The EHRC: Transformational, Progressively Incremental or a Disappointment?

BOB NIVEN

When the Equality and Human Rights Commission came into operation on 1 October 2007, virtually nothing was known (outside or inside the body) about what it would seek concretely to achieve other than, sketchily, within its first six months designated by the EHRC as its ‘build-up’ phase. It had in contrast been clear by 2002 that the government would create a new single equalities body, and 2006 was soon touted as its front-runner first year. The governing statute, the Equality Act, received Royal Assent in February 2006; shortly afterwards, a transitional team of civil servants and externally contracted staff began in earnest the project to establish the new organisation; the EHRC Chairman and bulk of the Board of Commissioners were appointed in the latter months of 2006; and the Chief Executive, appointed rather late in the process, took up post in March 2007.

The relatively ‘blank sheet’ does, however, offer a test case over time, not only for assessing this public body’s impact, but for tracking the decisions it makes and the critical factors underlying them. This article seeks to identify such factors within the EHRC’s broad statutory duties, its external context or ‘environment’ and internal composition. In doing so, the article addresses the likelihood (or at least likely rapidity) of the Commission meeting the high aspirations in some quarters that it will prove transformational: bringing about greater equality, effective rights and respect on the basis of a self styled ‘integrated mandate’, as distinct from Britain’s anti-discrimination approach thus far focused largely on specific groups or characteristics (race, gender, disability, etc.). The EHRC Chairman has, understandably, highlighted the transformational, distinctive role, and has referred to the EHRC as changing the weather, not simply protecting people from its effects.

The factors will not be deterministic. Not all of them tend in the same direction; the EHRC’s canvas for action is very wide; it will have a fair degree of discretion in deciding between options for action; and it will no doubt work to change some of the factors and their influence. Nonetheless, the EHRC will in practice face constraints and a circumscribed set of choices offering realistic prospects of major progress. As expressed by a leading Damon Runyon character in the betting fraternity: it may not always be the race to the swift and the battle to the strong—but that sure is the way to cast your dough.

Duties, aims and objectives

It will be for the EHRC to set its own aims and objectives within the broad, demanding set of duties placed on it by the Equality Act. To have a tangible impact, the Commission will need to select priorities and target its actions pretty ruthlessly. The Act places a substantive general duty on the EHRC in effect to work towards a society where people’s ability to achieve their potential is not limited by prejudice or discrimination; where there is respect for and protection of each individual’s human rights as well
as respect for their dignity and worth; each individual has an opportunity to participate in society; and there is mutual respect between groups based on understanding and valuing diversity as well as shared respect for equality and human rights. On equality and diversity the Commission is to promote understanding of their importance; encourage good practice; promote equal opportunity; promote awareness and understanding of rights under the separate anti-discrimination laws; enforce those laws; and work towards the elimination of unlawful discrimination as well as harassment. A further duty relates to human rights, with the EHRC to promote understanding of their importance; encourage good practice; promote awareness, understanding and protection (the EHRC has no direct powers of enforcement in this area); and to encourage public authorities to comply with the Human Rights Act. For good measure, the EHRC is also required to address good relations between groups and between groups and others in society through promoting understanding of the importance of good relations; encouraging good practice; working towards eliminating prejudice, hatred and hostility aimed at members of groups; and enabling them to participate in society. Groups are defined in terms of age, disability, gender, gender reassignment, race, religion or belief, and sexual orientation. Additionally, the Act requires the EHRC to publish triennial strategic plans and ‘state of the nation’ reports on equalities and rights in Great Britain; as well as to monitor and as appropriate report to government on the effectiveness of the relevant statutes.

Given all that, it is probably as well that the Act is largely permissive on how, within the framework of duties, the EHRC may choose to deploy its wide range of statutory powers and functions. Nonetheless, some difficult, tough choices lie ahead for the EHRC in determining its precise objectives and accompanying actions in ways that will provide the best trade-offs between potential results, likelihood of achievement and (direct and opportunity) cost. While the EHRC’s public rhetoric may prove to be frequently couched in terms of its societal and human rights duties, its delivery programmes (although having an impact with respect to human rights and good relations) are likely initially to focus more on its equality and diversity duty and, overtly or de facto, on particularly hard-hit groups and specific patterns of severe entrenched disadvantage.

Context and environment

Diversity in British society is markedly on the increase. The contributory factors include the growing proportions of the population accounted for by older people and people in black and minority ethnic (BME) communities, as well as the net effect of increasing flows of inward and outward migration (including from such non-traditional sources as Eastern Europe). The growing participation of women in higher education, employment and public life has yet to have its full effects. Within a decade, compared with one in two a generation ago, fewer than one in four of the working population is likely to be white, male and born British. A decline in more traditional class (and perhaps family) identities has been accompanied by a greater sense of individuality and also confidence in asserting other identities such as being a disabled or gay, lesbian or transsexual person. The salience of religious affiliations is on the increase (coupled to an extent with growth in fundamentalism). The EHRC has signalled recognition of all this in the first part of its chosen mission statement, which speaks of a society confident in its diversity.

The remainder of the mission statement highlights equality, rights and respect for all. Discernible progress has been made in tackling inequalities in
Britain in recent years. However the gap between the richest and the poorest appears to have widened; socio-economic status still plays a major part in determining life chances; systematically, some groups fare significantly less well than others and the population at large; and there is no shortage of interest at political and other levels in the importance of the issues and their causes. The EHRC itself is not equipped with the policy instruments or resources to make a direct impact on generic socio-economic causes of inequalities. Insofar as the EHRC addresses them, it seems likely to deploy communications on the benefits of greater equality (the economic and business case, social cohesion and moral considerations); influence key players, especially government and other public bodies, to recognise that tackling persistent inequalities can contribute to achieving their own policy aims and service-delivery targets; and perhaps help to strengthen confidence and knowledge among the disadvantaged as consumers, savers and investors to participate effectively in the market economy, and as citizens to benefit from public services.

**Inequalities**, and their relative incidence, are not solely attributable to socio-economic factors. Membership of social groups also plays a major part. The most recent comprehensive account of this is contained in the report of the government-sponsored Equalities Review chaired by Mr Trevor Phillips (before and after he was appointed EHRC Chair). The report (and the arguably better written summary version) takes a long-term view of inequalities in Britain, in some cases looking back 50 years or more and similarly projecting forward. It highlights education, employment and health as among the key determinants of life chances, and argues that certain experiences and opportunities within key stages of individuals’ lives (in particular early years, education and working age) are especially influential. While noting that progress is being achieved, the report confirms the deep-seatedness of several forms of inequalities and how, on present trends, their eradication will take several decades or longer. Group-specific inequalities include equal pay for women and their representation in top-level posts; sharing of family and work roles between men and women; and educational and employment prospects for members of certain BME communities, especially black Caribbean men, Pakistanis and Bangladeshis. Disabled people fare poorly on the great majority of indicators. The review points out that some inequalities become even more pronounced when analysed in terms of more than one group identity—for example, Bangladeshi women are especially disadvantaged generally, and significantly higher levels of mental health problems are found among black men living in cities (with a range of associated further disadvantages). The report further identified bullying and harassment (including that aimed at gays and lesbians) and the high proportion of old people in poverty.

Although the equalities review report is not above criticism, it confirmed and added to understanding of inequalities. It seems set to have an appreciable influence on the EHRC’s strategy on equality and diversity. But fully constructed jumping-off points are less obvious for the Commission’s other two duties, on human rights and good relations. Over time its human rights remit could prove of major importance to the EHRC. It offers in principle the prospect of a single set of positive rights and desired end-states, and hence both a coherent framework to govern all of the Commission’s work and a statement of what every person in Britain is entitled to, irrespective of group or other background. The EHRC’s ability to intervene in (although not directly support) human rights cases in court provides a useful vehicle to reach actions of the public services that play a significant
part in ensuring dignity and appropriate treatment but which are beyond the scope of the various group-based anti-discrimination legislation laws (there is encouraging precedent in interventions by the Commissions for Race Equality, Equal Opportunities and especially Disability Rights (CRE, EOC and DRC) prior to establishment of the EHRC) (see Nick O’Brien’s article in this issue).

On the other hand, human rights provisions (whether within the Human Rights Act (HRA) or international conventions) are frequently broadly worded and can overlap with each other, requiring the application of sometimes demanding tests of proportionality and relevance. Notwithstanding a number of useful studies, the various potential linkages and differences between the EHRC’s duties on human rights, equality and good relations have yet to mapped fully; the HRA only applies to public bodies, and does not therefore bite on the private or voluntary sectors; and human rights have not been the favoured flavour of the month for some time in some political and media circles as well as more widely. The Commission will also need to establish relations with the new statutory commission for human rights being established in Scotland with jurisdiction on (the extensive) matters that fall within the devolution settlement. All in all, while acting on its human rights remit as particular occasions demand and providing basic information and advice, the EHRC may well need considerable time before adopting a fully fledged strategy on human rights.

The Commission’s duty on good relations is in essence taken over from the previous legislation governing the Commission for Race Equality, and the EHRC’s work in this area seems likely to focus primarily on race relations at various levels together with especially relations between Muslim and non-Muslim communities. The EHRC seems less likely to rush to engage in such thorny issues as relations between certain religious groups and gay and lesbian groups; or between parts of the women’s and disabled people’s movements on abortion and other right-to-life issues; between some religious and non-religious groups (e.g., humanists); or possibly between the interests and values of older and younger people. The EHRC is very aware of the importance of the issues to those involved. However, other than helping to managing the course of any disputes arising in the media or elsewhere, the Commission may well conclude that such clashes of cultures and deeply held principle cannot be tackled successfully in the short or even medium term but are more appropriately addressed through longer term action directed at dignity and mutual respect more generally. As in the TV series Yes Minister, Jim Hacker’s reaction (i.e., to retreat) when told his proposed course of action was ‘very courageous, Minister’ can be the right one if there are other significant but more promising tasks to tackle.

Advocates of the EHRC pursuing an integrated mandate can derive only limited comfort from the present position on anti-discrimination and equalities law and the dispersed allocation of equalities responsibilities among Whitehall Ministers and departments. An acute academic observer of the legislative scene has described the development of anti-discrimination and equality law (perhaps kindly) as ‘fumbling towards coherence’. The Race Relations and the gender-based Equal Opportunities and Equal Pay Acts came into effect in the mid-1970s and remain in force. They established a set of anti-discrimination rights and obligations in employment and with respect to goods, services (including education), facilities and premises. The CRE and EOC were also established with a wide range of powers and functions. These statutes largely reflected or at least came to be associated with a paradigm that focused on individual acts of discrimin-
tion, provided remedies after the event and defined discrimination in terms of equal treatment between different groups (blacks and whites, women and men). Legal cases brought successfully under the legislation’s provisions on indirect discrimination could lead, in addition to individual redress, to the defending organisation adjusting policies and practices: but the case still had to be brought by an individual on the basis that discrimination had already taken place. The commissions were also empowered to undertake formal investigations leading to recommendations on policies and practices that were legally enforceable on the organisation under investigation. They nonetheless had to have in advance sufficient *prima facie* evidence of individual acts of discrimination.

The paradigm remained pretty stable for twenty years or so. From the mid-1990s, however, various new separate pieces of legislation were enacted, reflecting largely the growing diversity in British society and the impact (powerful in some respects but inadequate in others) of the 1970s paradigm. Some of this largely extended the existing paradigm to new groups (albeit unevenly in terms of grounds covered) following an EU Directive concerned in particular with sexual orientation, age, religion and belief. But other legislation contained new departures. The 1995 Disability Discrimination Act (DDA) was not equal treatment legislation and instead provided self-standing rights and obligations in respect of disabled people alone rather than in comparison with the non-disabled. Some of the Act’s duties required action to anticipate and in effect prevent (not just than cure) disability discrimination; the Act required duty holders to make reasonable adjustments to their arrangements; and, uniquely, positive discrimination was permitted in favour of the disabled. The 1999 Disability Rights Commission Act established the DRC with certain powers and functions additional to those available to the EOC and CRE. The Human Rights Act established justiciable positive rights for all individuals with respect to the actions of public bodies. The Race Relations Amendment Act placed a positive duty on public bodies pro-actively to pursue race equality and prevent discrimination, especially through schemes addressing the design and operation of their services, policies, processes and practices (in terms both of their outward facing activities and as employers). Similar but not identical public sector duties were later introduced on disability and then gender.

The legislative scene has therefore been pretty dynamic. But it presents the EHRC with various practical constraints and presentational difficulties: a mix of paradigms; variable coverage; and some differences in terminology and detailed provisions. And, with the exception of the HRA, each of the various Acts and regulations is concerned with particular specified groups (even to the extent that it is not possible to bring a composite case to the employment tribunals covering more than one type of discrimination). The Equality Act succeeded in accumulating for the EHRC the full set of powers and functions available previously between them to the EOC, CRE and DRC (plus an additional tweak or two). In contrast, the government’s 2006–2007 discrimination law review did not take things forward in terms of significantly enhancing, harmonising or simplifying the existing body of law, and the resulting consultative green paper met with a widespread critical response (although the Confederation of British Industry was rumoured to judge that the recommendations were ‘well balanced’). In pretty much its first substantive public action, the EHRC also responded largely critically, and Ministers are believed to regard the green paper as dead in the water. The EHRC therefore has a good opportunity to help bring about the sort of legislation it judges will best serve...
British society, but will have to contend with a powerful de-regulation lobby within and outside Whitehall as well as government departments’ concerns at the more detailed requirements of the public sector equality duties. The government was committed to introducing early legislation but it now seems unlikely that any significantly different legislation could start to take effect much before 2010 (and then quite possibly in stages).

Whitehall (crucial to the EHRC’s success) is similarly distant from embodying a fully integrated approach. Over the last fifteen years or so, policy responsibilities for race, gender and disability have mostly been held by separate departments, and (together with those for women’s issues and equalities) quite frequently—sometimes as an afterthought—switched to different departments following general elections or ministerial reshuffles. Departmental sponsorship of the EOC has been particularly peripatetic (to the detriment of that commission’s ability to plan and secure additional resources), dependent on the mainstream portfolio of the person additionally appointed at the time as Cabinet-level Minister for Women.

After a degree of rationalisation following the 2005 general election (centred on the Department for Communities and Local Government (DCLG) and its Ministers), the arrangements reverted to type in July 2007, over a month after Mr Brown became Prime Minister. Policy responsibility for race, religion and belief currently remains with DCLG and its Secretary of State; for human rights with the Ministry of Justice; and disability with the Secretary of State, Minister for Disabled People and the Office of Disability Issues, all at the Department for Work and Pensions. DWP was also allocated responsibility for gender, sexual orientation, age and sponsorship of the EHRC by way of a new Government Equalities Office (GEO) which reports on a day to day basis to a DWP Minister of State (a different person from the Disability Minister) but overall, beyond DWP, to the Cabinet-level Secretary of State for Equalities (Harriet Harman), who continues in her (non-departmental) role as Leader of the House of Commons. Overall responsibilities for tackling social exclusion and poverty lie with another set of ministers. Subsequently, in October, it was decided that the GEO would form in effect a self-standing mini-department reporting directly to Harriet Harman in her further (non-departmental) role as Lord Privy Seal. This would have its own Director General rather than be led by a DWP official. It will take time for this new arrangement to settle, but it seems likely to have at best only a marginal impact on the GEO’s effectiveness.

No doubt the EHRC will work hard to make these arrangements work effectively and is pleased at the formal designation for the first time of a Secretary of State for Equalities. It would, however, be understandable if the rest of the disparate arrangements were not the EHRC’s first preference: on balance they seem likely to make access to the legislative programme a bit more difficult, and the GEO, having its own parliamentary budgetary vote, may as a result have difficulty in mounting a case to draw on under spends elsewhere in DWP. More significantly, the arrangements do not appear to signal any substantively greater priority on the part of the government for equalities, human rights or good relations; the arrangements do not support moves to an integrated approach (arguably, the reverse); departmental and often ministerial reluctance to allow other players onto their patch is a strong feature of Whitehall ways of working; and there is no certainty that the present structure will prove any more stable than previous versions. In the Westminster Parliament there has been for some years a cross-party group on equality, diversity and rights. However, the structure of formal Parliamentary Committees with which
the Commission will engage was not clear at October 2007, and may prove to reflect that of Whitehall departments (combined with an appreciable accountability to the Scottish government and Welsh Assembly for the EHRC’s activities in those countries).

There have been some moves among the EHRC’s stakeholder and client groups to form crosscutting arrangements and alliances with other groups. An express purpose of the Equality and Diversity Forum, with members from a wide range of relevant public, voluntary and private sector organisations, is to help coordinate positions and to influence developments on equalities and related rights legislation as well as the EHRC. The Inter-Faith Council has been involved throughout in the process to establish the EHRC. 2006–2007 saw a substantial degree of joint working between relevant organisations on carers, gender, disability, older people and care services with a view to persuading the EHRC to commit to improved arrangements on care, carers and independent living. There has been growing interest among group-based organisations in how the interests of their group may to mutual benefit link with those of others, with a view to tying in with the remit and expected outlook of the EHRC and making submissions, singly or jointly, to influence its priorities. The existence of the EHRC will encourage more such cross-group working, and there are already well-established organisations on human rights, including the British Institute for Human Rights.

However, alongside business and service providers, the great bulk of relevant interest groups and stakeholder organisations will remain group-based. The Commission will need to work with them as sources of information, advice and ideas as well as vehicles for delivery. Not all of the organisations (particularly among the BME communities and disabled people) are reconciled to the EHRC or its leadership, and group-based organisations may prefer an EHRC with whom members of the group can readily identify. They will certainly want the EHRC to operate programmes and services that, however presented, bring tangible benefits to those whom the organisation represents. Stakeholder relations are likely to play a crucial role in the effectiveness or otherwise of the EHRC, as will its relations with broader group-based movements.6

Final features of the external context lie in the legacy from the previous group-based equality commissions; in terms of their impact on public and stakeholder attitudes and expectations; overcoming the EHRC’s relatively low profile prior its coming into operation; and perhaps a need for the Commission to enhance its reputation for dynamism and effectiveness following the less than totally impressive project to establish the new body (particularly in the years prior to EHRC starting to recruit its own permanent staff in spring 2007).

Features of the EHRC

Every new organisation needs time to get into shape, and to learn sufficiently about its environment and best use of its powers and functions to form and deliver an effective longer term strategy. Particular further factors apply in the case of the EHRC. As of 1 October 2007, the Commission’s leadership was not yet fully in place. Four of the fifteen regular appointments to the Board of Commissioners remained to be made by the Secretary of State (two more were appointed in November); not all places on EHRC’s statutory decision-making committees on Scotland, Wales or disability had been filled; one of the posts within the senior management team had had to be readvertised; and only a third of the nineteen next most senior managers had been recruited (all from the previous commissions).
The bulk of the Chairman’s career has been in business, broadcasting and politics (in particular as deputy Labour leader of the Greater London Authority). Perhaps atypically, Trevor Phillips took a relatively low public profile while the project to establish the EHRC was underway. Such of his public statements as did attract attention included a number on group-specific issues including poor treatment of a disabled celebrity by a leading hotel, immigrants and the representation of the role of non-White people in British history. Some commentators feel he still has some way to go to offset the impression given when, in his previous post as Chair of the CRE, he very publicly criticised and at one point opposed the government’s plans for an EHRC. More generally, he did not shun controversy.

As chair of the equalities review, Mr Phillips advocated a range of measures including building a widely shared vision on equality in Britain and consensus on the value of tackling inequalities as well as shifting general attitudes and addressing stereotypes. The report advocated setting clear targets and accountabilities, use of public procurement powers, the extension to other groups and effective use of the statutory equality duties on public bodies, greater statutory scope for positive action, and better information and advice services for business. The review also called for concerted action to tackle the most severe and deep-seated forms of inequalities, and for ‘more sophisticated’ use of enforcement powers.

The Equality Act prescribes that one of the Commissioners must have special responsibility for disability matters and in effect that two others have responsibility for Scottish and Welsh issues, respectively. Otherwise, Commissioners do not have formal representational roles, although in practice most have strong links with one or more of the particular groups identified in the Act or with human rights. As of October there were no Commissioners who worked in the private sector, but three with strong links with the trade union movement. In addition to the regular Commissioners, there are three transitional Commissioners drawn respectively from the former EOC, DRC and CRE (in the latter two cases: their Chairs) who will serve until 2009. The Chief Executive was previously a (by reputation, able and formidable) senior official in the Foreign Office and Department for International Development. The other top managers so far appointed also came from public bodies broadly defined, but not from equality bodies (although the well regarded legal group director formerly led the human rights organisation Liberty). A key figure is likely to be the group director of strategy and policy, Patrick Diamond, previously a senior visiting fellow at LSE and Special Adviser in Mr Blair’s Policy Unit. He has made a favourable initial impression, and his earlier Fabian Society publication Equality Now: The Future of Revisionism called for a new expansive egalitarian agenda aimed at realising individuals’ potential.7

The government has indicated an annual budget for the EHRC of £70 million when fully operational (close to £20 million more than the combined budgets of the three previous equality commissions but nonetheless equating to less than £1.20 per person in Britain). The EHRC’s initial organisational design is based largely on reasonably familiar ‘vertical’ functional directorates but with a distinct capacity to undertake cross cutting projects. There are offices for Wales and Scotland, and regional presences in England. No part of the structure is group-based other than the post of disability programme director to support the disability committee and to help promote disability across the organisation as a whole. The full structure comprises just over 500 posts and the Commission took on all 370 staff wishing to join it on
1 October from the previous commissions (70 per cent of their total staff). Few of the 370 will be hidebound in their approach to equalities, human rights or good relations, and most will feel able and want to tackle generic and multiple identity issues. Yet the experience and contacts of many will tend to be group-specific, and it will take until well into 2008 for the EHRC to externally recruit to all the other 130 or so posts (with an expected emphasis on expertise in human rights and groups other race, gender or disability). The different backgrounds of the externally recruited staff (especially the most senior) and of the staff transferred from the previous commissions may require careful management in moving to shared values and working methods.

Over its first six months, in addition to running help lines and completing its website (both on an increasingly integrated basis), the EHRC has agreed to continue with certain locally outsourced services on disability and a race grant programme inherited from the previous commissions together with ongoing legal cases, other enforcement action and some other projects. Some of this will no doubt spill over into 2008–2009, as will action on other announced early (largely process) priorities including building an effective and authoritative CEHR, exploring the scope for a new discourse on equalities and rights, and beginning to address persistent inequalities.

**Conclusion**

So, how transformational will the EHRC be? Or will it in practice make progress incrementally (or possibly even prove ineffective)? Much will depend on the interplay between features of the EHRC that, on balance, tend to an integrationist and distinctive approach and of its external context and environment, which, at present at least, appear to point on balance the other way and to a continuing emphasis on group-based priorities. It is likely to take several years to resolve this seeming dislocation. Put crudely, the jury is likely to be out for some time on whether the EHRC is simply ahead of its time or out of step.

The EHRC’s first strategic plan will therefore have to be constructed under conditions of considerable uncertainty and will need to enable delivery, development and learning. A first strategy to this end might comprise a mix of tightly drawn actions on these lines:

- A strong communications campaign on the EHRC’s vision and its advantages.
- A set of powerful programmes and initiatives on a generic or cross-cutting basis (e.g., drawn from topics such as promoting human rights, a new legislative framework, concerted use of the various statutory equality duties on public bodies); carers, caring and independent living; violence, harassment and bullying; or early years.
- Programmes targeted at key sectors (especially education, employment and health) with a prime emphasis on the deep seated inequalities within them.
- Projects concerned with multiple disadvantage and likely to have major payoffs (Bangladeshi women, black males living in inner cities).
- Projects and campaigns on major persistent and distinctive group-specific issues (e.g., equal pay for women and broadly defined access for disabled people).

Depending on experience gained, the mix could be rebalanced over time.

Some commentators (and this author) hope that in time the EHRC will establish itself as a national institution—in effect, a standing commission for social justice. To get there, the Commission will have to demonstrate impact on socio-economic issues (especially by working effectively with the departments and bodies with established responsibilities in this area). However, it will also need to demonstrate...
that the Commission can successfully tackle the range of unjustified discrimination and inequalities still disproportionately experienced by many members of specific groups: no other public body is in a position to undertake that.

Notes


3 The machinery of government may prove more helpful in Scotland and Wales, but momentum towards greater devolution in both countries and perhaps independence in Scotland will pose their own challenges.


