

## PROFORMA FOR EHRC REFORM CONSULTATION RESPONSES

**The consultation closes on 15 June 2011.** Please let us have your response by that date.

When responding, it would be helpful if you could provide the following information.

Please fill in your name and address, or that of your organisation if relevant. You may withhold this information if you wish, but we will be unable to add your details to our database for future consultation exercises.

### Contact details:

Please supply details of who has completed this response.

Response completed by (name):

Position in organisation (if appropriate):

Name of organisation (if appropriate):

Address:

Contact phone number:

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Date:

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In what capacity are you responding (please tick if appropriate)?

As an individual

On behalf of an organisation

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Other (please specify)

**Note:**

- In addition to the completed proforma, you can also send other supporting information if you so wish.

Completed forms should be e-mailed to the following address:-

[EHRC.reform@geo.gsi.gov.uk](mailto:EHRC.reform@geo.gsi.gov.uk)

If you are posting the form please send to:-

EHRC Reform Consultation Responses  
C/O Louise Sutton  
Government Equalities Office  
Zone G10, 9<sup>th</sup> Floor Eland House  
Bressenden Place  
London SW1E 5DU

Thank you for completing this response form.

**EHRC's core functions****PROPOSAL ONE – Repealing the General Duty****Question 1: Do you agree that Section 3 should be repealed?**

Please place a cross in the appropriate box

Agree	<input type="checkbox"/>	Disagree	<input checked="" type="checkbox"/>	Not sure	<input type="checkbox"/>
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Please explain why -

**Recommendation: We recommend that Section 3 should be retained.****A. The importance of Section 3**

Section 3<sup>1</sup>, as currently written, provides an important vision for the type of society to which the EHRC and others should be working; we believe that the vision is the right one. We do not believe that any evidence has been provided that supports the contention that Section 3's existence has been the cause of the EHRC's difficulties. As a purpose clause, this General Duty should not be viewed as creating "unrealistic expectations", but embraced as an aspiration and vision of the world we seek. Moreover it is a vision which we would hope the Government shares. We do not believe that it is beyond the ability of an effectively governed EHRC, to set clear priorities for discharging its responsibilities based on realistic expectations associated with Section 3. Removing Section 3 because of fears about the EHRC's ability to plan would be disproportionate and unreasonable.

**B. Commenting on the overall approach - a flawed conceptual approach**

We are concerned that the starting point for this review is fundamentally flawed:

- the proposals undermine the general race, disability and gender equality duties<sup>2</sup> and the new public sector equality duty (Section 149);
- inadequate or limited consideration appears to have been given to ensuring that the EHRC can play an effective part in discharging the UK's international obligations,
- there is a failure to recognise that the UK has any equality, diversity or human rights provisions apart from the provisions set out in the Equality Act 2006, the Equality Act 2010 and the Human Rights Act 1998
- the proposals, if implemented, would damage rather than promote equality.

<sup>1</sup> The Commission shall exercise its functions under this Part with a view to encouraging and supporting the development of a society in which—(a) people's ability to achieve their potential is not limited by prejudice or discrimination, (b) there is respect for and protection of each individual's human rights, (c) there is respect for the dignity and worth of each individual, (d) each individual has an equal opportunity to participate in society, and (e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

<sup>2</sup> Section 71, Race Relations Act 1976, Section 49, Disability Discrimination Act 1995, Section 76, Sex Discrimination Act 1975 as amended

### **C. The principles underpinning the review are flawed**

A key flaw in relation to the proposals is that they do not appear to recognise the importance of an effective national institution for tackling discrimination and promoting equality. The consultation document (para. 4) states that *'the decision was taken to retain the Commission but substantially reform it, to focus it on areas where only it can add value, to increase its accountability to Government, Parliament and the public, and improve its effectiveness and value for money.'* Paragraph 5 states that the EHRC must *'focus on its core role as an independent equality regulator, working in accordance with Hampton principles for modern regulators, and as a UN accredited national human rights institution. It must be able to show that it's using public money wisely.'* Whilst value for money is important, this cannot justify the failure to set out any principles associated with maintaining an effective equality and anti-discrimination body. We believe that due consideration must be given to the U.K.'s international obligations; the guidance provided by Equinet, the European Network of Equality Bodies, is helpful in this regard. Equinet advises that:

*'Equality bodies function as independent organisations giving assistance to victims of discrimination, monitoring and reporting on discrimination issues, and promoting equality. They have a statutory remit to promote equality and combat discrimination in relation to one, some or all of the grounds covered by the EU Equal Treatment Directives – gender, race and ethnicity, age, sexual orientation, religion or belief and disability.'*

*'Equality bodies are required to have the function to provide independent assistance to victims of discrimination. This function can involve a range of activities including:*

- *providing information about the existence of anti-discrimination legislation and about the possibility to take legal action to secure redress for discrimination*
- *referring the people who experience discrimination to an organisation/institution that could assist them*
- *assisting people who experience discrimination to come to an amicable settlement (mediation)*
- *providing legal advice and representation to people who have experienced discrimination'*

*'Equality bodies are further required to have the functions of: conducting independent surveys concerning discrimination, publishing independent reports and making recommendations on any issue relating to discrimination.'*

*'Most equality bodies also have functions to promote equal treatment e.g. through information campaigns aimed at the general public or through providing support to employers and service providers in relation to good equality practice.'*

### **D. Undermining the previous general equality duties and the new Public Sector Equality Duty**

The Draft EQIA says that the purpose of the reforms is to:

- *'Set out more clearly EHRC's core functions as an equality regulator and national human rights institution (NHR I), making it easier for the EHRC to define and deliver effectively against its remit.*
- *Stop non-core activities and/or where appropriate make alternative provision, where they can be done better and or/or more cost effectively by government or other civil society/private sector providers.*
- *Clarify EHRC's relationship to government, increasing transparency and accountability to government, Parliament and the public for how it spends taxpayers' money (in line with aims of Cabinet office NDPB review), strengthening its internal governance and management controls.'*

The Draft EQIA does not identify how the proposals would assist the EHRC to better eliminate discrimination, promote equality of opportunity or good relations and therefore fails to articulate the role that a modern national equality institution should play. No analysis is provided of the existing statutory duties, powers or functions; instead the document merely asserts that changing the EHRC's duties, functions and powers would resolve the governance and operational problems that the EHRC has experienced. We do not believe that management or governance problems are resolved by changing the functions or purpose of an organisation. Important problems have been identified but the solutions are inappropriate, disproportionate and have the potential to undermine the promotion of equality in the UK.

## **E. International obligations and race equality<sup>3</sup>**

As a race equality focused organisation, we believe that as a signatory to international obligations, the UK must give explicit consideration to relevant requirements in the race directive and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); we are therefore surprised that no reference has been made to these, or equivalent, obligations in the consultation document. We believe that the current proposals could undermine compliance with key provisions in the race directive, particularly the requirements set out in paragraph 19<sup>4</sup>, articles 13 (1)<sup>5</sup> and 13 (2)<sup>6</sup>. We are concerned that the proposals, if

<sup>3</sup> Key obligations include Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment between men and women (recast)

<sup>4</sup> *'Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts. [Preamble, para 19].*

<sup>5</sup> *Article 13 (1) : 'Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.'*

<sup>6</sup> *Article 13 (2). Member States shall ensure that the competences of these bodies include: a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints*

implemented, would undermine the UK's ability to comply with the ICERD particularly Articles 2<sup>7</sup>, 6<sup>8</sup> and 7<sup>9</sup>.

#### **F. How the proposals would damage rather than promote equality**

We believe the proposals to repeal Section 3, amend Section 8 and remove the good relations function represent a significant regression in the potential to advance race equality in Britain. Removing the General Duty would represent a distinct lowering of the UK Government's ambitions. The effect of these proposals and the proposal to remove conciliation services would lead to a fundamental regression in the Commission's remit and lead to the EHRC focusing disproportionately on just the implementation of the Equality Act 2010; this approach would potentially undermine: a) compliance with international race obligations to which the UK is subject (i.e. the EU race directive and the ICERD); and b) the EHRC's ability to incorporate equality and civil rights related legislation linked to the promotion of equality and human rights.

<b>Other key equality and human rights legislation and provisions</b>	
<b>Employment related equality provisions not in the Equality Act 2010</b>	<b>Civil rights – key legislation with equality and human rights implications</b>
Health and safety protection	Carers (Equal Opportunities) Act 2004
Minimum wage	Children Act 2004
Paternity, parental and adoption leave	Domestic Violence, Crime & Victims Act 2004
Pregnancy related employment rights	Gender Recognition Act 2004
Protecting the health of workers	Protection from Harassment Act 1997
Time off for dependents.	Racial and Religious Hatred Act 2006 (England & Wales)
Working time regulations	

about discrimination; b) conducting independent surveys concerning discrimination; c) publishing independent reports and making recommendations on any issue relating to such discrimination.

<sup>7</sup> Article 2: '*States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation*';...

<sup>8</sup> Article 6: '*State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.*'

<sup>9</sup> Article 7: '*States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.*'

**PROPOSAL TWO – Amending the equalities duties at Section 8 to clarify EHRC’s core equality functions**

**Question 2: Do you agree that remodelling the duties at s.8 of the Equality Act 2006 to mirror the role and functions set out in para 1.9 of chapter 1 will help to focus EHRC on its core functions as an equality regulator? If not, what do you think EHRC’s core functions should be?**

Please place a cross in the appropriate box

Agree  Disagree  Unsure

Please explain why -

**A. A regressive approach**

We believe the proposed amendments to Section 8 are regressive and would result in a fundamental and negative change in the Commission’s remit. We question how such a narrowing is the panacea to problems which appear to relate to leadership, management and governance, rather than the existing responsibilities or breadth of the EHRC’s remit. As currently worded, Section 8 (1) states that:

*‘The Commission shall, by exercising the powers conferred by this Part—*

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

Table 1 compares the existing provisions and the proposed changes. Although we have sought to comment on the proposals, it is unclear how they are supposed to relate to the existing provisions. Our overall assessment is that the proposed rewording is ill-considered, inappropriate and fails to address the international obligations identified at the beginning of this response. We believe that the approach adopted to re-drafting Section 8 is also an inappropriate approach to drafting primary legislation because it confuses the need to have clear responsibilities for the EHRC with a number of issues about how and with whom it should be done. This looks like an inappropriate attempt to enshrine some form of work programme into primary legislation. This attempt to enshrine working methods in primary legislation appears contradictory to the purpose of primary legislation, and a government approach that says it is committed to avoiding top down management and avoiding focusing too heavily on process. We believe that the existing duties set out in Section 8 should remain unchanged.

Table 1: Assessing the proposed amendments to Section 8		
The current law	The proposals	Comments
a) promote understanding of the importance of equality and diversity	a) promoting awareness of equality legislation, so that individuals, employers and others understand their rights and obligations.	The proposal would limit the EHRC's remit by placing an undue focus on individuals and employment. The law is not just about "individuals and employers <sup>10</sup> and others", but about service providers, education and other areas <sup>11</sup> . This undue focus on employment and individuals is misleading and narrows the scope of the EHRC's responsibilities.
b) encourage good practice in relation to equality and diversity	<i>b) Working in partnership with organisations to highlight good practice and build their capacity to eliminate unlawful discrimination, advance equality of opportunity and foster good relations.</i>	The proposal suggests that the EHRC will no longer have a duty to encourage good practice but instead it will have to work in partnership to highlight good practice. We do not understand how the proposal to <b>build capacity of partners</b> could be realised when finances are already limited and when other proposals suggest that the EHRC's capacity to undertake such work will be cut. We would also note that organisations have been and are being badly hit by the cuts that have already been implemented (12 of London's Race and Equalities Councils have closed over over the past 3 years) and will be hit further by the proposed closure of the EHRC's grants programme. Furthermore, this proposal, would build a potential conflict of interest into the statutory duties of the EHRC. The EHRC should simply not be fettered in this way. It is inconceivable that one could have an effective national equality and human rights commission that does not have a responsibility to encourage or promote good practice.

<sup>10</sup> Please note for example the Equality Act 2010 makes it clear that work includes employees; police officers; partners; the Bar; office-holders; qualification (qualification bodies); employment services (employment service providers); trade organisations; local authority members; recruitment (inquiries about disability and health).

<sup>11</sup> Please note the Equality Act 2010 identifies 6 core areas - services & public functions, work, premises, education, associations & contracts etc



Table 1: Assessing the proposed amendments to Section 8		
c) promote equality of opportunity,	<i>c) Monitoring compliance with equality legislation and, in <b>partnership</b> with civil society organisations, holding Government and public bodies to account for their performance on equality, for example on their compliance with the new Public Sector Equality duty.</i>	The proposal would remove the duty to promote equality from the EHRC. Furthermore, promoting equality involves much more than monitoring compliance. The proposal suggests that the EHRC will be obliged to work in partnership with civil society organisations to hold public bodies to account. It is inappropriate to seek to prescribe in primary legislation how the EHRC would meet the duty to promote equality.
d) promote awareness and understanding of rights under the equality enactments,	<i>d) Intervening to address non-compliance including by bringing or supporting individuals to bring strategic test cases to clarify and enforce the law.</i>	The requirement to promote awareness and understanding of rights is a fundamental principle and fundamental requirement. It is inappropriate to try to set out in primary legislation the most appropriate mechanism or tools for promoting awareness or understanding. We agree that it is appropriate for the EHRC to bring test cases but this is not the only way that the EHRC should enforce the law or promote awareness. It is inappropriate to fetter the EHRC in this way.
e) enforce the equality enactments,	<i>e) Maintaining a robust evidence base to inform and drive improvements in equality practice and against which progress towards a more equal society can be monitored.</i>	Proposal d appears to suggest that there will be limited scope for enforcement and that the enforcement function will be carried out only by working in partnership. Whilst it is important to have clear evidence, maintaining a robust evidence base to drive improvements is a tool and again not an issue to be addressed in primary legislation. Furthermore, it is unclear how or why the duty to enforce equality has been translated into the need to maintain a robust evidence base and drive improvements. It is simply inconceivable that a reformed EHRC would not be responsible for enforcing equality enactments.
f) work towards the elimination of unlawful discrimination	<i>f) Helping the Government to evaluate and monitor the effectiveness of the Equality Act 2010.</i>	It is entirely unclear how the duty to work towards the elimination of unlawful discrimination can possibly be translated to a requirement to 'help the Government ' 'evaluate and monitor' the effectiveness of the Equality Act 2010. The language here is entirely inappropriate. The

<b>Table 1: Assessing the proposed amendments to Section 8</b>		
		EHRC must have a duty/ responsibility to monitor the implementation of equality enactments (plural) and to take enforcement action where necessary. It is not acceptable to reduce the EHRC to a role that is simply about 'helping' the Government, especially as in some circumstances it may in fact be the Government 's action or inactions that the EHRC has to challenge.
g) work towards the elimination of unlawful harassment.		The proposals do not seem to include any clear equivalent to the duty to work towards the elimination of unlawful harassment. This omission is unacceptable and no rationale has been provided.

**Question 3: Do you agree with our proposal to amend the section 12 duty so that it:**

**a) specifies the aims and outcomes which EHRC is required to monitor progress against; and**

**b) requires a report every five rather than three years, to tie into the Parliamentary cycle and enable reports to capture meaningful change over time?**

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Please place a cross in the appropriate box

Agree  Disagree  Not sure

Please explain why –

As a member of Equality and Diversity Forum (EDF), we share their assessment of and concerns about this proposal. We support the current general duty as well as the requirement to report on progress towards these goals. The alternative aims and outcomes are not set out in the consultation document so it is impossible to say if we would agree with them. However we find it hard to visualise an improvement to Section 3 as these were very carefully crafted after wide-ranging consultation with a very broad range of civil society organisations. If they are to be replaced, we think it is essential that the goals in relation to which the EHRC was required to report should include progress towards respect for human rights as well as ‘progress towards a fairer society’.

Like EDF, we consider that a three year reporting cycle is preferable to a five year reporting cycle because a five year cycle will be less responsive to changes in society. Also a five yearly reporting cycle tied to the electoral cycle might make the review appear to be a commentary on the performance of a particular government. Such a change could transform what is now a broadly-based and independent review into a mechanism for party political point scoring, which we think would be unhelpful.

### **Recommendation**

We recommend that the outcomes set out in Section 3 should be retained as a measurement of progress, and we recommend the retention of a three year reporting cycle.

## PROPOSAL THREE – Supporting the EHRC to enhance its focus on human rights

**Question 4: Do you agree that the proposals to focus the Commission on its core functions, as well as the measures set out in Chapter 3 to increase the Commission’s accountability for its performance, will help the Commission fulfil its human rights remit? If not, what further changes do you suggest?**

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Please place a cross in the appropriate box

Agree  Disagree  Not sure

Please explain why -

Like EDF, our assessment is that it is not clear from the consultation document how the proposals to re-focus the work of the EHRC will help them to better fulfil their human rights remit. However, given that equality is part of human rights we do not see how narrowing the EHRC’s equality remit will ‘bring about a step change in its performance on human rights’, particularly when taken together with the proposed governance changes that we believe threaten EHRC’s independence. We therefore support the comments made by the British Institute of Human Rights (BIHR) in response to this question.

## PROPOSAL FOUR – Removing the Commission’s good relations duty (section 10)

**Question 5: Do you agree that we should remove the Commission’s good relations function, and the associated power at section 19? If not, why not?**

Please place a cross in the appropriate box

Agree  Disagree  Not sure

Please explain why -

**Recommendation: We strongly disagree with the removal of the Commission’s good relations function and urge Government to reconsider this proposal. We agree with the recommendations made by EDF and agree that either:**

- **The duty in section 10 is retained but is changed from a duty into a power, OR**
- **An explicit provision is added to the amended Section 8 giving the EHRC power to take action to promote good relations between groups, AND**
- **Section 19(2) should be retained.**

### **A. Overall comments and significance for race equality and equality across all protected characteristics**

We believe the proposal to remove the Commission’s good relations duty is unacceptable and presents particular challenges in relation to race equality but also for other protected characteristics. The duty to promote good relations is central to the promotion of racial equality. The duty to promote good relations has been part of the legislative framework in relation to race equality since the inception of the modern race legislation framework as part of the Race Relations Act 1976; the concept of good relations is pivotal to race equality in Britain.

We believe that a commitment to promoting good relations should mean that the Commission undertakes, commissions and publishes research, develops innovative ways to promote good relations and works to promote public education strategies; and. If the good relations function is removed work around diversionary activities and bringing communities together may not be undertaken in future. We feel a consequence of this absence may be the deterioration of relations between different racial groups and a distancing and potential conflict between communities. This conceptual framework applies equally to religion and other protected characteristics.

## **B Good relations as a duty**

Under the Race Relations Act 1976 the newly established commission for racial equality had three duties the second of which was to 'promote equality of opportunity, and good relations, between persons of different racial groups generally'<sup>12</sup>.

## **C. Good relations and community cohesion**

The promotion of good relations is recognised as being central to the community cohesion agenda. Whilst the good relations element of work in relation to race and religion is clear, even if exceptionally challenging at times, it has perhaps less clear how the good relations agenda translates across to other protected characteristics. However it would be difficult to argue against work that promotes a better understanding and good relations between young people who are not disabled and learning disabled people and their carers, especially where young people have engaged in antisocial behaviour.

## **D. Concurring with EDF's analysis**

We concur with the EDF's analysis:

*The 'good relations power is very important in relation to 'issues arising from race, Gypsies and Travellers, interfaith relations, hate crimes, the causes of violence against women, intergenerational age issues and highly stigmatised groups like people with mental health problems or HIV/AIDS.'*

*The consultation document suggests that what EHRC does may overlap with the good relations work of NGOs citing, amongst others, the work of the Runnymede Trust. However, Runnymede's good relations work is funded by the EHRC. If section 10 is removed and, as indicated elsewhere, EHRC's grants programme is closed down, this work is likely to stop.*

*Currently some projects could arguably be carried out either under the good relations remit or under Section 8. However, if Section 8 is amended in the way that the consultation document proposes and the good relations duty in section 10 is removed then there will be no provision for this aspect of the EHRC's work. The ability to undertake good relations work is important to the proper functioning of the EHRC if it is not to become narrowly a regulator, as the EHRC itself has characterised it, a compliance factory.*

*We note that removing section 10 would also entail removing the duty in 10(5) to 'promote or encourage the favourable treatment of disabled persons'. This section recognises, as does the Equality Act 2010, that in order to achieve equal opportunities for disabled people it is sometimes necessary to treat disabled people more favourably than non-disabled people. This requirement is still frequently misunderstood and the EHRC has an important role to play in promoting a better understanding of this requirement.*

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<sup>12</sup> Race Relations Act 1976, Section 43 (1 b)

*Section 19(2)(a)&(b) give the EHRC powers to co-operate or assist in monitoring crime affecting particular groups and to prevent or reduce crime affecting certain groups. We regard these as useful powers for the EHRC to enable them to record or take action to reduce criminal activities which are the result of prejudice. The recording and monitoring of this type of crime will be an important function for the EHRC as we understand that the Home Office has recently decided to stop doing this.*

#### **E. Rejecting the proposal**

We believe that this proposal simply fails to take account of work which has developed both the conceptual analysis and framework for good relations in the UK<sup>13</sup>. Given the increasing recognition in Scotland of problems around good relationships associated with religion and the recognition of the importance of good relations work in Northern Ireland's legislative framework, there appears to be absolutely no rationale for proposing the removal of the good relations duty

We believe that the combined impact of this proposal and the proposed amendments to Section 8, would lead to a drastic reduction in preventative work and other non-legal initiatives. We also believe that given the good relations provisions within the PSED, the removal of the EHRC's powers in this area would undermine the implementation of the PSED.

We accept that good relations function does not fall within the regulatory approach proposed in this consultation document. However we believe that this clearly demonstrates a fundamental flaw in the approach adopted by the GEO in relation to this review. Until societal changes genuinely promote good relations between different groups, a good relations function should be upheld, as regulation alone will never achieve significant moves towards the sort of equal society set out in Section 3.

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<sup>13</sup> Good Relations: the Conceptual Analysis Institute of Community Cohesion/ EHRC, 2009. Good Relations Measurement Framework, Policy Evaluation Group, 2010

**EHRC's Non-core activities****PROPOSAL FIVE – Repealing the Commission's power to make provision for conciliation services**

**Question 6: Do you think the Government should repeal the Commission's power to make provision for conciliation services, as part of the process of focussing the Commission on its core functions?**

Please place a cross in the appropriate box

Agree  Disagree  Not sure

Please explain why –

**Recommendation: The government should not repeal the commission's power to make provision for conciliation services.**

**A. The importance of conciliation and dispute resolution services**

Conciliation and dispute resolution services are comparatively inexpensive tools compared to litigation where there are extensive costs in terms of finance, time and stress. Conciliation services are a vitally important function when dealing with discrimination cases especially when there is little alternative support to resolve goods and services and non-employment cases.

We believe there should be a commitment for citizens to access mechanisms of justice, but resolving issues appropriately means that it makes no sense to remove this cost effective power which contributes to the Commission's core functions. We appreciate that Government finances are limited. However this should not be used to remove this crucial power.

Options for mediation and conflict and dispute resolution are exceptionally important and with community resources under so much stress, this option should not be removed from the Commission's toolbox.

We are concerned about the lack of information provided about how this service might be replaced and the impact on our services users.

**B. Discrimination cases an employment tribunal**

The success rate for unfair dismissal has held at 10% for the last six years whilst the success rate for applicants claiming race discrimination has been 3% for the last six years. The data suggests that it is very difficult to win any form of discrimination case at an employment tribunal. Key factors may include lack of adequate advice and/or representation, the complexity of the legal system, the difficulties in proving discrimination and the adversarial nature of the system. There have been a number of unsuccessful attempts over the years to improve the availability of assistance in



relation to discrimination cases<sup>14</sup>. However as we move towards 2012, cuts in legal aid, cuts to advice services and general cuts on the voluntary and community sector are only likely to make it more difficult for organisations and individuals to access effective support for discrimination cases. Against this background, appropriate and effective conciliation mediation services can be seen to be a particularly important.

**Box 13: Number & percentage of successful claims to Employment Tribunals – 2004/5 – 2009/10**

Year	Race		Disability		Sex		Unfair dismissal		
	number	%	number	%	number	%	number	%	
2004/05	107	3%	236	5%	299	2%	3493	10%	
2005/06	119	3%	173	4%	4068	17%	3425	10%	
2006/07	102	3%	149	3%	463	2%	3870	10%	
2007/08	121	3%	178	3%	469	3%	3791	10%	
2008/09	129	3%	177	3%	341	3%	3935	10%	
2009/10	130	3%	170	3%	340	2%	5200	10%	

<sup>14</sup> Employment Tribunals (Representation and Assistance in Discrimination Proceedings) Bill <http://www.publications.parliament.uk/pa/cm200506/cmbills/014/06014.i.html>

**PROPOSAL SIX – A new system for equality information, advice and support**

**Question 7: Do you agree with the proposals set out to provide a new system of information, advice and support? If not, what changes to the system would you recommend?**

Please place a cross in the appropriate box

Agree  Disagree  Not sure

Please explain why -

We are surprised that Britain’s only independent equality regulator will not be able to provide a helpline service to assist those who are most often disadvantaged and those unsure about upholding people’s legal rights and obligations. The provision of information, advice and support offers the opportunity to increase public awareness and therefore meeting criteria set out for National Human Rights Institutions in the Paris Principles to combat discrimination. We believe that the removal of these provisions is inconsistent with the requirements of the race directive and ICERD:

*‘Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts. IRace Directive: Preamble, para 19].’*

*‘Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.’ IRace Directive: Article 7(1)].’*

*‘ Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are compliedwith, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.’ IRace Directive: Article 7(2)].’*

Information, advice and support are central to citizen’s ability to challenge decisions?, particularly within a framework of “Big Society” in achieving equality of outcomes. We

believe this service should be retained, remaining independent and potentially be delivered through the voluntary sector. The huge central government reductions to legal aid support, payment by results and the removal of grant making functions would signal the loss of vital services and the opportunity for the Commission to gather intelligence to identify priorities and inform the Commission's strategic direction.

We are also concerned about the likelihood of outsourcing the helpline. We believe there is a lack of specialist knowledge in some generic services and this must be taken into account in the provision of support.

We would advocate capacity building to provide support to individuals to challenge public authorities and signposting specialist advice through larger advice services.

**Question 8 What should a new citizen - focused, cost effective information and generalist advice service look like?**

Please explain -

**Recommendations: We recommend that provision is made for continued funding at the same level for discrimination advice and case workers in legal centres such as the Race and Equalities Councils, Law Centres, Disability Advice Service and Citizens Advice which should not be subject to the same limitations as legal aid.**

We are also aware that detailed work has been carried out on the issue of advice and representation in relation to discrimination cases and we would recommend a review of previous work and thinking in this area<sup>15</sup>.

**A. Particular issues for BAME communities**

Our experience with BAME organisations shows that many minority ethnic communities will not use internet or telephone services predominantly due to communication problems. Moreover often race discrimination, racial harassment or associated cases are very complex and raise a range of issues not least the distress caused to the individual making the complaint. These individuals need adequate access to face-to-face advice and we therefore advocate for the provision of face-to-face community based services, particularly for discrimination and harassment cases. We are extremely worried that a generalist service would not offer the same levels of assessment by a experienced and knowledgeable advisers.

**B. Concurring with EDF**

We concur with the assessment by EDF and would support their proposals in this area. A new information and generalist advice service needs to be readily accessible to the most disadvantaged sections of the community who will include those unable to access a computer or telephone. It will therefore need to be available in a variety of forms from telephone and internet but would importantly need to include significant resources for personal face-to-face advice. It also needs to be available to all members of the public, including children, people who use English as a second language and disabled people. This includes provision in sign language and alternative formats such as Braille.

The need for face-to-face advice must not be underestimated. To limit the service to a telephone or internet service limits its ability to reach some of the most disadvantaged sections of the community who mostly experience discrimination. Some of the people who would not be able to adequately access a phone-only service include:

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<sup>15</sup> Employment Tribunals (Representation and Assistance in Discrimination Proceedings) Bill <http://www.publications.parliament.uk/pa/cm200506/cmbills/014/06014.i.html> and [www.parliament.uk/briefing-papers/RP05-59.pdf](http://www.parliament.uk/briefing-papers/RP05-59.pdf)

- those ethnic minority clients who have difficulty in understanding or speaking in English or reading documents in English,
- clients with a physical or mental health impairment affecting their ability to communicate by telephone or more generally, including people with hearing loss (1 in 7 of the population) and those who use sign language, as well as
- those who are very distressed or frightened.

So although a telephone or internet helpline will be useful to some people, it should not be the sole access point to legal help, there is a continuing need for locally available face-to-face advice.

Some people may also need an advocate to represent them in handling cases, such as people with mental health problems or learning disabilities, or people who require an interpreter. For example, statistics from Mind's legal advice line show that on balance more calls are received from friends, relatives, advocates and supporters on behalf of people experiencing mental distress than from mental health service users themselves. Use solely of a telephone advice service would therefore raise issues around independence, consent and confidentiality.

Additionally many victims of discrimination have problems that they find difficult to explain and where the core legal issue can only be identified from documentation – this will not be available to a telephone or internet adviser. For example, a person with a welfare benefits case with discriminatory implications may not understand what the issues are whereas sight of the correspondence would clarify them.

EDF members that have experience in direct advice giving to the public will attest that when a client is very distressed, frightened, confused or upset it can take time for them to explain the salient details of their problems.

**Question 9: How can government best provide public education on discrimination and human rights, targeted on the most disadvantaged groups?**

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Please explain -

There exist a variety of methods to best provide public education on discrimination and human rights, for example, researching relevant barriers and threats to equality to inform work. We believe many of the activities which contribute towards public education for disadvantaged groups can be contributed to by working effectively with the voluntary and community sector and maintaining strategic grants and legal funding programme.

We concur with HEAR's response, that existing expertise and resources of voluntary sector organisations that have built relationships with individuals and communities through their services should be utilised. These organisations are best placed to tailor public education according to the specific needs of their communities or the groups that they serve because they have specialist knowledge and understanding of these needs. Working closely with equality organisations, which have relationships with some of the most marginalised in society, would be an effective way of ensuring that public education reaches those that need it the most.

We believe that implementing the proposals to remove good relations powers would impair the Commission's position and effectiveness to target the most disadvantaged through public education. For efficient public education to happen, the government, through the Commission, needs to be in a strategic position to carry out research and consult by having a solid overall understanding of different societal phenomena that lead to or underpin inequalities and/or discrimination.

If good relations work is not undertaken, we believe that this may generate a gap in understanding surrounding race relations and other equality areas. We also agree with Inclusion London's response to this question, which states that the proposals under question 1 (to remove Part 1 Section 3 of the Equality Act 2006) will undermine the framework of the Commission's work and will make it more difficult for the Commission to provide the best research and evidence to allow it and the government to provide the best 'public information on discrimination and human rights'.

**Question 10: Is there anything that distinguishes discrimination cases from other cases eligible for civil legal aid that would justify further public funding for support?**

Please explain-

**Recommendation: That provision is made for continued funding for discrimination case workers in legal centres such as the Law Centres, Race and Equalities Councils Disability Advice Service and Citizens Advice which should not be subject to the same limitations as legal aid.**

**A. Discrimination cases**

The last six year's employment tribunal data demonstrates that it is exceptionally difficult to win discrimination cases at Employment Tribunal. Across all of the protected characteristics, less than 5% of applicants have an outright win at employment tribunals. The fact that discrimination cases consistently achieve less than one third of the success rate of unfair dismissal claims suggests that more support is required for discrimination cases.

As discrimination cases very often require specific sectoral support and are notoriously difficult to both identify as justifiable to go to court, we believe there is certainly justification for further public funding specifically to support discrimination cases. Detailed knowledge on discrimination law is essential with experience to be able to empathise. Pre-court legal advice, including expertise in discrimination law is also essential. Informed high quality advice early in the process can weed out claims without merit but it can also identify options for mediation before the battle of courting ensues.

We are particularly concerned that this question is being raised when pre-court legal advice is being removed from the legal aid budget; with the removal of the legal grants programme we fear a significant reduction in advice and support for people with discrimination claims. There is a real danger that reduced support for discrimination cases prior to employment tribunal or court proceedings, simply results in court litigation, potentially higher costs and increased stress for all concerned.

**B. Concurring with EDF's response**

One of the tests of a modern democratic state is its ability to provide a remedy for those who consider that they have been the victims of discrimination. People who feel treated unequally feel marginalised and excluded from society and this can lead to a desire not to contribute to society and even, on occasion, anti-social behaviour.

Discrimination cases frequently involve making difficult and personal allegations which are better made by lawyers or people often removed from the situation. For example, a woman who has been subjected to serious sexual harassment may find it very difficult, if not impossible, to cross examine her alleged harasser. The State would not expect a person alleging rape to prosecute her own case and nor should we expect those who allege harassment to cross examine their alleged harasser.

Similarly cases involving sexual orientation or disability can involve very personal questions which can make it difficult for the individual to conduct themselves. People who have experienced discrimination are likely to find retelling or testifying about the incident(s) extremely distressing. Some may have developed depression, anxiety or post-traumatic stress disorder that, coupled with the unfamiliar and daunting nature of the justice system, particularly the adversarial court process, means people may need support or adjustments to give their best evidence.

Direct discrimination cases invariably involve establishing sufficient evidence to reverse the burden of proof and the drawing of inferences require a lawyer's skill to do effectively. Indirect discrimination cases or cases about reasonable adjustments, justification or competing rights all require those skilled in the law in order to have them conducted efficiently and effectively.

In any event legal aid does not provide funding for representation in small claims in the County Court nor does it provide funding for representation at employment tribunals but only for legal advice and assistance. Financial eligibility levels for legal aid are already very stringent and often a person may not qualify because of the capital value of their home or because they have savings just over the limit. Yet a person who does not qualify for legal aid may have a case that if determined in their favour brings major benefits for others.

Many discrimination cases arise out of or in connection with other legal claims – housing, employment or welfare benefits, for example. It is proposed that such legal aid as there is currently for housing, employment or welfare benefits will be removed. If it is not possible to obtain funding for these parts of the claim it will be very difficult to take action to pursue the discrimination claim.



**Question 11: Do you agree with the proposal for the Air Transport Users Council (AUC), part of the Civil Aviation Authority (CAA), to provide the complaints handling service for disabled passengers in the future? If not, why not?**

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Please place a cross in the appropriate box

Agree  Disagree  Not sure

Please explain why -

We endorse the response of EDF which notes that the AUC was abolished before this consultation document was issued and has been replaced by the Aviation Consumer Advocacy Panel, about which only limited public information appear to be available at present. Like EDF, we are surprised that this was not recognised in the consultation document and are concerned that this implies that only limited consideration was given to this proposal before it was made.

We agree with EDF that the best outcome for disabled air travellers would be for EHRC to retain this function and for the current Memorandum of Understanding to be retained. The EHRC is expert in disability discrimination law, the Aviation Consumer Advocacy Panel is unlikely to be so. To expect the Aviation Consumer Advocacy Panel to fulfil this function would require them to acquire extensive information both about the nature of disabilities and the most appropriate way to respond to them as well as knowledge of the most efficient ways to provide reasonable accommodation for people with disabilities. This would be inefficient, time consuming and unnecessarily costly.

## PROPOSAL SEVEN: Supporting Social Action

**Question 12: How could the new Government funding stream most effectively support civil society organisations to promote equalities, human rights and tackle discrimination?**

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Please explain -

The present environment by which BAME organisations can obtain finances to support their work to promote race equality is particularly worrying. Many funding streams announced and implemented by the government have been inaccessible to BAME organisations. Core funding is fundamental to the resilience of BAME organisations, which are very often small in size. Without specific funding streams for this work an effective citizen's challenge on race equality grounds will be severely limited.

Any new funding stream would need to have a specific remit for equality and human rights organisations to carry out their work independent of Government direction and sustained over 3+ years. Funding streams that promote equalities and human rights should have independence from government objectives and should not therefore be prescribed by government but an independent public body. At a very practical level it is also vital that funding to voluntary organisations does not place barriers, such as short term funding which creates unnecessary pressure and limits the success of a project. Core and sustained (3+ years) funding is imperative to small organisations as it allows an organisation to focus and increase detail and ensure greater impact from their work.

It is very important that any new funding stream ensures that those who receive funding have a track record of successfully delivering to marginalised communities. This would mean that funding would need to ensure there are face-to-face services as many BAME communities may not access internet services. Funding provision needs to take into account practical issues, for instance, the location of advice services. ROTA's evidence has shown that where Race Equality Councils have had to close down their services, service users are now expected to travel across several boroughs to receive an appropriate service which takes account of cultural nuances and has empathy to their multi-dimensional needs.

**Achieving greater value for money and accountability****Question 13: Do you agree with our legislative proposals to increase the Commission's transparency, accountability, and value for money?**

Please place a cross in the appropriate box

Agree	<input type="checkbox"/>	Disagree	<input checked="" type="checkbox"/>	Not sure	<input type="checkbox"/>
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Please explain why -

The proposals to clarify the Commission's relationship with Government, to increase transparency and accountability, actually appear to do the opposite. We believe the proposals outlined are likely to compromise the independence and accountability of the EHRC and therefore its effectiveness as a national equality and human rights body. While financial probity is essential, independence is key to the EHRC's functioning and to remaining an 'A' status human rights institution according to the United Nations.

It is suggested that the Commission would need to present its annual business plan to parliament. While parliamentary scrutiny is good, this might make the annual plan a political football and subject to political considerations. Secondly it is proposed that business plans should be presented through the Minister of the GEO; this would appear to mean that the commission would need to obtain ministerial approval and consent of its business plan. We believe that these provisions are inconsistent with ensuring the independence of the EHRC.

We have particular worries and feel there are evident problems with the additional financial and reporting requirements being proposed. We find the issue of reporting financial status to ministers and Parliament is somewhat peculiar for a non-departmental public body. Once again, this proposal raises questions over the autonomy of the Commission and the Government's reasons for attempting to place such obligations upon the Commission. We share the detailed concerns expressed by EDF:

**Independence**

It is widely recognised that independence is key to the effectiveness of national equality and human rights bodies.

The EHRC was set up to comply with the requirements of a number of international criteria such as the UN Paris Principles and we regard compliance with these norms as essential for the delivery of the EHRC's services, its international standing and its accreditation as an A status National Human Rights Institution.

We note that the Council of Europe Commissioner for Human Rights has recently issued an Opinion on National Structures for Promoting Equality in which he says:

*'The independence of these bodies can be understood in terms of being able to allocate their resources as they see fit, make decisions in relation to their own staff, determine their own priorities and exercise their powers as and when they deem necessary. Independence can be both de jure and de facto. De jure independence is based on the legal provisions that govern the relationship between the body and political institutions. De facto independence is based on the reality of independence as exercised by the body.(para 4.4)'*

We recognise that an institution's independence can be impaired by a number of small measures that, taken together, can inhibit appropriate actions or decisions. Whilst we agree that the EHRC must be properly accountable for its use of public funds, and these must be used in a cost effective way, we are gravely concerned about the potentially dangerous effect of provisions being proposed here.

In particular we are concerned that:

- The proposed statutory requirement for the EHRC to lay its annual business plan before Parliament does effectively give the Secretary of State a veto over its contents, given that it would be highly unusual for a Secretary of State to lay before Parliament a document with which they disagree. This proposal thus interferes with the EHRC's de facto independence.
- The proposal to make it a statutory requirement for the EHRC's chair and CEO to have regard to using public money efficiently and effectively will have a chilling effect. This proposal, which we understand would be an unusual provision for an NDPB, would be likely to make the EHRC highly risk averse. Given that a NHRI will on occasion be required to make bold decisions and to deal with matters of public controversy, it is essential that its governance arrangements do not make it excessively cautious.
- We do not understand why it is necessary to make an explicit provision that the Secretary of State can impose a financial sanction where the EHRC can be shown to have mis-spent taxpayers' money. The Secretary of State already has this power and in any event future grants can be limited because of past actions so to include such a new power appears to be a threat to the EHRC's independence.
- We are not clear what precisely is intended by the argument that the EHRC must be subject to 'Government public expenditure restrictions'. The EHRC's overall budget is set by Ministers (unless the EHRC is able to raise further funds itself from other sources) and in that sense it evidently is subject to public expenditure constraints. However we are not persuaded of the case for subjecting an NHRI to detailed expenditure controls. An independent body should be able to determine for itself the appropriate balance of its spending between staffing and other forms of expenditure, for example, and we do not think it should be subject to external 'management controls' without very clear justification of their necessity and guarantees that they will not inhibit its de facto independence. An Audit Committee with independent members is an important safeguard for all public bodies.

We believe that the EHRC should have a closer relationship with Parliament, both to balance its relationship with the Executive and to promote engagement with its work

by parliamentarians. We recommend that this could be achieved through a requirement to table an annual report before Parliament, followed by a debate. We note the recent newspaper coverage of the case for a parliamentary Equalities Audit Committee, an idea that we think has considerable potential.

### **Shared services**

We would welcome any initiative to keep the back office costs of the EHRC to a minimum in order to concentrate its resources on delivery. However we are concerned about the proposal to share back office services with government departments and it is not clear from the document the extent of the shared services and how far this has already been implemented. We accept that this could lead to some cost savings which are, of course, very welcome. However, we are concerned that some services are not appropriate for such sharing with the Government. For example, we can see no objection to shared pay roll servicing, however, we would be concerned about a proposal to share IT services with the Government as this could lead to problems if the EHRC was to conduct an investigation into a Government department. This would give rise to a clear conflict of interest. On the other hand if the IT provider was a non-government provider who provided services to both the Government and the EHRC we would consider that fewer problems would be likely to arise.

### **Relationship between Chair and the Senior Management Team**

The document says that the Government wants to work with the Commission to, amongst other things, 'enhance the ability of the Chair to hold the Senior Management Team (SMT) to account for financial and management propriety'. It is clearly important that the Commission's management is accountable to its Board and in particular the Chair. However, this accountability must be through the Commission's Chief Executive, who is also its Accounting Officer. If other members of the SMT were to be accountable directly to the Chair, rather than through the Chief Executive, or were to be performance managed by the Chair, this would undermine the position of the Chief Executive. Undermining the position of the Chief Executive could not possibly be helpful from the point of view of good management and governance. We do not imagine that a proposal would make government department staff accountable to a Minister directly rather than through their Permanent Secretary. We hope that the proposal in this document is simply unfortunate phrasing that will be corrected.

## **Our approach to reform & next steps**

### **Question 14: Do you agree with our approach of legislative and non-legislative reform?**

Please place a cross in the appropriate box

Agree	<input type="checkbox"/>	Disagree	<input checked="" type="checkbox"/>	Not sure	<input type="checkbox"/>
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Please explain why -

We are profoundly concerned about the proposals and have set out our reasons at length within this document. Like EDF, we believe that nothing should be done to jeopardise the independence of the EHRC and its recognition as an A status National Human Rights Institution.

We believe that explicit consideration should be given to ensuring that relevant international obligations can be addressed.