRE and EOC). Whereas the DRC, if it 'has reason to believe that a person has committed or is committing an unlawful act', may (subject to the apparently irrelevant section 3(3)) enter into an agreement, the CEHR may enter into such an agreement 'only if it thinks that the person has committed an unlawful act' (section 23(2) EA). We would suggest that 'thinks' might reasonably be understood to require a significantly higher degree of certainty than 'has reason to believe'; thus, if this is, indeed, the case, setting a higher threshold, in the EA, for being able to enter into a 'binding' agreement.

Tabled amendments, however, had aimed to require an even higher degree of certainty than was thought to be implied by the term 'thinks'. In particular, Brokenshire states (HC Standing Committee, 2005:102) that amendment 80 "seeks clarity by substituting 'is satisfied'" for 'thinks'. He goes on to argue (ibid) that "since Clause 23(3) refers to whether the Commission thinks that a person has committed an unlawful act, I suspect that such an agreement would be admissible in evidence in any subsequent proceedings. The wording will give an indication that the agreement had been entered into in the first place on certain grounds ... It is therefore important for the Commission to satisfy itself that an unlawful act has been committed...".

Section 23(1) EA provides that the ‘Commission may enter into an agreement with a person under which - (a) the person undertakes -
(i) not to commit an unlawful act of a specified kind, and
(ii) to take, or refrain from taking, other specified action (which may include the preparation of an action plan for the purpose of avoiding an unlawful act), and
(b) the Commission undertakes not to proceed against the person under section 20 or 21 in respect of any unlawful act of the kind specified under paragraph (a)(i).’.

This also is similar to the comparable provisions in the DRCA, but, again, with some significant differences. The DRCA, section 5(2), provides that an agreement under section 5 is one by which -
‘(a) the Commission undertakes not to take any relevant enforcement action in relation to the unlawful act in question; and
(b) the person concerned undertakes -
(i) not to commit any further unlawful acts of the same kind...; and
(ii) to take such action (which may include ceasing an activity or taking continuing action over a period) as may be specified in the agreement‘.

It seems that the meaning of 'agreement' in the EA might be wider than in the DRCA. Specifically, the EA allows for an agreement in which the person undertakes not to commit ‘an unlawful act of a specified kind‘ i.e. any act which is unlawful within the meaning of section 34 EA and which is specified in the agreement. In contrast, the DRCA appears to restrict the agreement (at least in so far as it would be enforceable under the relevant provisions) to unlawful acts of the same kind as the act which gave rise to the agreement. This would, for example, mean that, if the CEHR entered into an

agreement on the grounds that it thinks that a person has committed an act which is unlawful under the RRA, the agreement could include an undertaking not to commit an act which is unlawful under a provision of the DDA.

It might be that other unlawful acts could, in effect, be specified in pursuance of 5(2)(b)(ii) DRCA (the person concerned undertakes - 'to take such action (which may include ceasing an activity or taking continuing action over a period) as may be specified in the agreement'), so long as the action to be ceased was itself specified instead of, or in addition to, the kind of unlawful act of which it was considered to be an example. However, section 5(5) provides that 'The action specified in an undertaking under subsection (2)(b)(ii) must be action intended to change anything in the practices, policies, procedures or other arrangements of the person concerned which - (a) caused or contributed to the commission of the unlawful act in question; or (b) is liable to cause or contribute to a failure to comply with his undertaking under subsection (2)(b)(i).' In other words, if the agreement were to include an undertaking not to commit other unlawful acts, which were not of the same kind as, what might be called, the 'original' unlawful act, the other unlawful acts would need to be arrangements which caused or contributed to the commission of the 'original' unlawful act or were liable to cause or contribute to a failure to comply with the undertaking not to commit any further unlawful acts of the same kind as the 'original' act.

Under sections 24(2) and (3) EA, if the Commission thinks that a person 'has failed to comply', or 'is likely not to comply', with an undertaking under a section 23 agreement, the Commission may apply to a county court or to the sheriff (in Scotland) for an order requiring the person to comply with the undertaking and 'to take such other action as the court or sheriff may specify'. The main difference between this and the comparable provisions in the DRCA is that, instead of requiring that the Commission 'thinks that a party ... is likely not to comply', the DRCA requires that the DRC 'has reasonable cause to believe that he intends not to comply ...'. Arguably, 'likely not to comply' has a materially different meaning to 'intends not to'. For example, the Commission might consider that a person intends to comply but, because of organisational weaknesses, also believe that the person is likely not to comply.

8.3.4 applications to court

Section 6 ('Persistent discrimination') of the DRCA, which is similar to the persistent

discrimination provisions in the SDA and RRA, applies to a person during the five years beginning with the date on which a non-discrimination notice served on him or her has become final, or a finding, by a court or tribunal, that he or she has committed an 'unlawful act' (within the meaning of section 6(4)) has become final. If during this period, it appears to the DRC that unless restrained the person concerned is likely to do one or more 'unlawful acts', the Commission may apply for an injunction/ interdict restraining him or her from so doing.

Clause 26 (‘Applications to court‘) of the Equality Bill was modelled on the persistent discrimination provisions, and provided very similar powers (albeit, of course, applicable to more than one ‘strand’). The clause, however, underwent quite substantial amendment to provide, at section 24(1) EA, that ‘If the Commission thinks that a person is likely to commit an unlawful act, it may apply’ for an injunction restraining (or, in Scotland, for a interdict prohibiting) the person from committing the act.

Baroness Ashton (19 October 2005: col. 798) said, referring to clause 26, "We agreed to take this away and consider it further. I am pleased to inform noble Lords that these amendments achieve the intention of the noble Lord, Lord Lester - that is, they remove the barnacles. Quite simply, we are persuaded that there is a good case for extending the circumstances in which the commission may apply an injunction to stop a person discriminating ..... While the current legislation requires that a person has already discriminated, Clause 26, as amended, will impose no such restriction. The power can be used against a person whom the commission thinks will discriminate, even though there is no established record in that regard". She stressed (ibid), however, that "the effect of the amendment is not to make the process of applying for an injunction any less rigorous. This is an evidence-based process, where only evidence of real substance will convince a court that an injunction is necessary to prevent an unlawful act. ... These amendments create a streamlined approach, eliminating preliminary stages."

Speaking next, Lord Lester (2005, 19 October: Col. 799) expressed his gratitude to the Government for "removing completely unnecessary bureaucratic obstacles", and agreed that the change "does not in any way lower the high threshold needed by the commission to obtain injunctive relief". He noted, however, that "The Equal Opportunities Commission would have been happy had it continued to have the option of going to an employment tribunal in order to obtain a finding of unlawful employment discrimination. It

prefers employment tribunals to county and sheriff courts as appropriate places to deal with discrimination. I understand and sympathise with this view but it seems to me that that should be taken into account by the discrimination law review ... ".

Removing the ‘bureaucratic obstacles’ could make it more likely that the Commission uses the powers provided for in section 24. Lord Lester, for example, stated (2005, 19 October: Col. 799) that "In my personal experience, the power has been rarely exercised in the past - partly because of the obscurity of the drafting, which has been removed“. However, the requirement that a person has been the subject of a non-discrimination notice or has already been found to have discriminated, while potentially restricting, could be a useful heuristic for determining against whom action would best be directed. In addition, a brief look at tribunal judgements reveals a quite large number of repeat discriminators. Their one ’offence’ means that (if the other criteria were met) ‘persistent discrimination’ action could have been taken against them; and their repeat ‘offending’ indicates, we would argue, that ‘persistent discrimination’ action should probably have been taken against a significant percentage of them. That it wasn’t - there having been just one ‘persistent discrimination’ injunction issued during the period studied (1999-2006) - seems to suggest that the ‘bureaucratic obstacles’ might not have been the decisive obstacle to Commission action.

Furthermore, removal of the ‘obstacles’ appears to have been granted at a price, or, at least, has been accompanied by an associated reduction in enforcement powers. As Lord Lester seems to allude to (19 October 2005: col. 799), the possibility of ‘preliminary action in employment cases’ (seeking declarative relief before an application for a restraining injunction) - as exists under section 73(1) of the SDA and section 64 of the RRA - has not been provided for in the EA (although it continues to exist, in the EA, in relation to discriminatory advertisements and instructions and pressure to discriminate). Arguably, such preliminary action might well have been more attractive to the Commission than seeking an injunction - in that declarative relief might be easier to obtain but still constitute a strong deterrent.

8.3.5 application to restrain unlawful advertising, pressure and instructions to discriminate

Section 25 EA applies to actions which are unlawful under 'the discriminatory advertisements', or 'instructions and pressure to discriminate' provisions in the SDA,

RRA, DDA, and EA (with those in the EA relating to religious discrimination).

The most significant difference between section 25 EA and the comparable provisions in the DDA, SDA, and RRA concerns, it appears, the requirements which must be fulfilled before a restraining injunction can be applied for. Under section 17B(4) DDA, for example, the DRC may only apply for a restraining injunction if a tribunal has made a finding, which has become final, that a person has done an act which is unlawful under section 16B (discriminatory advertisements) or 16C (instructions and pressure to discriminate); and 'it appears to the Commission that, unless restrained, he is likely to do a further act which is unlawful under that section'. In contrast, under the EA, it is sufficient that the Commission thinks that the person has done such an act, so long as the Commission also 'thinks that if unrestrained the person is likely to do another act' to which section 25 applies.

8.3.6 legal assistance

8.3.6 (a) the duty to consider applications

The EOC and CRE are required to consider all the applications for assistance which each is empowered to grant, but can decide which, if any, applicants to provide assistance to (although the relevant sections specify the grounds on which an application may be granted). Both the DRCA (section 7) and the EA (section 28) provide this discretion but do not require that the DRC or CEHR consider all applications. Basing the Equality Bill, in this respect, upon the DRCA, and not the SDA and RRA, appears to have caused some concern, and resulted in an unsuccessful amendment. Moving amendment no. 129, Baroness Gibson of Market Rasen stated (11 July 2005: col. 946) that "The commission should be under a duty to consider all applications for assistance" and added that if the duty "were omitted from the new commission, that would be a breach of the 'non regression' principle enshrined in the relevant EU directives ..... Its removal from the commission would remove the right of some victims of discrimination to apply for assistance". Two other former EOC Commissioners also spoke to the amendment, with one of them, Baroness Howe, noting (11 July, 2005: col. 947) - "it is a quite a club we are becoming".

Talking against the amendment, Baroness Ashton (11 July, 2005: cols. 947-948), for the Government, argued that the Commission needed to be allowed "to use its power in the way it considers most effective", and that "In practice, it has to consider all the

applications if it is to identify which, if any, it wishes too support. As a public body, it has an implicit obligation to not act unreasonably and could be challenged if its ignored applications it received".

The amendment, however, would not have prevented the Commission from using its power to provide legal assistance 'in the way it considers most effective', since it would have discretion as to whether or not to support a case. It also does not appear correct to suggest that it would, in practice, have 'to consider all applications'. Once it finds a test case for discrimination on grounds of religion or belief, for example, it might well, unless required to do otherwise, stop looking at applications relating to those grounds. Consequently, it would be likely to miss cases in which the need of the applicant was so high that it would be inequitable for the Commission not to provide some legal assistance. As to the idea that unreasonable action could be challenged, it seems iniquitous to expect, for example, someone who does not have the competencies to conduct a discrimination case against their employer - hence the need to apply to the Commission for assistance - to seek judicial review against the £90 million per annum CEHR; and, in addition, we suspect that such claims for judicial review, on the grounds that the Minister appears to be suggesting, would be unlikely to succeed.

8.3.6 (b) assistance outside the equality enactments

The EA provides (at section 28(6)(a)) that, where legal proceedings relate or may relate partly to a provision of the equality enactments and partly to other matters, assistance may be given (under section 28(1)) in respect of any aspect of the proceedings; but also provides (section 28(6)(b)) that assistance may not be continued if the proceedings cease to relate to a provision of the equality enactments, except in so far as it is permitted by virtue of subsection (7) or (8).

Subsection (7) provides that the Lord Chancellor may by order disapply subsection (6)(b) in respect of legal proceedings which, when instituted, related (wholly or partly) to a provision of the equality enactments; have ceased to do so, but relate to any of the Convention rights within the meaning given by section 1 of the Human Rights Act 1998. Subsection (8) provides that the Secretary of State may by order enable the Commission to give legal assistance in respect of legal proceedings in the course of which a person who is, or has been, a 'disabled person' relies or proposes to rely on a matter relating to his/ her disability (except in relation to alleged behaviour contrary to Part V ('public

transport') of the DDA). Importantly, however, subsection (9) provides that an order under subsection (7) or (8) 'may make provision generally or only in relation to proceedings of a specified kind or description (which in the case of an order under subsection (7) may, in particular, refer to specified provisions of the equality enactments) or in relation to specified circumstances'.

It is notable that the EOC argued in its parliamentary briefing (2005f: 9-10) that "the CEHR should be free to bring strategic legal cases under relevant employment and non-transposed EU law, not just equality law". There was also a wider concern, expressed during the debates and in amendments, that "if the Commission's remit is interpreted strictly according to the enactments listed in Clause 35, then key elements of its work would not be covered" (Baroness Gould, 11 July 2005: col. 979). Clause 35 listed those enactments which were included within the meaning of 'the equality enactments'. An example, Baroness Gould (ibid) said, was that the Commission "will not be able to investigate why many employers do not carry out health and safety assessments of pregnant women and take enforcement action in connection with that".

In reply to this, and comments from Lord Lester, Baroness Ashton stated (11 July 2005: cols. 980-981) - "We expect the commission to promote equality for women and men in their roles as carers, parents and part-time workers through its role of promoting understanding and good practice in equality and diversity. It might decide to use its inquiry powers to look into these sorts of issues, as these powers are not tied to equality and human rights legislation". She adds, however, that "The commission's regulatory role .... is primarily concerned with the equality enactments .... I believe that it would be inappropriate to extend this role into areas where other bodies have responsibilities. To do so could risk the loss of focus on the commission's role in equality and human rights".

A particular problem with section 28, about which I suspect we might hear a good deal in future, concerns the discretion given to the Lord Chancellor under subsection 7. Firstly, the nature of the Human Rights Act, its use to date, and the Government's ambivalent attitude towards human rights (in relation, for example, to US renditions), seems to indicate that the Government might quite frequently find itself subject to action under the HRA. Is it appropriate, therefore, that the Government should be able to have this significant influence on the circumstances in which individuals might be given support. Secondly, bearing in mind the way in which the Government appears to have attacked

the HRA for short-term political advantage - including, in particular, to distract attention away from problems at the Home Office - can the Lord Chancellor be trusted with this power? Thirdly, human rights are understood to be fundamental, and inalienable, and, therefore, enforcement and protection of these rights should not be at all dependent upon what could, in effect, be the populist whim of a declining government.

8.4 differences relating to accountability, transparency and control

Some of the differences, which concern the direct enforcement powers, have been discussed above (8.3). Some of the other differences, which do not specifically concern the direct enforcement powers, are discussed below (8.4.1 - 8.4.4).

8.4.1 Commission appointments

The Secretary of State's control over the appointment and dismissal of CEHR commissioners is similar to that possessed in relation to the existing Commissions. Specifically, under the EA, as similarly provided for under the SDA, RRA and DRCA, the Secretary of State appoints the commissioners (Schedule 1, Part 1, paragraph 1(1) EA); appoints a 'chairman' from among their number (paragraph 4(1)); and 'may dismiss a commissioner who is, in the opinion of the Secretary of State, unable, unfit or unwilling to perform his functions' (paragraph 3(5)). The EA also provides, as do the other aforementioned acts, that the Commission may appoint a chief executive (paragraph 7(1)(a)), but may only do so with the consent of the Secretary of State (paragraph 7(2)). It might be noted, however, that the DRCA required that 'The first appointment of a chief executive shall be made by the Secretary of State' (Schedule 1, paragraph 10(2)); something which is not provided for under the EA. Since, the DRC's entire life span appears set to be about eight years, such a power might, in retrospect, turn out to have been of some overall consequence.

In some respects, the EA is more prescriptive as to the criteria which the Secretary of State is required to apply in selecting commissioners. In particular, Schedule 1, Part 1, paragraph 2, provides that, in appointing commissioners, the Secretary of State shall -
'(a) appoint an individual only if the Secretary of State thinks that the individual -
(i) has experience or knowledge relating to a relevant matter, or
(ii) is suitable for appointment for some other special reason, and
(b) have regard to the desirability of the Commissioners together having experience and knowledge relating to the relevant matters.'

Subparagraph (2) explains that 'the relevant matters are those matters in respect of which the Commission has functions including, in particular' discrimination and human rights. Comparable requirements - relating to ‘experience and knowledge’ - are not placed on the exiting Commissions. It might be wondered, however, whether, in practice, this EA paragraph will make a great deal of difference to the appointments process. In particular, while (a)(ii) (‘is suitable for appointment for some other special reason’) would not encompass clearly improper matters, such as, for example, having made a political donation, it does appear to allow for considerable latitude.

The EA provides (schedule 1, Part 1, paragraph 2(3)) that the Secretary of State shall ensure that the Commission includes a commissioner who is (or has been) a ‘disabled person‘; a commissioner, appointed with the consent of the Scottish Ministers, 'who knows about conditions in Scotland'; and a commissioner, appointed with the consent of the National Assembly for Wales, 'who knows about conditions in Wales'. In contrast, there are no requirements in the SDA, DRCA, or RRA regarding knowledge of conditions in Scotland or Wales, and none regarding disability in the SDA and RRA (although each Commission appears to have favoured the appointment of a commissioner for Scotland and a commissioner for Wales). In addition, there are no requirements in the SDA and RRA regarding disability. The DRCA, however, includes a requirement designed to ensure that more than half of the commissioners will be disabled or have had a disability (Schedule 1, paragraph 2(2)), and also provides that the Secretary of State shall exercise his powers with a ‘view to securing that at least one of the persons holding office as chairman or deputy chairman is a disabled person or a person who has had a disability’ (schedule 1, paragraph 6(2)).

8.4.2 Committees

The CEHR may (Schedule 1, Part 2, paragraph 11) establish ‘one or more’ advisory committees; and (paragraph 12) one or more decision making committees, to which it may delegate functions. It ‘shall‘, however, establish a decision-making Scotland Committee (paragraph 16), Wales Committee (paragraph 24), and Disability Committee (Part 5, paragraph 49(1)). Indeed, paragraph 12 should, perhaps, read ‘three or more ....’, since it does not have the power to establish less than three.

The DRCA, RRA and SDA also provide considerable freedom to establish committees.

The DRCA, for example, appears to achieve this by providing (Schedule 1, paragraph 14(1)) that ‘The Commission may authorise any committee of the Commission or any commissioner to exercise such of its functions (other than functions relating to the conduct of a formal investigation) as it may determine'; and also by not otherwise providing what it may or shall do in relation to committees. The DRCA, RRA, and SDA, however, do not require the establishment of a Wales, Scotland, or Disability Committee. In the case of the Wales and Scotland Committees, and the requirements for commissioners with knowledge about conditions in these countries (see above, 8.4.1), the legislation appears to be catching up with the devolution acts (even though, of course, the DRCA 1999 was passed after the Government of Wales Act 1998).

According to the Minister (Munn, 21 November, 2005: col. 1245) "Schedule 1 provides .... for a disability committee to oversee the commission's disability-specific work". The Committee, she continued, "which will be subject to review under the Bill, will build on the work of the Disability Rights Commission and will reflect the unique aspects of disability law including, for example, the requirement to make reasonable adjustments". There appear, however, to be comparable arguments for having a 'race' or gender committee, including, in particular, some of the distinctive characteristics of prejudice and discrimination which is on grounds of ’race’ or gender. Consequently, the suspicion remains that the disability committee was partly the result of a successful attempt to appease the DRC, as, perhaps, delaying abolition was in the case of the CRE.

As discussed earlier, there had been unsuccessful attempts, during the Bill’s passage, to provide for a 'race' committee. Putting forward what appears to have been the government’s main argument against such a committee, Meg Munn stated (21 November, 2005: col. 1246) - "the Bill gives the commission complete discretion to establish committees and delegate functions to them as it sees fit. It can establish committees to provide a voice for specific groups, to bring in specific expertise, or for any other purpose. It is better for the commission to make those decisions, rather than impose committees through the Bill". There appears, to us, to be considerable strength in these arguments (despite it not being clear why the Government did not reject the idea of a disability committee on the same grounds).

We would suggest, however, that the CEHR should, as a priority, set up a committee covering 'race' discrimination, 'race' relations, and related matters; but needs to be

exceptionally deliberative in how it sets about doing so. To begin with, there is the question of who it should aim to represent. Keith Vaz, referring in debate to a letter protesting against proposals to abolish the CRE, stated (16 January 2006: col. 594) - “They say that in any new body there should be a proper opportunity for the black and Asian Community to be represented, hence the importance of the establishment of a race committee”. But wouldn’t it also need to represent others who suffer particularly high levels of discrimination, such as, for example, gypsies and travellers, east Europeans, Jewish communities, and individuals with ‘mixed’ parentage? There is also the question of how the CEHR will ensure that those on the Committee are, in fact, representing those groups which they are claimed to be representing. Sandra Gidley (16 January 2006: col 616), for example, stated - “It concerns me that black and ethnic minority groups feel disenfranchised and I am not convinced that the CRE was the voice that it thought it was.... “. Perhaps most importantly of all, there is the question of how the CEHR will ensure that it doesn’t strengthen the concept of ’race’, which is itself dependent upon racist/ racial assumptions; assumptions which appear to have long been discredited in the scientific community.

Perhaps, in putting together a 'race' committee, the CEHR should focus on achieving the optimum combination of those who, together, have the relevant personal experience, knowledge, and expertise; and should also ensure that all are strongly committed to tackling discrimination and racialist beliefs. These requirements would seem to necessitate that the great majority identify as being from, or tend to be identified as being from, minority ethnic groups. The CEHR could also make a good start by not including ‘race’ in the committee’s title.

Our final suggestion on committees - based upon the apparent failure of the existing Commissions to take sufficient account of strands other than their own - is that there should be a committee which addresses multiple discrimination (i.e. individuals suffering discrimination on two or more grounds); and, in particular, considers how the realities of multiple discrimination can be better reflected in the legislation and in court and tribunal judgments.

8.4.3 plans and reports

8.4.3 (a) annual reports

The requirements on the CEHR, in relation to annual reports, do not appear to constitute

a substantial departure from the requirements on the existing Commissions. The CEHR and the existing Commissions, for example, are all required to prepare an annual report on the performance of their functions. There are, however, some significant differences. Of particular note, there is a requirement on the CEHR (Schedule 1, Part 2, paragraph 32(2), but not on the existing Commissions, that 'An annual report shall, in particular, indicate in what manner and to what extent the Commission's performance of its functions has accorded to the plan under section 4' (the Strategic plan). This, we imagine, should help to increase transparency and accountability. Any such increase, however, might depend, to some extent, upon whether subparagraph 32(2) should be taken to include the extent to which it has been successful in meeting aims, objectives and targets in a strategic plan or just the extent to which it has carried out planned activities.

It is also notable that the DRCA, unlike the EA, includes a requirement (Schedule 1, paragraph 16(2)(c)) to include 'proposals for the Commission's activities in the current year'. While such information should, nonetheless, be in the CEHR's business plan, any such plan is likely to be less well publicised and less widely read, and might also be harder to obtain. The omission of a comparable requirement could, therefore, facilitate some reduction in transparency and accountability (although, of course, the CEHR might decide to include the information despite not being required to do so).

8.4.3 (b) the strategic plan

Section 4(1) EA provides that 'The Commission shall prepare a plan showing -
(a) activities or classes of activities to be undertaken ...,
(b) an expected time-table for each activity or class, and
(c) priorities for different activities or classes, or principles to be applied in determining priorities'.

It also provides that the Commission shall review the plan at least once during a period of three years (section 4(2)); if appropriate, revise it (section 4(3)); and shall 'send the plan and each revision to the Secretary of State, who shall lay a copy before Parliament' (section 4(4)). In addition, section 5 requires that the Commission shall, before preparing or reviewing a strategic plan, consult and take account of any representations received.

While the existing Commissions all produce a strategic plan (albeit in one case referred

to as a corporate plan), they do not appear to always review them on the regular, and relatively frequent, basis required under the EA. Perhaps, more importantly, their consultation practices appear to be somewhat haphazard, and restricted, compared to those specified in section 5 of the EA. In particular, section 5(c) EA requires that the Commission 'issue a general invitation to make representations, in a manner likely in the Commission's opinion to bring this invitation to the attention of as large a class of persons who may wish to make representations as is reasonably practicable'. We assume (or at least hope) that this will mean more than a link on the Commission's website; and, instead, will include, for example, the use of local and national media, and outreach work aimed at disadvantaged and hard to reach groups.

Another difference of potential importance is that the strategic plans of the existing Commissions are not laid before Parliament. Liz Blackman (16 January 2006: col 661) welcomed the requirement relating to the production and content of a strategic plan, which she said "is extremely important...". She continued, however, that "as important, is the link between that process and Parliament and the fact the strategic plan and its revision will be laid before Parliament. Only through such a transparent process will this accountable body of Parliament have a regular opportunity to scrutinise in detail the work of the commission. If we cannot do that, there is no point in having a commission. It must be made accountable". The problem, as intimated earlier, might be that inclusion in 'Votes and Proceedings', and being sent to the Table office, is not the same as being debated and does not appear to amount to scrutiny. Indeed, we assume that most MPs will, if they want a copy of a strategic plan, get it off the Commission's website rather than from the Commons Library.

8.4.3 (c) tri-annual report on progress

what's in section 12?

Section 12(1) of the EA provides that the 'Commission shall from time to time identify -
(a) changes in society that have occurred or are expected to occur and are relevant to the aim specified in section 3,
(b) results at which to aim for the purpose of encouraging and supporting the development of the society described in section 3 ("outcomes"), and
(c) factors by reference to which progress towards those results may be measured ("indicators").'.

Section 3 ('General duty'), to which reference is made above in section 12(1), provides that the Commission shall exercise its functions 'with a view to encouraging and supporting the development of a society' with the characteristics specified in the section, including, for example, 'in which - (a) people's ability to achieve their potential is not limited by prejudice or discrimination'.

Section 12(2) provides that, 'In identifying outcomes and indicators the Commission shall - ' consult (including in the manner prescribed) and shall take account of any representations made; subsection (3) provides that the 'Commission shall from time to time monitor progress towards each identified outcome by reference to any relevant identified indicator'; and subsections (4) and (5) provide that the Commission shall publish a triannial report on progress towards the identified outcomes by reference to the identified indicators, and send a copy of each report to the Secretary of State who shall lay a copy before Parliament.

section 12 and accountability

According to Patricia Hewitt (5 April 2005: col. 1303), for the Government, publishing the regular 'state of the nation' report will be a "critical aspect of the commission's work". The report will, she said, "use hard measures and rigorous evidence to monitor the progress being made towards delivering greater equality of opportunity and tackling discrimination". In response to a question as to whether she agreed that a "report appearing, in effect, only once during a Parliament would not be enough" (Henry Bellingham, 5 April, 2005: col 1303), Hewitt argued (ibid) that "Whatever the interval, the report will be an important tool for holding to account the public sector, the Government and employers more broadly for progress being made, as well as providing a means for Parliament and others to evaluate the effectiveness of the strategies that the commission adopts to reduce inequality".

Whether or not it does provide a means to assist in the assessment of the Commission ("to evaluate the effectiveness of the strategies") seems to depend, to a significant degree, upon the meaning of section 12(1)(b), into which a surprising number of ambiguities appear to have been squeezed. In particular, who does the section envisage should be 'aim'ing at the 'results', are 'results' the same as 'outcomes', and are 'outcomes' component, but final, parts of the 'society' specified in section 3?

For example, since the focus of the sub-section is 'results', and since 'outcomes'

appears in brackets and in speech marks at the end of the subsection (both often devices for indicating that the term in brackets is another signifier for the main concept outside the brackets), it might reasonably be assumed that 'outcomes' are 'results'. Adding weight to such an interpretation is the less ambiguous use of a similar structure in subsection 12(1)(c). Since, there, 'factors' are clearly '("indicators")', it might be deduced that the Act also intends 'results' to be understood as '("outcomes")'. ‘Outcomes’, however, might also reasonably be taken to mean - component parts of the final desired societal destinations. In particular, between 'results at which to aim' and '("outcomes")' comes the 'society described in section 3'. Since these are two distinct concepts, presumably '("outcomes")' cannot usefully apply to both of them. Therefore, it might reasonably be concluded that the term in brackets applies to the concept which immediately precedes it i.e. 'the society described in section 3'.

Furthermore, these ambiguities have the potential to matter. For example, if 'results' are 'outcomes', 'outcomes' are components of the desired ‘society’, and the ‘aim’ing is something (in terms of what will be measured in the pursuance of this section) which will primarily be the responsibility of the Commission, it appears to amount to judging the Commission on the non-mediated basis of whether or not there comes into existence ‘respect for and protection of each individual’s human rights’, along with the other characteristics described in section 3. Clearly, this would be absurd. However effective the CEHR might be, its control over such aggregate characteristics will be quite limited. Is it responsible, for example, if someone is murdered, and thus has their human right to life extinguished; or is it responsible if the government further contravenes sections of the HRA, or, indeed, decides that a bill of rights is no longer desirable? If, in contrast, the aiming (within the meaning of the section) is intended to include what we should all be doing, the section does not appear to provide a means to, in the Minister’s words, “evaluate the effectiveness of the strategies that the commission adopts to reduce inequality”. In putting everybody on the hook, it would effectively be taking everybody off.

One approach (and we are not advocating the terminology that we use to explain the proposal) might be to differentiate, in section 12, between outcomes (which constitute, and operationalise, the desired characteristics specified in section 3 and to which indicators might be assigned) and contributions (again, to which indicators might be assigned) on the part of the Commission towards achieving particular outcomes. However, while there is, we would suggest, a place for such measurement in the ‘state

of the nation report', it needs, perhaps more importantly, to also be properly incorporated into the strategic plan. At present, section 4 ('Strategic plan') provides that the plan include 'activities or classes of activity to be undertaken by the Commission'; but does not require the inclusion of the objectives which the activities are designed to achieve, and does not require any kind of assessment of the extent to which the Commission is meeting its organisational objectives or achieving its targets.

8.4.4 status and supervision

8.4.4 (a) status

In addition to the standard (for such commissions) provisions about not regarding the Commission as the servant or agent of the crown (see, for example, the provision at Schedule 1, paragraph 1(2) DRCA), and service as a Commissioner or employee not being employment in the civil service, the EA provides (Schedule 1, Part 4, paragraph 42(3)) that 'The Secretary of State shall have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining -
(a) its activities,
(b) its timetables, and
(c) its priorities'.

It is unclear how this will be interpreted by the courts (if the matter ever requires their determination), and how it is likely to influence the actions of the Secretary of State and others. It is also unclear what the intent behind the section was. Since, however, it was not included in the Bill, it might reasonably be wondered whether it was, to some extent, a means (without undue legal consequence) to address concerns, expressed during debate, that the Commission be substantially independent of government. Munn (21 November 2005: col. 1244), for example, stated that, during scrutiny in the Lords, "the Government showed that they were willing to listen to proposals for improving the Bill, and amend it accordingly"; and that, in addition to the inclusion of a new Part 3, "Other important improvements include strengthening the independence of the new Commission.".

If the subsection had been accepted, to a significant degree, for public relations reasons (including as a signal of good intent), this might partly explain the apparent weakness of the provision. In particular, the force appears to be doubly knocked out of it - through the inclusion of 'have regard', as opposed to, for example, taking 'reasonable steps to

ensure' and through the omission of 'due' (the oft companion of regard). Further, it seems far from clear what the term 'constraints' is intended to encompass or what 'reasonably possible' is intended to mean. The requirement to consult, for instance, is a constraint on its activity of producing a strategic plan; and the Race Equality Duty will be a constraint on all of its activities (or at least should be); but we assume that the Government would not regard the removal of these constraints as desirable.

8.4.4 (b) supervision

As with the existing Commissions, the CEHR will be subject to investigation by the Ombudsman and the National Audit Office (NAO). The greater size, and wider responsibilities, of the CEHR, however, will, we assume, make it more likely that the NAO - which (as noted above *7.3.2*) has not conducted an investigation specifically into any of the existing Commissions - will conduct one or more specifically into the new combined Commission. Indeed, it seems not inconceivable that there might be sufficient reason, and pressure, for further investigation by the Committee of Public Accounts.

9. RECOMMENDATIONS

9.1 changes to enforcement powers

9.1.2 investigations and assessments

9.1.2 (a) *CEHR to be required to record and assess all requests for an investigation and all requests for an assessment of compliance with public sector duties*

So as to capitalise on the potential monitoring role of the public, and help ensure that the worst cases of discrimination (and public authority failures) do not go unaddressed, the Commissions should be required to record, and undertake an initial assessment of, all requests that it conduct an investigation (under section 20 EA) or that it conduct an assessment of compliance with public sector duties (under section 31 EA). Where it appears that someone contacting the Commission might request an investigation, or an assessment of compliance, if he/she knew about the relevant powers, the Commission should explain the powers to the person concerned and explain the person's rights in relation to those powers.

9.1.2 (b) *assessment of requests to be carried out against published criteria*

Such assessments should be carried out against published criteria; should give substantial weight to whether the Commission has received a significant number (taken to mean from five or more people) of not withdrawn requests that it investigate (or in the

case of section 31, assess compliance on the part of) a particular person, as well as, of course, the seriousness of the behaviour being alleged; and those making the requests should be informed, in a timely manner, of how their request met or failed to meet the published criteria; and of their right to make a complaint, under the formal complaints procedure, about the manner in which the assessment was conducted or the decision was made.

9.1.2 (c) *certain bodies to be able to require an investigation or assessment*
When a request to investigate comes from the National Assembly for Wales, the Scottish Parliament, or a Committee of the House of Commons or Lords, the Commission to be required to conduct, as a minimum, an investigation which is sufficient to determine whether or not there is reasonable cause to conduct a full investigation. If there appears to the Commission to be reasonable cause, or the requesting body declines to withdraw its request, the Commission should be required to conduct a full investigation. A comparable provision should apply in relation to section 31 assessments.

9.1.2 (d) CEHR *to have an investigative power comparable to DRC's power at Schedule 3, Part 1, paragraph 3(3)(b) DRCA*
The CEHR should be empowered to investigate whether or not a person has committed an unlawful act, even if it does not suspect that the person concerned may have committed an unlawful act, if the question of whether or not he/she has committed an unlawful act is to be investigated in the course of an investigation into compliance with a requirement under an unlawful act notice or an undertaking under a section 23 agreement. This would be similar to the power that the DRC possesses under Schedule 3, Part 1, paragraph 3(3)(b) DRCA. It would appear to be at variance with the purpose of such investigations to not allow the Commission to check or confirm that the problem which necessitated the unlawful act notice, or the agreement, had been properly resolved (irrespective of whether it suspected that it had not been).

9.1.3 unlawful act notices
9.1.3 (a) *Government to clarify whether it believes that there is a power to require, in an unlawful act notice, that no further unlawful acts of the same kind be committed*
In contrast (see above, 8.3.2) to the DRC's power under section 4(1)(b) DRCA, the EA does not, explicitly at least, provide the CEHR with the power to require that the person, to whom an unlawful act notice is addressed, not commit any further unlawful acts of the

same kind (or cease committing any unlawful acts that he/ she has been found to be committing). It was noted above (*8.3.2*) that Baroness Ashton, in debate, did not take the opportunity to explain this, in Baroness Gibson's words, possible 'regression issue'. Since the absence of this power could have a significant impact upon the work of the CEHR, it might be useful if the Government now explains its reasoning and position, and, in particular, states whether it considers that such a power still exists, and, if such a power does exist, what it specifically provides for.

9.1.3 (b) *CEHR to have the power to require, in an unlawful act notice, that the person concerned take action specified in an action plan*

It was also noted above (8.3.2) that under the EA - again in contrast to the DRCA - there is no power to require, in an unlawful act notice, that the person concerned take any action which is specified in an action plan which has become final; and, instead, the CEHR would need to apply for a court order. This appears to be adding an unnecessary obstacle to the useful exercise of its functions. We, therefore, suggest that the CEHR be given a power comparable to that at section 4(3)(b) DRCA.

9.1.3 (c) CEHR to have the power to apply for an order requiring revision of the first proposed action plan

As discussed above (8.3.2), it might be wondered why the CEHR will not be able to apply for an order requiring revision of the first proposed action plan served on it; since this is something which the DRC may do if the conditions in Schedule III, Part 3, paragraph 17(2) DRCA (concerning first inviting the person to serve a revised plan) are met. In particular, does it mean that a person will be able to lawfully stick to his/ her first proposed action plan (however inadequate it may be), so long as he/ she does not respond to any request from the CEHR for a first revision? So as to avoid this possibility, the CEHR should be given, in this matter, a power comparable to the DRC's.

9.1.4 <u>employment complaints in CEHR's own name</u>

9.1.4 (a) CEHR to have the power to present to an employment tribunal a complaint that a person has done an act of unlawful discrimination

It was noted above (8.3.4) that the power to take 'preliminary action in employment cases' - as exists under section 73(1) of the SDA and section 64 of the RRA - has not been provided for in the EA. Even though the removal of what Lord Lester called (11 July 2005: col. 945) the 'barnacles', from the process of applying for an injunction (8.3.4),

means that the power to submit a complaint in its own name is not as important as it would otherwise have been, it still has the potential to be of substantial value. In particular, presenting such a complaint might tend to be a more attractive option to the Commission than seeking an injunction - in that declarative relief might be easier to obtain (including because the likelihood of committing further acts would not need to be shown) but would still constitute a strong deterrent. It should be stressed, however, that a complaint should be able to be presented without it having to be intended as action preliminary to seeking an injunction or, indeed, as preliminary to any other further action.

9.1.4 (b) *tribunals to have powers to make declarations and recommendations in such cases*

The tribunal, if it considers that such a complaint is well-founded, should be able to make a finding to that effect; and, if it thinks it just and equitable to do so, make a declaration of the rights of the complainant and the respondent, or a recommendation that the respondent take action for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates, or both. The tribunal should also have the power to recommend changes to those policies, procedures and practices which it considers contributed to the act of discrimination to which the complaint relates or which it considers are likely to contribute to further acts of unlawful discrimination.

9.1.5 <u>legal assistance</u>

9.1.5 (a) *CEHR to be required to consider all application for assistance which it is empowered to grant*

This requirement would not remove the CEHR's discretion as to whether or not to support a case. It would, however, help ensure that it identified cases in which the need of the applicant was so high that it would be inequitable for it not to provide some legal assistance, and those which were likely to help the Commission further its strategic objectives. We would further suggest that applications be assessed against publicised criteria which the Commission has established after consultation conducted as part of the consultation required under section 5 EA; and that applicants be given a full response within 20 days.

9.1.5 (b) *applicants to have the right to appeal the decision (and to be informed of and offered assistance in relation to this); and to complain, through the CEHR's complaints*

procedure, about the manner in which a decision was made

It was noted above (7.4.2(a)) that the existing Commissions have taken the position that their complaints procedures do not cover complaints about a refusal to provide legal assistance. The Commissions, we would suggest, have confused the discretion to make the decision (which they have) and the discretion to make the decision in whatever manner they please (which they shouldn't have and, in some respects, don't have). We suggest, therefore, that applicants be given the right to appeal the decision; and, in addition, that the Commission's complaints procedure be applicable in relation to the manner in which the decision was made. The complaints procedure should, for example, cover alleged failures to consider an application, delay that could have been avoided, faulty procedures or failure to follow correct procedures, or unfairness, bias or prejudice.

Furthermore, applicants should be informed of, and offered assistance in relation to, the appeals and complaints procedures; and the Parliamentary Commissioner should confirm (and publicise the confirmation) that he/she is able to consider complaints about how the CEHR handled applications for assistance in relation to legal proceedings and prospective proceedings, except in so far as any such complaint relates to a decision which was fairly and properly arrived at (and is not alleged by the complainant to have been otherwise).

9.1.5 (c) *CEHR to have the same discretion to provide legal assistance in relation to the HRA as it currently possesses in relation to the equality enactments.*

Bearing in mind the Government's ambivalent attitude towards the Human Rights Act and the likelihood that it will quite frequently find itself the subject of actions under the Act, section 28 EA might be thought to give the Lord Chancellor too much power over the circumstances in which the CEHR may assist an individual who is or may become party to legal proceedings which relate or may relate to a provision of the Human Rights Act (see above, 8.2.6(b)). We suggest, therefore, that - unless and until a human rights commission comparable to the CEHR is established - the CEHR should have the same discretion to provide legal assistance in relation to the HRA as it currently possesses in relation to the equality enactments.

9.1.6 a possible role for local authorities

9.1.6 (a) *consideration to be given to whether local authorities should have some powers to enforce parts of the equality enactments*

Since the Government expects the Commission to 'use its regulatory powers only rarely' (Munn, HC Standing Committee, 2005: col. 97), and states that it 'will support cases brought by individuals only in a very few cases' (Baroness Ashton, 19 October 2005: col 812), and since legal aid is not made available for representation in employment tribunals, it is not clear that the equality acts will be adequately enforced. Consequently, the government, and others, should consider whether local authorities should have some powers to enforce parts of the equality enactments.

This might involve, for example:
(i) Learning lessons from the experience of Environmental Health Officers (EHOs), and the relationship between EHOs and the Health and Safety Executive.
(ii) Local authorities having the power to investigate allegations of discrimination made against private companies in their area (local authorities would themselves, of course, remain subject to investigation by the CEHR).
(iii) Consideration of whether fines could play a role.
(iv) Local authorities to each have an anti-discrimination officer; who would need to work closely with legal services and equality and diversity departments, and ensure that there is an effective mix of enforcement action, education, support and encouragement.

9.2 changes to the use of enforcement powers

The approach of the existing Commissions, and the approach which the Government 'expects' from the CEHR, appear to be based upon untested assumptions and wishful thinking; and, in the case of the Government at least, upon ideological preference and political concerns. It might, therefore, make sense to attempt to better determine what has worked and what hasn't.

9.2.1 research on effectiveness

9.2.1 (a) *determine what approaches are most effective*

As a priority, the CEHR should attempt to better determine which approaches are likely to be the most effective in reducing discrimination and in helping to encourage and support the development of the society specified in section 3 of the Equality Act (see above 1.3.2).

9.2.1 (b) *commission independent research* into different approaches

This should, in particular, include independent research into the impact that the existing

Commissions have had through -
(i) action to promote good practice,
(iii) action to help bodies comply with the law, and
(iii) enforcement related action.

Research might usefully include attempting to better determine the role that enforcement action has had, and could have, in deterring unlawful action; in increasing knowledge and awareness of rights and duties; and in changing attitudes (amongst the general public and on the part of particular stakeholder groups) towards unlawful discrimination.

9.2.1 (c) consider how best to combine approaches
The CEHR might consider how it can most effectively present itself as an active enforcement agency but as also being prepared to work co-operatively with organisations to help them comply with the law.

9.2.1 (d) determine what is meant by a 'strategic' use of powers
The Government and the existing Commissions should discuss, determine, and explain, what they mean by the term 'strategic'. For example, when the DRC (2004b:15) refers to using its 'strategic legal powers (like Formal Investigation)', which, if any, enforcement powers does it consider not to be strategic; and what exactly does the Minister (Munn, HC Standing Committee, 2005: 97) mean when she says that "We expect the commission to use its regulatory powers only rarely .... I emphasise that the commission will use its powers strategically ...". Does the term 'strategic' have a precise meaning? Has the (apparently inconsistent) use of the term 'strategic' substituted for (and helped conceal the absence of) an agreed, and well thought out, approach to enforcement? Or does, as government comments during debates on the EA might suggest, 'strategic' simply mean sparingly?

9.3 improving transparency and accountability

9.3.1 <u>record keeping and requests for information</u>

9.3.1 (a) *CRE (which will exist until March 2009) to address the serious problems that it appears to have with regard to record keeping and transparency*
In response to a request, under the Freedom Act, for information on the use of its powers, the CRE told us (CRE, 2006(a)) that it 'simply does not capture information in the manner you request'. It is not clear how an organisation which does not know how it is

using its enforcement powers can be effective in their use or accountable for their use. The information it eventually provided - after several complaints, involving the office of the Information Commissioner, and a long wait - was incomplete and included important errors.

9.3.1 (b) CEHR to properly record, and make available, information on the use of its powers

The CEHR should ensure that it systematically records all the relevant information on the use of its powers; does so in such a way that it can be easily accessed, analysed, and compared across periods; and that it makes this information available, without the need for a Freedom of Information Act requests and an extended fight, to the public and others. There appears no reason why this information should not be on its website.

The CEHR should also ensure that its policies, procedures and ethos are such that it promptly and fully responds to FIA requests. It should only refuse to provide information when there is a very good reason for so doing, not simply because it thinks that providing it could go beyond what it is required to do under the Act.

9.3.2 plans and reports

9.3.2 (a) CEHR to be required to publish objectives and targets and to report upon the extent to which these are achieved

The Commissions provide some indication - through their strategic plans and annual reports - of what they intend to achieve, and what they intend to do to try and achieve these intentions. The statements, however, tend to be lacking in specificity; and, the documents do not, in general, indicate the extent to which, if at all, they achieved what they intended to achieve i.e. met their objectives. This, of course, makes it difficult to assess their level of effectiveness and success (see above, 7.1.1). We suggest, therefore, that there should be a requirement on the CEHR (through amending section 4) to include aims, objectives, and targets, in its strategic plan; and to report, in its annual report, on the extent to which these have been achieved, explain the reasons for any having been missed, and indicate what will be done to address identified problems. It should not be enough for the annual reports to highlight successes.

9.3.2 (b) annual reports to include, in a standardised format, information on the use of each enforcement power

It proved impossible to obtain, from annual reports, most of the information which we

needed (hence the need for the FIA requests). This was because the information was not there at all, or because there was, in most cases, no way of determining whether a report included all the occasions on which a particular power had been used or just those occasions which happened to illustrate a point which the Commission wished to make in the report.

We suggest, therefore, that each report include, perhaps before the accounts, information, in a standardised format, on the use of each enforcement power. This might include, for example, a table showing the number of different types of complaints about 'discriminatory advisements' received during the period of the report, the Commission responses broken down into categories, and the outcomes broken down into categories. The Commission, however, would also need to maintain, and make available when requested, more detailed information. This might include, for example, information which allows, while maintaining confidentially, the reader to trace a complaint from the point at which it was made to its outcome to date.

9.3.3 Parliament and the NAO

9.3.3 (a) Parliament to consider taking a more robust role in scrutinising the CEHR than it has taken in relation to the existing Commissions

We noted above (8.4.3(b)) that Liz Blackman (Commons Hansard, 16 January 2006: col 661) stressed how important she felt it was that the strategic plan will be laid before Parliament. We also, noted however, that the annual reports of the existing commissions, despite being laid before Parliament, do not appear to have been debated; and that, indeed, Parliament has tended not to scrutinise the actions of the Commissions.

9.3.3 (b) NAO to conduct investigations into the CEHR

In addition, we suggest that there should be regular investigations (in the form of 'value for money' audits) by the NAO. This would appear to be justified on the grounds that the CEHR will have responsibility for equality issues across all the strands covered in domestic legislation, and, therefore, could make a substantial difference to life in Britain; and, in addition, will be responsible for a substantial budget. It also seems that Committee of Public Accounts investigations might usefully follow some of these audits (perhaps once in each Parliament).

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11. APPENDICES

For reasons of digital space, the appendices have not been included in this document. If, however, you would like them emailed to you, please phone PIRU on 01559 370 395.