

Equalities and Human Rights Commission
A Hampton Implementation Review Report

January 2010

Equalities and Human Rights Commission

This review is one of a series of reviews of regulatory bodies focusing on the assessment of regulatory performance against the Hampton principles and Macrory characteristics of effective inspection and enforcement. It was carried out by a review team drawn from the Better Regulation Executive, the Local Better Regulation Office and the Financial Reporting Council in September 2009.

Further information about the reviews can be found at:

<http://www.berr.gov.uk/whatwedo/bre/inspection-enforcement/page44029.html>

EXECUTIVE SUMMARY AND CONCLUSIONS

This review is one of a series of reviews of regulatory bodies undertaken at the invitation of HM Treasury and focusing on the assessment of regulatory performance against the Hampton principles and the Macrory characteristics of effective inspection and enforcement. The review process is designed to identify where a regulator is on the road to full implementation and the issues it needs to address to become Hampton-compliant.

The review focused on those aspects of the Commission's activities that impact the private sector. This meant, for example, that programmes of work focussed on the promotion and enforcement of public sector duties or narrowing gaps in educational outcomes were out of scope.

Our methods included: interviews with Commission staff, including senior managers; interviews with other stakeholders, including Government departments, business and equality representative groups; and reviews of documents, including the Commission's high level strategies and plans.

The review team is grateful to the Commission for its support and commitment over the review period. Its leadership team and staff were extremely helpful and generous with their time. We are also grateful to the Commission's stakeholders for their helpful insights into the wider context within which the Commission operates.

What we found

The review team concluded that the Commission is committed to implementing a regulatory regime that is consistent with the Hampton principles. We saw a mixed picture of regulatory achievement, however, with progress in stakeholder engagement, advice and guidance, and risk-based analysis weighed against the need for greater transparency and clarity of purpose.

Since the Commission has only exercised full statutory powers since October 2007 it is inevitable that the findings of the review reflect the fact that the Commission is at a relatively early stage in its work. Furthermore, the changes that are taking place are being pursued in the context of a genuinely

challenging background:

- Government support for a new equality bill aimed at securing an effective legislative and regulatory framework that both simplifies and strengthens existing equality law;
- High expectations of the Commission itself (its arrival, in 2007, being described as the “most important legislative measure for the advancement of human rights since the Human Rights Act itself”); and
- External challenge on its achievements, and the extent to which has produced enough work of sufficient quality to merit its £62m annual budget.

The results of this review should therefore be seen in this context, and as an encouragement to the Commission’s leadership team to continue with its programme of change.

In addition to the key findings and main issues for follow up, the review team has also suggested some specific actions that the Commission might wish to consider as part of its 2010/11 Business Planning process. These are set out in the relevant sections below.

Key Findings

- The Commission is being proactive in its quest to transform itself into a modern regulator. The leadership team is asking all the right questions; better regulation is in the language of the organisation, if not yet embedded throughout its culture.
- The Commission recognises that its current approach is not entirely risk-based and is working hard to create a culture that is less reactive and less dependent on soft, somewhat ad-hoc intelligence. The new Intelligence Hub is a welcome step in the right direction.
- The Commission has set up a strong and effective network of advisory committees to help develop new statutory and non-statutory guidance for businesses. The timetable is challenging, but the programme of work has been well thought through and is being well managed.
- The Commission has published an Enforcement and Compliance Policy. The policy explains how the

Commission chooses enforcement methods that are relevant and proportionate to a particular breach. The policy is widely accessible to businesses and other organisations.

- The Commission is committed to the proportionate use of sanctions, adopting an advisory and supportive approach to businesses trying to be compliant.
- The Commission is making efforts to be transparent in the way in which it undertakes its regulatory activities, but is still finding its feet in terms of reporting on the impact and effectiveness of those activities.
- The Commission is committed to ambitious change outcomes, but has yet to work out how best to link these to its priorities, work programmes, individual projects and key performance indicators. A key challenge will be to obtain hard evidence on the effectiveness of its interventions.

Issues for follow-up identified during the Review

In the areas that we looked at, issues for follow up include:

- Developing a more strategic understanding of the influences, interests and attitudes of different stakeholders towards the programme's outcomes;
- Continuing to build a comprehensive evidence base to inform regulatory interventions.
- Better risk-targeting through improved use of intelligence and communication.
- Ensuring the right balance between promoting equality and human rights on the one hand, and enabling the facilitation of compliance on the other;
- Reporting on the impact and effectiveness of its activities alongside measures of stakeholder perception and regulatory costs.

INTRODUCTION

Introductory background information about the Regulator such as the rationale for establishing it:

The Commission is a non-departmental body (NDPB), established as a corporate body and sponsored by the Government Equalities Office (GEO). The Commission's mission is to reduce inequality, strengthen good relations between people, and promote and protect human rights, which it seeks to achieve by:

- **Promoting** awareness, understanding and the importance of equality and human rights;
- **Working towards** the elimination of unlawful discrimination and harassment;
- **Monitoring, measuring and reporting** on the effectiveness of laws relating to equality and human rights; and
- **Encouraging compliance and enforcing** equality enactments.

The legislation establishing the Regulator:

The Commission was created by the Equality Act 2006 and came into legal existence on 1 October 2007.

The Commission paved the way for consolidation of the existing bodies of the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC) and was part of a wider shift in Britain's equality regime ushered in by the growing recognition of multiple discrimination considerations, and the extension of anti-discrimination legislation to new grounds.

The Regulator's statutory remit or objectives:

The Commission is charged with a responsibility to protect, enforce and promote equality across the seven "protected grounds" of age, disability, gender, race, religion and belief, sexual orientation and gender reassignment and to promote understanding and encourage good practice in relation to human rights.

The work of the Commission covers Great Britain i.e. England, Scotland and Wales, but not Northern Ireland. The Scotland and Wales Commissions exist to ensure that British policy-making reflects the needs of the two countries and to deliver specific programmes of work in Wales and Scotland.

The regulator's budget:

The EHRC has a provisional budget for 2009/10 and 2010/11 of approximately £62 million. This is split as follows:

- £60 million - Revenue
- £2 million - Capital

The projected salary and staffing costs for 2009/10 are £27.7 million. The salary and staffing costs, together with the day to day running costs and estate costs, are £40.9 million.

The main source of income for the Commission's activities is funding received directly (as grant-in-aid) from the GEO. Additional income is generated from charges the Commission is allowed to make for its information and conciliation services (as defined by Sections 13 and 27 of the Equality Act 2006) and recovery of costs (as defined by Section 29 of the Act).

Number of staff (including breakdown of policy and frontline staff):

The Commission employees over 500 full time equivalents (over 300 of whom came from the three 'legacy' bodies). Commission staff work in one of four Group Directorates (Strategy, Legal, Communications and Corporate Management), plus national directorates in Scotland and Wales. The breakdown by directorate is:

Strategy Directorate - 16%

- (Policy, Research and Foresight teams)

Legal Directorate - 15%

- (Casework and Litigation, Enforcement, Legal Policy and Standards teams)

Communications Directorate - 30%

- (External Affairs, Helpline, English Regions and Stakeholder Management teams)

Corporate Management - 23%

- (Finance, HR, Business Planning, ICT, Buildings & Facilities and Information Management, including Policy Support teams)

Scotland and Wales - 13%

Other - 3%

The Commission operates from offices in London, Manchester, Birmingham, Cardiff, Glasgow and Edinburgh and

a number of co-located hub offices employing a small number of staff in locations including Nottingham, Newcastle, Leeds, Guildford, Bristol and Cambridge.

The sectors and number of businesses regulated either directly or indirectly:

The Commission has significant responsibilities in relation to both the public and private sector. Its regulatory role cuts across the economy, dealing with duties on all enterprises (including companies and legal partnerships), employers and providers of services of all kinds (including housing).

The Commission has undertaken a number of inquiries into equality issues in a range of sectors, including, for example, publishing reports on racism in the construction industry, treatment of temporary workers in the meat and poultry processing sectors and gender discrimination in the financial services sector.

THE HAMPTON VISION

“Both the Hampton and Macrory reports are concerned with effective regulation - achieving regulatory outcomes in a way that minimises the burdens imposed on business. Key to this is the notion that regulators should be risk-based and proportionate in their decision-making, transparent and accountable for their actions and should recognise their role in encouraging economic progress.”

Any findings relevant to whether the review team believes the regulator is risk-based:

The work of the Commission requires intelligence in order to:

- Identify issues of persistent or systemic discrimination;
- Identify the causes of non-compliance and tools for achieving change;
- Enable a risk-based and proportionate approach to enforcement; and
- Identify repeat and worst offenders.

The review team recognises the challenge that the Commission faces in deciding which issues to pursue, given the number of “protected” equality strands for which it is responsible, and the breadth of the community that it regulates which encompasses all businesses in the UK as employers and providers of services in the private, public and voluntary sectors, and public authorities in their role as policy-makers.

We also acknowledge that breaches of equality and human rights legislation are less visible to the naked eye than, for example, breaches of health and safety, food hygiene or commercial practices. We note the Commission’s powers do not extend to surprise inspections or ‘mystery shopping’ style exercises.

However, the Commission is not without powers, and its budget provides for comprehensive risk assessment to be (or become) the essential means of directing regulatory resources where they can have maximum impact on outcomes.

We found:

- A strong commitment to the development of tools and processes to better identify and understand systemic

discrimination or non-compliance;

- Use of a range of intelligence sources including:
 - Searchable databases (e.g. outcomes of discrimination cases heard by Employment Tribunals);
 - Relevant public information (e.g. Tribunal and court decisions);
 - Intelligence from frontline staff including the English Regions team, the Helpline team, and national directorates in Scotland and Wales.
- Regular meetings of the legal and enforcement teams, which involve staff from other directorates across the Commission, to help prioritise enforcement activities; and
- Some enforcement actions being pursued with an eye to “wider potential” and “fit with strategic priorities”.

Commission management and staff to whom we spoke displayed a solid understanding of Hampton principles and provided several good examples of how their intelligence-gathering and decision-making processes worked in practice. We were impressed with some of the innovative approaches that had been taken to tackle businesses whose equality practices had been called into question and whose behaviours and approach had improved as a result of the Commission’s interventions.

However, the review team concluded the Commission had not yet developed the necessary capability to be considered fully Hampton-compliant; more needs to be done to ensure regulatory interventions are based on a rigorous and systematic assessment of risk.

We also wondered whether the Commission’s emphasis on pursuing issues with “wider potential” might sometimes distract or divert the relatively small amount of resource devoted to this area. Some specific actions that the Commission could usefully take to make further progress in this area might include:

- **Work to help migrate from a complaints- and demand-led model to one based on more formal or systematic risk analysis;**
- **Work to determine how and to what extent the**

existing ten criteria for taking enforcement action¹ help ensure decisions are proportionate and risk based. Are some criteria more 'primary' than others, and if so what improvement in regulatory outcomes might be achieved if these were privileged?

- Work to satisfy itself that businesses are clear about the role and purpose of frontline staff (who are accountable under the Regulators' Compliance Code for their activities) and extent to which intelligence may be gathered as part of this engagement process.

Any findings relevant to whether the regulator is transparent and accountable:

Stakeholders to whom we spoke identified three broad issues in this area: consultation practices and processes; role and purpose; and engagement with wider public policy work.

There was broad agreement that the Commission's engagement with stakeholders had improved over the last year, and that both steering and advisory groups were increasingly better set up and managed.

Business stakeholders said that consultation processes were improving, with specific references to consultations on non-statutory guidance, although the timing of certain exercises was still less than ideal. Stakeholders said meetings were often called at short-notice and sometimes clashed with similar events being hosted by the Commission's sponsoring body (the GEO). Jointly held meetings had some advantages, but it was important to make clear who was running the session when these took place.

Although the Commission has made available a number of corporate publications, the majority of stakeholders to whom we spoke said they remained unclear about the Commission's role and purpose. Was it a champion or advocate in the style of its 'legacy' commissions? Or was it a campaigner, focused on promoting new ways of working and relating? Few stakeholders saw it as a regulator in the traditional sense of the word, although all recognised the Commission had quite strong regulatory powers.

The review team was clear that the Commission's statutory duties required it to be each and everyone one of these in turn, but that there were some specific actions it could undertake to make much clearer what its key priorities are for different types of stakeholders (e.g. users/beneficiaries, influencers, providers, partners); and in which mode the

¹ See the Commission's May 2009 Enforcement and Compliance Policy

Commission is operating when undertaking these activities (e.g. is the “Working Better” initiative a campaigning activity or a regulatory one?).

Other stakeholders raised concerns about “silo thinking”. There was a feeling that the Commission did not always recognise how its work linked to other (Government) policies and policy issues. We witnessed some specific examples of this during the review in relation to advice, guidance and procurement.

Some specific actions that the Commission could usefully take to make further progress in this area might include:

- **Providing greater public clarity around the role and purpose of different teams within the Commission and how these fit both with strategic priorities and individual programmes of work. This might usefully be shared with staff internally to ensure consistency and coherence of messages to stakeholders;**
- **Work with business stakeholders to help make clearer where the Commission’s priorities lie; how and who in the Commission supports them; and what the impact and consequences are for them and their members. This could involve appointing Relationship Managers (drawn from the Commission’s senior management team) to work with key business stakeholders on a one-to-one basis;**
- **A similar approach to Government departments and their agencies, to ensure wider policy issues are taken into consideration when the Commission is developing its work programmes and activities.**

Any findings relative to whether the regulator encourages economic progress:

The Commission’s origins lie in the task of being an organisation that provided individual redress for those who suffered discrimination. However, the Commission’s role has become more focused on institutional reform and culture change.

As a result, many in the Commission do not explicitly recognise that the organisation has a specific role in allowing or encouraging economic progress. Whilst it is necessary, at times, for the Commission to intervene in a way which may adversely affect a business in the short term (e.g. amending HR practices, implementing new training and development programmes), we saw nothing to suggest these activities had a significant dampening effect on economic progress.

The Commission recognises the need to consider the impact of equality and human rights legislation on businesses, and thus far, has steered away from proposals that would be financially onerous for large swathes of business and small and medium-sized businesses in particular. It has been responsive to the slowdown in the global economy, producing useful materials to help businesses manage their equality responsibilities in these challenging times. Overall, the review team concluded the Commission's approach does allow for economic progress, with interventions restricted to areas (or business sectors) where there is evidence of discrimination.

The Commission is also taking care to ensure new proposals are evidence-based, though the review team felt that greater economic and analytical rigour is needed to ensure that future work meets the rigorous standards of those it will need to influence in order to secure its desired outcomes: in particular other policy-makers and shapers in and around Government.

Business stakeholders' greatest concern in this area appears to be the risk that with the increase in public coverage of equality and diversity issues over the last year, a great many individual enterprises - sole traders, small and medium-sized businesses, partnerships and public companies alike - will put in place more rigid and inflexible processes and practices than are necessary to ensure compliance with equalities and human rights legislation to avoid being taken to Employment Tribunals, or becoming the subject of intense media attention or speculation

The review team was reminded that negative media coverage can lead to a perception that regulations are more burdensome than they actually are. Newspaper headlines that trumpet big pay-outs as a result of an Employment Tribunal finding only exacerbate businesses' concerns. One way of tackling this would be for the Commission to reach out to regulators who face similar challenges, e.g. the Health & Safety Executive (HSE), and to look at imaginative ways in which they worked to help manage this risk, e.g. the HSE's Five Steps to Risk Assessment, Myth of the Month, and Sensible Risk Management campaign.

DESIGN OF REGULATIONS

Hampton Principles

“All regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all parties should be consulted when they are being drafted.”

“When new policies are being developed, explicit consideration should be given to how they can be enforced using existing systems and data to minimise the administrative burden imposed.”

Key findings on Design of Regulations:

- The Commission actively advocates for regulatory change in both the UK and Europe, in line with its statutory duties.
- The Commission is alive to the need for a good quality evidence base to support its regulatory proposals.
- The Commission consults with its key stakeholders, but engagement tends to be activity-based (e.g. producing statutory guidance), rather than strategic.
- The Commission should consider the potential benefits of building closer links with a wide range of Government institutions, including policy departments and their delivery partners.

Background information such as the regulator’s role in developing regulations:

Responsibility for developing UK regulations and EU negotiating positions lies with Government. However, the Commission has an explicit statutory duty to keep legislation under review, and to make recommendations for change, e.g. preparing a response to the UK Government Consultation on the Article 13 anti-discrimination directive informed by wider consultation.

The Commission takes many of its regulatory responsibilities directly from the Equality Act 2006 and the Human Rights Act 1998. Other responsibilities derive from legislation going back to the Equal Pay Act 1970 (amended). Further responsibilities will be assumed as and when the current Equality Bill is passed.

Review findings:

In order to fulfil its statutory duty to keep equality and human rights legislation under review and make recommendations for change, the Commission must work through those able to influence and or introduce legislation. In the UK this includes a range of Government departments; in Europe, the Commission,

The extent to which the review team

believes the regulator is acting in line with the Hampton principles:

the Council of Ministers and Parliament.

These actors, in turn, must be able to balance the arguments made by the Commission with those made by other stakeholders with an interest, including business groups, third sector representatives (e.g. Consumer Focus) and other NGOs (Non Government Organisations).

The review team found that the Commission had the necessary legal depth and capacity to both review and challenge legislation - and that it was well respected in Europe. It was less clear to us, however, how the Commission develops policy, and how the views of external stakeholders are fed into that policy-making process.

For example, we were told of some good work that the Commission had done on a particular area of work (multiple discrimination), concluding that proposed draft regulations would prove difficult to understand, implement and enforce. This resulted in the draft regulations being withdrawn. However, it was not clear whether business or employer groups had contributed to this thinking, or whether any formal (or even informal) consultation had taken place to inform the Commission's view.

The Commission recognises that it has to revisit its work with stakeholders and is currently trying to align relationships in a way that supports its strategic work, for example, through new stakeholder relations' officers, grants policy and Commissioner appointments.

While the Commission is independent of Government, it has certain obligations under the Regulators' Compliance Code, and is expected to adopt Hampton principles with regards to its regulatory activities. This includes making design processes transparent, allowing for adequate consultation and feedback from stakeholders, ensuring proposals that might ultimately result in regulations are necessary, easily enforceable and proportionate, and minimising burdens to achieve its outcomes.

Major regulators (into which the Commission must fall by dint of the size of its regulatory community, alongside its budget) are expected to undertake a range of activities to meet their obligations, e.g. undertaking robust cost-benefit analyses and impact assessments, considering the possible unintended consequences of a proposed regulation, and building - wherever possible - on existing standards and standard-setting mechanisms.

The review team concluded that the Commission was making steady progress in some of these areas, but that a step change in both activities and culture should be a key priority over the next 12 -18 months, and that part of this work should include

consulting with key stakeholders on more of the ‘bigger picture’ issues. We recognise that the Commission is fully alive to the need for a good quality evidence base to support its regulatory proposals, and acknowledges the benefits that additional economic and analytical capability would bring. **A specific action the Commission could consider taking would be to strengthen its economic capacity to help develop appropriate economic rigour in the organisation.**

We also thought that the Commission could usefully promote a better understanding and appreciation of the Whitehall and Brussels machinery internally. As with any regulator, successful influencing relies in part on understanding not only how to work “the system”, but also the professional standards of evidence-gathering and analysis that others have to meet in order to support arguments for change.

With regard to policies and regulations that Commission staff raised with us, this would mean, for example, balancing the case *for* extending the right to request flexible working (the benefits), with the case *against* (the costs, risks and potential unintended consequences), or scaling regulatory proposals in ways that are as manageable for smaller businesses as larger ones; all of which are “bread and butter” for the majority of EU and UK Government policymakers and regulators.

Whilst recognising that the Commission needs to maintain its independence, it should consider the potential benefits of building closer links with a wide range of Government departments. This will enable it to influence more effectively for change.

Another challenge for the future is to engage more directly with the Commission’s regulated community - small and medium-sized businesses in particular. The review team is aware of a number of channels, networks and organisations that the Commission could use to facilitate round-table discussions or focus groups (e.g. Regional Development Agencies, Business Link) and encourages the Commission to explore ways of doing this on a more continuous basis.

ADVICE AND GUIDANCE

Hampton principle

“Regulators should provide authoritative, accessible advice easily and cheaply”

Key findings on Advice and Guidance:

- Advice and guidance is mainly provided free of charge, through various channels including the Commission’s own website and Helpline, frontline staff, case studies and publications.
- The Commission has set up an effective network of advisory committees to develop new statutory and non-statutory guidance for businesses. However, care needs to be taken to avoid “mission creep”.
- The Commission needs to ensure that when providing advice to business, the right balance is struck between promoting equalities and human rights legislation on the one hand, and facilitating compliance on the other. Internal governance structures and processes need to be strengthened in order to mitigate risks in this area.

Background information, such as the means by which the regulator provides advice and guidance:

The Commission is responsible for producing statutory codes of practice to interpret and explain the law. The Commission is currently in the process of developing new codes of practice to replace those of the legacy Commissions and incorporate the new areas of the Equality Bill.

The Commission also operates a telephone Helpline service. Though it can, in theory, take calls and provide help to individual businesses and other organizations, in practice its primary constituency is individual members of the public.

Example of good practice:

In the production of the guidance on undertaking equality impact assessments we engaged fully with stakeholders, understanding their needs and involving them in content, design, development and user-testing. Although this is of most relevance to the public sector, we also addressed those in the private sector who may contract to deliver public functions in the guidance. For example, in drafting the guidance on the proposed Equality Bill we included specific guidance for private adoption agencies that provide adoption services on behalf of local authorities. We also ensured that guidance was simple to follow, easy to understand, accessible and above all provides the answers that businesses, people and

organisations need when they need it.

Review findings:

The extent to which the review team believes the regulator is acting in line with the Hampton principle:

The review team found the Commission had developed a well thought-out programme of work to develop new statutory codes and non-statutory guidance to explain the new Equality Bill. The responsible team is engaging stakeholders to ensure that the codes and guidance take account of their needs, and receive the approval of the Commission's sponsoring body and Parliament. The responsible team is also working hard to ensure that both the codes and guidance are published in the most effective and accessible formats and channels. Some challenges remain - integrating materials with existing advice and guidance offered on established websites, such as businesslink.gov.uk, for example.

The challenge for the Commission is to ensure the programme does not suffer from "mission creep". We were told, for example, that some of the non-statutory guidance underpinning the Equality Bill would refer to existing employment regulations, such as flexible working.

We thought such inclusions were redundant, since guidance on how businesses should comply with these regulations is provided by the relevant Government departments, and this goes beyond the Commission's remit. We would encourage the Commission to look again at the necessity of restating existing guidance. Overall, however, we were very impressed by the professional and inclusive approach that the team was taking to this piece of work.

Stakeholders to whom we spoke were also keen for the Commission to provide further clarity about the Helpline and the website, and how these were being developed. There were some minor criticisms of the website in terms of its navigability and search engine functions; some regular users said they could not always find key documents, which sometimes included ones that they knew existed. Alongside this, there were concerns that the current Helpline, while offering clear value to individuals, might not be the best vehicle for businesses looking for advice.

The Commission was very much alive to these issues. We were persuaded that the work that the senior management team was doing was both thoughtful and pragmatic; they (and we) agreed that most employers would be more likely to use the services of ACAS, Business Link or other bodies when seeking advice on equality obligations, and that a Helpline that also provided soft intelligence to enforcement staff was unlikely to gain widespread support from the business community. Our recommendation, which the Commission's senior management team accepted, is that the Commission should set out the difficulties involved in repurposing

the Helpline for business, as well as develop a policy for ensuring advice was provided through more relevant bodies, supported by Commission expertise as required.

Alongside the development of new statutory and non-statutory guidance, the Commission funds a programme of work aimed at promoting equality 'best practice', e.g.

- “Here for everyone, here for business”: a range of guides for business covering topics including, recruitment, company culture and leadership, flexible working and procurement;
- “Working Better”: a policy initiative aimed at promoting new models and best practice in flexible working, including proposals for extending current flexible working regulations, underpinned by extensive stakeholder engagement;
- Workshops and seminars aimed at supporting businesses (particularly SMEs) bidding for public sector procurement contracts.

The review team noted the significant resource - funding, people and time - that the Commission is putting into these programmes. However, the review team is concerned that well-intentioned efforts to promote 'best practice' to businesses could lead to some or many of those same businesses assuming that they need to do more than is actually required.

A simple way to help remedy this is to work closely with the natural policy 'owners' of these policy areas to ensure messages are consistent. Although in some instances such engagement did appear to have taken place, we did not think Commission staff were actively consulting relevant officials as a rule. We also thought that in some instances Commission staff were taking the opportunity to 'gild the lily'; that is, to suggest ways in which business might improve their equality credentials where close examination of existing processes and practices may demonstrate behaviour is already wholly compliant.

Whilst we recognise that the regulatory divide between Government departments, agencies and regulators is largely artificial from the employers' perspective, and that the priority need is comprehensive advice and guidance regardless of source, the Commission must take care to consider when meeting its broader duties to promote understanding and encourage good practice in relation to equality and human rights, that it ensures clarity in informing stakeholders what the relevant laws or codes actually are.

The Commission's senior management team is clear that its advice and guidance must clearly distinguish between those processes and

practices that employers *must* observe (i.e. their obligations) from those processes and practices being undertaken by businesses and employers at the leading edge of equalities and human rights legislation.

We were content that the team spoke as one on this issue. However, **a specific action that the Commission could usefully take to ensure outcomes are delivered is to review its internal governance structures and processes** to ensure that work by individual teams and members of staff is entirely clear on the distinction between information on legal requirements on the one hand, and advice and promotion of good practice on the other.

DATA REQUESTS

Hampton principle

“Businesses should not have to give unnecessary information or give the same piece of information twice.”

Key findings
on Data
Requests:

- The Commission makes few direct requests for data from the majority of businesses.
- The Commission has invested time and resources into producing light-touch data requests. However, there is a challenge in ensuring future data requests are not issued to tight timetables which are difficult to meet.
- The Commission might usefully explore ways to share ‘best practice’ across different teams to promote greater consistency of approach.

Background
information
such as the
data
required by
the
regulator;
the means
by which
business can
return data,
etc:

The Commission imposes limited data requests in the course of its work and most are of a voluntary nature. In the course of an inquiry, however, the Commission can make a statutory request for specific data from organizations. The Commission has used its statutory power in this respect once so far, in the case of the inquiry on gender discrimination in the financial services sector. This involved compulsory completion of questionnaires sent to 50 randomly selected financial organizations. Two other inquiries were voluntary.

Example of
good
practice:

As part of the Inquiry into Gender Discrimination in the Finance Sector, we used our mandatory disclosure powers to require a randomly sampled group of 50 banks to complete a questionnaire about what their employees get paid broken down by gender. Before taking this approach, we considered, by consulting experts and seeking legal advice, whether a mandatory data request was reasonable and proportionate. In addition, to reduce the burdens associated with the data request, we set up a helpline/email account to answer questions, developed a set of Frequently Asked Questions and met with a number of banks.

Review findings:

The extent to which the review team believes the regulator is acting in line with the Hampton principle:

The Commission draws a distinction between the voluntary and compulsory provision of data, generally favouring a voluntary approach that takes careful account of the cost of providing data (although it had used its statutory powers in obtaining data in relation to one specific project). The review team found evidence of a variety of approaches to data requests, each tailored to the requirements of a specific project.

We also found that the Commission has sought to ensure that data request burdens are minimised and data requests are designed with respondents' needs in mind, as well as those of the Commission. For example, in preparing for the inquiry into the Financial Services Sector, the Commission included use of equal pay experts to keep it simple, the use of barristers' advice to ensure the approach was proportionate, and set up a dedicated helpline to help respondents with any queries.

However, there is a challenge for the Commission in ensuring that data requests do not impose inappropriate burdens on private sector organisations because they are over-complex or required within timetables which are difficult to meet. An area where this may happen is in relation to the work that the Commission is currently undertaking with regard to reporting of the gender pay gap.

Clause 73 of the new Equalities Bill contains a power to require private sector employers with 250 or more employees to produce reports on the gender pay gap in their organisation. The Government's aim is for employers to publish this information voluntarily on a regular basis. In order to give voluntary arrangements time to work, it proposes not to use this power before 2013.

The Commission is tasked with developing a set of metrics for gender pay reports in consultation with business and equality stakeholders. The Commission will monitor progress on reporting within the private sector annually and will only advise on the use of the power contained in the Bill should the voluntary arrangements not result in an improvement in reporting. From a Hampton compliant regulatory perspective, it is to the Commission's credit that it is seeking a voluntary approach to pay gap monitoring, aiming to achieve the regulatory objective through transparency rather than regulation.

The approach to pay gap measurement is being carried out in a measured, collaborative and proportionate way. The Commission has set up steering and technical advisory groups to inform thinking, and has commissioned both quantitative and qualitative research to test assumptions, generate options, and test for risks and unintended consequences. Caution needs to be taken to ensure

short deadlines dictated by external factors do not reduce the effectiveness of this approach. Overall, however, the Commission appears to be taking a Hampton approach to the project with a view to ensuring resulting data requests or obligations are targeted and proportionate.

INSPECTIONS

Hampton principle

“No inspection should take place without a reason.”

Key findings
on
Inspections:

- The Commission does not undertake routine inspections.
- The Commission’s capacity to conduct inquiries and investigations into specific sectors is limited and arguably somewhat inflexible.
- The Commission is ultimately responsible for all decisions on enforcement actions. This decision making function is delegated to the Legal Committee which is made up of commissions.
- Many enforcement issues are dealt with by “pre-enforcement activity” in the form of letters, or meeting with senior staff of organisations where compliance may be an issue.
- Stakeholders offered no views on the use of the Commission’s inspection powers; none of them had been inspected by, or represented individuals who had been inspected by, the Commission.

Any relevant background information such as the number of inspections and the number of businesses inspected; the regulator’s risk model etc

The Commission’s enforcement powers allow it to investigate whether organisations and businesses are complying with their legal duties regarding equality. The Equality Act gives EHRC two specific investigative powers which it presents as formal enforcement powers, rather than as routine inspection powers.

- a. *Inquiries (Equality Act s.16)*: The Commission can conduct an inquiry into any matter relating to equality and diversity, human rights, or good relations between groups. It does not need to suspect that there has been a breach of the law. The legal steps are:
 - The Commission publishes Terms of Reference;
 - The Commission may then give notice to organisations to provide specific relevant information (and it is an offence for them not to comply with this);
 - It must consider carrying out an investigation at any point where it considers that an unlawful act has been committed. If an investigation is commenced, the Inquiry

must not proceed in so far as it relates to the subject of the investigation until that is complete.

- The Commission will then publish a report of its findings, and individuals to whom recommendations are addressed must have regard to it.

b. *Investigations (Equality Act s. 23)*: Where the Commission has evidence to suspect that an organisation has carried out an unlawful act it may carry out an investigation. The steps involved include:

- Providing written detail as to why an action may be unlawful;
- Publishing Terms of Reference;
- If an investigation finds that a specific individual has committed an unlawful act, the Commission will provide them with a copy of a draft report before publication. Comments may be provided within 28 days;
- Failure to act on recommendations can lead to the Commission issuing an unlawful act notice (see below).

Example of good practice:

‘T’ is an engineering company which is part of a large commercial group. Our Enforcement Team began enquiries following an employment tribunal case involving sexual harassment of an employee. The company wanted to work with us to tackle harassment and bullying, but also to improve its general approach to equality and diversity. An agreement between both parties was signed in 2009 detailing the way ‘T’ would deal with equality and diversity. Although the existence of enforcement powers influenced the company’s decision, our staff focused on building a positive, collaborative relationship which resulted in a formal agreement being put in place as to the future employment practices of the company involved. Through this agreement we can ensure that the agreed changes are implemented.

Review findings:

The Commission’s stated enforcement policy is to take formal enforcement action only when all other means have been exhausted. Many cases are dealt with by “pre-enforcement activity” in the form of letters (around 400 to date), the vast majority of which have resulted in a successful outcome (compliance) at an early stage in the process.

The extent to which the review team believes the regulator is acting in line

The Commission’s use of pre-enforcement activity to achieve compliance is commended. The review team would encourage the Commission to strengthen this approach with an improved

with the Hampton principle:

intelligence base and more targeting.

In 'Our Strategic Plan 2009-2012' the Commission states that at least seven formal inquiries and investigations would be progressed over the time period. The review team was somewhat surprised to see targets included in this way; an outcomes-based approach to regulation would typically result in inquiries and investigations being launched as needed, on the basis of comprehensive risk assessment. We understand the Commission is considering whether to change its approach to better reflect Hampton principles in this regard and we would encourage this work to continue.

Notwithstanding this, the review team believes that the Commission has generally made judicious use of its powers to date. Although the Commission is ultimately responsible for all decisions on inquiries and investigations, we did note that in at least one instance the Commission's choice of inquiry was strongly influenced by a third party.

The Commission also carries out quasi-inspection activity when and where it finds evidence of low levels of compliance with equalities and human rights legislation, e.g. where a business has lost a succession of Employment Tribunal cases. We were told of some particularly interesting cases where the Commission had worked with individual businesses as a result of pre-enforcement activity. Resulting changes to business practices and processes appeared to have led to changes in behaviour and culture. Overall, the review team found the Commission's inspection activities were broadly compliant with Hampton principles. However, we concluded there is a wider question that the Commission will need to address in the not too distant future which relates to the way it tackles discrimination and equality issues with regard to the seven protected strands.

Some staff to whom we spoke said they thought this was one of the most difficult challenges facing the Commission and, as yet, had not been tackled in any discernibly systematic way. Through discussions with stakeholders and document review, the review team came to a similar conclusion.

We were persuaded, however, that senior Commission staff are familiar with the traditional cycle of activities that regulators observe in order to achieve their outcomes i.e. standard-setting, awareness raising, monitoring, inspecting and enforcing. On this basis, **a specific action we think the Commission should take as part of its 2010/2011 business planning process is to determine which enforcement activities need to be pursued for each of the seven strands, and to discuss how these might impact on future work programmes with key stakeholders.**

SANCTIONS

Hampton & Macrory principles

“The few businesses that persistently break regulations should be identified quickly, and face proportionate and meaningful sanctions.”

“Regulators should be transparent in the way in which they apply and determine administrative penalties.”

“Regulators should avoid perverse incentives that might influence the choice of sanctioning response.”

“Regulators should follow up enforcement actions where appropriate.”

Key findings on Sanctions:

- The Commission has pursued over 400 cases since 2007, resolving over one third. Some matters that remain unresolved are awaiting hearing dates in the European Court of Human Rights; others are awaiting judgment from domestic courts.
- The Commission does not have traditional sanction powers, e.g. prosecution or fine. However, the market has its own sanctions which can be far more severe than any imposed by the Commission, e.g. reputational damage.
- Enforcement actions are proportionate to the seriousness or persistence of, and potential commercial gain from, the compliance breach.
- Some regular offenders may not be identified easily or quickly, especially where individuals are dissuaded from taking initial action against a business or employer.

Background information, such as a summary of sanctions available to the regulator and any data on sanctions imposed by the regulator:

The Equality Act provides enforcement powers that enable the Commission to enforce equality enactments. The Commission may also support individuals who are pursuing legal action regarding a specific case.

The Commission has a range of enforcement powers available to it, which allows it to, for example:

- conduct inquiries and investigations and public sector assessments;
- enter into a formal agreement (Equality Act s. 23) with a

- person who it believes has committed an unlawful act;
- issue unlawful act notices which are enforceable through the courts (Equality Act s21);
- intervene in court proceedings and bringing own name judicial review proceedings (Equality Act s30);
- bring proceedings in respect of discriminatory advertisements (Equality Act s.25);
- apply for injunctions to prevent unlawful acts under the equality enactments (Equality Act s24);
- give assistance to individuals who are party to legal proceedings where the equality enactments are at issue, and the individual alleges that he has been the victim of behaviour contrary to their provisions (Equality Act s. 28).

Review findings:

The extent to which the review team believes the regulator is acting in line with the Hampton principles and Macrory characteristics:

The Commission has recently provided an update on its use of enforcement and compliance actions since October 2007. The update confirms the Commission has pursued over 400 cases, resolving one third of these. In the majority of the resolved cases (approximately 100), about 80% were satisfactorily resolved without the use of any formal sanctioning power. Where formal powers were used, the breakdown of powers used was: 3 inquiries, 16 interventions, 1 investigation, 1 judicial review, 1 assessment and 4 agreements. The bulk of the total cases involved related to the public sector duties, but with the new Equality Bill it is possible more cases will relate to private sector organisations.

The Commission has published an Enforcement and Compliance Policy for the benefit of organisations, businesses and the general public. As a statutory regulator the Commission has a wide range of tools available, and the Policy explains how the Commission chooses enforcement methods that are relevant and proportionate to a particular breach.

Interestingly, the Policy document states that, in relation to its use of enforcement powers, “When used strategically, these can operate as some of the most powerful tools for delivering change.”). Elsewhere, in the Enforcement Strategy, the Commission makes clear that it sees its role as only partly about enforcing compliance, and mainly about changing culture and behaviour.

The Commission’s powers are clearly designed to encourage change, by requiring those subject to its enforcement to agree and deliver against an action plan - there is no notion of deterrence built in to this approach. The focus is on creating case law more than penalising wrong-doers.

In this respect - formal enforcement ultimately leading to

compliance rather than penalty, outside of supporting civil claims - the main sanction available to the Commission is arguably negative publicity. Although this is a legitimate policy to pursue, we cannot conclude that it is entirely risk-based or consistent.

The Commission is encouraged to consider reviewing or clarifying the enforcement strategy by more clearly distinguishing those legal actions which aim to push or test the boundaries of the law (which serve the change agenda) and those which have compliance as their regulatory objective. We would also recommend the Commission consider ways in which it might communicate more clearly how enforcement activities are targeted on the basis of risks to the outcomes it has defined for itself.

FOCUS ON OUTCOMES

Hampton principle

“Regulators should measure outcomes and not just outputs.”

Key findings on Focus on Outcomes:

- The Commission has outcome-focused objectives, but it is yet to work out how best to link these to its programmes of work, individual projects, resources and performance indicators.
- The Business Plan is weighted towards short-term, outputs. The challenge ahead is to ensure a better mix of output and outcome measures, as well as short-term and long-term measures.
- Staff have a clear understanding of the outcomes being sought, and how their work contributes to the achievement of outcomes. How these will be delivered for each of the seven protected strands of equality is included in the publication “What our plans mean for you”.
- Business stakeholders have mixed views about whether the Commission is focusing on the right outcomes, and the extent to which its activities reflect those of a ‘modern regulator’.
- There has been high profile publicity for a number of successful Commission interventions, which raise awareness of equalities and human rights legislation, and which represent effective outcomes consistent with the Commission’s mission.

Background information such as the regulator’s key objectives:

The Commission has twelve statutory duties, six of which may be described as Hampton-esque:

- Promote awareness and understanding of rights under the equality enactments;
- Enforce equality enactments;
- Work towards the elimination of unlawful discrimination;
- Work towards the elimination of unlawful harassment;
- Monitor the effectiveness of laws relating to equality and human rights, and monitor and report progress towards identified desired outcomes;

- Encourage public authorities to comply with section 6 of the Human Rights Act 1998.

From these, the Commission has developed 5 strategic priorities. These are to:

- Secure and implement an effective legislative and regulatory framework for equality and human rights;
- Create a fairer Britain, with equal life chances and access to services for all;
- Build a society without prejudice, promote good relations and foster a vibrant equality and human rights culture;
- Promote understanding and awareness of rights and duties - deliver timely and accurate advice and guidance to individuals and employers; and
- Build an authoritative and responsive organisation.

Example of good practice:

The Equality Measurement Framework (EMF) is a tool which we and the Government Equalities Office developed following wide consultation with stakeholders to provide high-level data on various key dimensions of equality in Great Britain. The EMF will provide statistical indicators for ten important areas of life: life; health; physical security; legal security; education and learning; living standards; productive and other valued activities; individual, family and social life; identity, expression and self-respect; and participation, influence and voice. Where possible, these will be presented for each of our equality strands - gender, age, ethnicity, disability, religion/belief, sexual orientation and transgender - via a publicly accessible web interface.

The extent to which the review team believes the regulator is acting in line with the Hampton principle:

The 2009/10 Business Plan sets out the Commission's five strategic priorities alongside the work to support them:

- 8 programmes of work;
- 34 projects;
- over 100 deliverables; and
- 19 performance indicators (of which half relate to outward-facing deliverables, e.g. effectiveness of the Helpline).

Programmes are typically created to co-ordinate, direct and oversee the implementation of a set of related projects and activities in order to deliver some agreed outcomes and benefits related to the organisation's strategic objectives. Programmes are also typically run for a number of years, moving through a number of identifiable 'tranches'; each of

which should deliver improved capability and realisable benefits.

The review team was told that each of the eight programmes is managed by a Programme Board with a clearly designated Senior Responsible Officer and Programme Manager. However, this information is only available on the Commission's intranet. The Office of Fair Trading, among other regulators, provides such transparency of information, and the review team recommends the Commission publish similarly to better assist stakeholders understand by whom and how programmes of work are being governed.

We sometimes found it difficult to link individual projects to programmes. For example, while there may be merit in separating out the production of statutory codes of practice and practical non-statutory guidance to support the implementation of the equality bill (Programme 1) from the provision of employer guidance to small-to-medium businesses (Programme 6), we thought this worth reviewing given the overlaps in content.

We also struggled to understand what the Commission thought was its 'blueprint' of future capability, and how and who they expected to realise the benefits that capability is designed to support.

In the light of the comments made about role and purpose from several stakeholders to whom we spoke, we concluded that while there is a very definite focus on outcomes within the Commission, it does not yet have in place the building blocks needed to deliver them.

There is also a need to ensure that people or groups who have an interest in, or influence on, the outcomes of these programmes are clearly identified and managed appropriately. These may not be the same individuals or organisations invited to support the Commission through external advisory groups and may include, for example, senior ministers, officials or agencies. It is important to ensure the messages that are delivered to this group, and the feedback given as a result, are systematically captured to inform decisions.

The review team is aware of some good work that the Commission's senior management team has sponsored to better understand what capability needs delivering in order to realise its outcomes. However, alongside other actions we have suggested the Commission might usefully consider as part of its 2010/11 business planning process, we would recommend the following two actions to help create a step change in capability

and benefit realisation:

1. A further OGC Gateway Review to provide some additional and external challenge to the robustness of plans and processes;
2. A new outreach programme to other, established regulators aimed at generating a constructive exchange of ideas, practices and processes. We think such a programme would be helpful in identifying specific tasks that the Commission could undertake in support of its quest to become a modern regulator.

Annex 1 - Specific actions for the Commission's consideration

1. Explore ways to migrate from a complaints- and demand-led model to one based on more formal or systematic risk analysis.
2. Determine how and to what extent existing criteria for taking enforcement action are proportionate and risk-based.
3. Ensure frontline staff are familiar with the Regulators' Compliance Code.
4. Identify distinct priorities for different types of stakeholders (e.g. users/beneficiaries, influencers, providers, partners).
5. Clarify in which mode the Commission is operating when undertaking different activities.
6. Provide greater public clarity around the role and purpose of different teams within the Commission and how these fit both with strategic priorities and individual programmes of work.
7. Consider appointing Relationship Managers (drawn from the Commission's senior management team) to work with key business and Government stakeholders on a one-to-one basis.
8. Strengthen economic capacity to help develop appropriate economic rigour in the organisation.
9. Review internal governance structures and processes to ensure that advice and guidance sets out legal requirements separate to best practice.
10. Determine which inspection activities need to be pursued for each of the seven strands, and discuss how these might impact on future work programmes with key stakeholders.
11. Undertake a further OGC Gateway Review in relation to the 2010/11 Business Plan.
12. Establish a new and expanded outreach programme to other, established regulators aimed at generating a constructive exchange of ideas, practices and processes.

Annex 2 - Biographies of the review team

David Andrews is the Planning and Policy Manager for the Financial Reporting Council. He has extensive regulatory experience from working as an insurance supervisor, including direct responsibility for monitoring and enforcing regulatory requirements in relation to individual insurance companies, and as the head of a land use planning team in the Government Office for the South East. He has also been involved in financial regulatory policy, leading the UK team which negotiated the first EU Capital Adequacy Directive for investment firms. As a Senior Civil Servant in the then DTI, David led the regulatory policy team of the Small Business Service (SBS), and gave evidence to the Public Accounts Committee on the practical impact of regulation on SMEs. David worked closely with local authorities to encourage new ways of encouraging SMEs to comply with regulation without incurring unnecessary costs.

Kate Marshall heads up the Enterprise Team for the Better Regulation Executive. She and her team work with Government departments, regulators and arms length public bodies to forward the aims of the better regulation agenda. Together they provide regulatory input to a range of Government polices including employment and equalities, health and safety, and pensions and corporate governance. Kate spent the first half of her career in the media sector, holding management positions in network television, custom publishing and commercial radio. She joined the UK civil service in 2002 and has since worked in the Cabinet Office, HM Treasury and the Department for Business, Innovation & Skills. Kate holds a BA from Goldsmiths' College (London) and an MBA from the Macquarie Graduate School of Management (Sydney).

Wendy McVey is the Director of Corporate Strategy and Board Support for the Local Better Regulation Office. As a member of LBRO's Senior Management Team, Wendy supports its strategic objectives to drive regulatory reform in local authorities, and to support efficient and effective delivery of regulatory services to support both prosperity and protection. In her role as Director of Corporate Strategy and Board Support, she supports strategic engagement, policy development, performance and delivery and corporate planning. Wendy has a background in national regulation, having worked for over 20 years in the Health and Safety Executive, where she managed a number of business functions for its Field Operations Directorate, including Finance, Planning, Learning and Development, Strategy, Project Office, and Secretariat. She is also experienced in managing projects, programmes and business change.

Better Regulation Executive
Department for Business, Innovation and Skills
3rd Floor
1 Victoria Street
London SW1H 0ET

Website: www.bis.gov.uk/bre

URN: URN 10/560

© Crown copyright 2010

The text in this document may be reproduced free of charge in any format or media without requiring specific permission. This is subject to material not being used in a derogatory manner or in a misleading context. The source of the material must be acknowledged as Crown copyright and the title of the document must be included when being reproduced as part of another publication or service.