EHRC – CHALLENGES AND OPPORTUNITIES

IMPACT OF ENFORCEMENT ACTIVITIES: LION TAMER OR FLY SWATTER?

NICK O'BRIEN

Summary argument:

Although the EHRC has positioned itself as a 'regulatory body' and 'enforcer', its actual performance suggests that both descriptions require qualification. It is suggested that the EHRC has the potential to be a regulatory body but of a 'reflexive' rather than 'command and control' type. To achieve even that potential, its use of 'enforcement' powers would have to be more comprehensively 'strategic' than has so far been the case. In the absence of rigorously strategic deployment in support of a reflexive-regulation model, there is a danger that the equality and human rights enactments, and the EHRC's guardianship of them, will be undermined by what is perceived as largely reactive and un-coordinated 'fly-swatting'.

Outline:

The EHRC opened in 2007 at a time of unresolved debate about the part to be played by litigation and other 'legal' interventions in advancing equality and human rights more generally.

Increasingly the three equality commissions, with a steady eye on lion-taming territory, had defined themselves as 'strategic' in their use of enforcement powers and in an attempt to demonstrate more than fly-swatting potential.

The *Hepple Report*, published in the autumn of 2000, captured the emerging philosophy. *Hepple* identified what it described as an 'equality enforcement pyramid' and recommended 'reflexive' or 'responsive' regulation (in contrast to 'command and control' or 'collective laissez-faire' models): the simple equation of 'victims supported' and 'impact' was cast in doubt. Instead the 'limits of law' and its 'hollow hope' provided the background context to the discussion of new ways of brigading institutional powers to achieve sustainable change.

The powers granted to the EHRC, much like those granted to its predecessor equality commissions, offer a mixed economy of legal or quasi-legal functions: provider of 'legal aid'; law centre service; conciliation service; public interest litigant in its own right (or as an intervening third party); regulator; law reform agency; legal consultant.

Perhaps not surprisingly, it is hard to find a comprehensive EHRC statement that successfully makes sense of these various functions and subsumes them within a single narrative. Nevertheless, the recurrent and dominant motif deployed by the EHRC in discussion of its statutory powers is that of '*regulatory body*' and '*enforcer*'. The EHRC's own experience since 2007

suggests, however, that the application of either description ('regulator' or 'enforcer') is highly contestable, at least without some qualification.

'Enforcement' implies a measure of compulsion or sanction, the ability to insist on compliance, in effect to discharge a form of 'command and control' regulation. Of the seven or so available functions, that of regulator is the most promising in this respect. However, on closer inspection those regulatory powers look decidedly thin, at least as components of a command and control regulatory model. The closest to 'enforcement' of that sort is the ability to conduct investigations into the alleged unlawful activity of a particular person or organisation, and to follow-up such investigations with compliance notices which can in due course be enforced not by the EHRC but on application by the EHRC to the civil courts.

According to the EHRC's last published 'Legal Enforcement Update' (dated April 2010), it had by then conducted 3 investigations. The only one of those investigations subsequently highlighted in the update was one inherited from the EOC into sexual harassment at Royal Mail and formally discontinued in March 2009 on condition of compliance with an agreed action plan.

The same update mentioned 3 agreements in lieu of enforcement (i.e. in effect, in lieu of investigation): the only one highlighted in the commentary was an agreement with an unnamed company that it would produce a disability strategy to improve access for wheelchair users.

Although the EHRC has in the meantime conducted (or is still conducting) half a dozen 'inquiries' (for example, into employment discrimination in the meat and poultry processing sectors, into the experiences of women in the financial services industry, into human trafficking in Scotland, into the harassment of disabled people, into human rights generally, and into human rights violations in domiciliary services for older people), these activities are by their nature 'general': they lead to broad recommendations, but do not carry any direct sanction. In the case of the meat and poultry processing inquiry, for example, the evidence disclosed of 'widespread mistreatment and exploitation' of migrant and agency workers led to the EHRC making recommendations to supermarkets, agencies, processing firms, government, regulators and unions to 'encourage' a 'systemic' change in behaviour.

The Human Rights Inquiry, conducted between April-December 2008, appears in fact to have had the purpose of forming the background to the EHRC's first human rights strategy to cover the years 2009-2012. To that extent it served primarily as a research project or fact-finding survey. Notwithstanding the publication of the subsequent strategy, the Joint Committee on Human Rights still concluded (paragraph 26) that the EHRC was 'not yet fulfilling the human rights mandate set out in the Equality Act'. In respect of the strategy itself, the JCHR adopted the view of the then human rights Minister that it was 'too full of aspiration and too light on…concrete goals' (paragraph 27).

The other power that comes closest to 'enforcement' in that sense relates to the public sector equality duties (now 'duty'). These relatively new duties had promised to turn equality law on its head by shifting attention from retrospective individual remedial action to prospective preventive action instigated by the overseeing commission (CRE, DRC, EOC and in due course EHRC). Building on the success of such duties in Northern Ireland, the GB duties might have been expected to attract a lot of enforcement activity. The April 2010 Legal Update suggests that enforcement action had indeed been pursued by then in respect of 210 public authorities. Of the 149 'concluded matters', however, only 'around 12' had 'involved intervention' by the EHRC.

It is not clear what those 'interventions' comprised, but the example given in the Update appears to be of a formal Assessment of Jobcentre Plus, which led to a 'roundtable discussion' at which the EHRC communicated its 'learning' from the Assessment. There was mention also of public sector duty compliance notices being issued against 3 NHS Trusts in December 2009 for failure to put in place compliant race equality schemes, and against 3 district councils in November 2009 for failure to comply with the gender equality duty. There is no indication that any further action was taken in respect of these notices.

In short, insofar as the EHRC has powers of enforcement in its own right, it seems that it has either been unnecessary or too challenging to make much use of them in a way that leads to the imposition of a sanction.

If the use of 'enforcement' powers has been limited, then the use of own initiative litigation powers has hardly been more visible. The April 2010 Update notes that there had been one injunction obtained (to seek a change in the constitution of the British National Party) and two judicial reviews taken (the only example cited being a case against the Home Office which established that it had failed to comply with disability and race laws in its treatment of foreign national prisoners).

Where activity has been most intense, however, is in 'resolving cases at an early stage without the need for formal enforcement proceedings' and in intervening as a third party on a public-interest basis in litigation brought by others. When the EHRC records that between October 2007 and March 2010 it had 'pursued' 592 matters, it can only be assumed that the majority of these were potential anti-discrimination cases brought or contemplated by individual litigants. Although the use of statutory conciliation powers is not mentioned in the April 2010 Update, it is stated that 'the Commission continues to be extremely effective at resolving cases at an early stage… about 86% of matters have been concluded this way'.

Individualised litigation is likely to have lasting public benefit only if it is 'strategic': it must be visible, its targets well chosen, its outcomes effectively disseminated, and the remedies embedded and followed up purposefully. Those do indeed appear to have been the aspirations of the EHRC. Its Legal Strategy 2008-09, its Enforcement and Compliance Policy,

May 2009, and its Draft Casework and Litigation Strategy 2010-12 in different ways identify strategic priorities across all protected strands and establish as the 'basic criterion' for action 'assistance to the Commission' as a whole in meeting its objectives and in 'achieving positive change with maximum and lasting impact'. The Legal Strategy 2008-0, for example, lists under the heading 'Detailed Priorities' (somewhat ambitiously) 140 separate bullet-points, not just in respect of employment (traditionally the largest anti-discrimination jurisdiction by far) but also goods, facilities and services, education, and public functions.

According to the pie-charts published by the EHRC, the vast majority of these 'matters' (no figures given) concerned the public sector in one form or another and well over 50% were to do with race, gender or disability discrimination (i.e. the grounds protected before the EHRC opened). If any concerned 'multiple discrimination' (the ostensible rationale for creating a single equality body in the first place), that fact is not given any prominence in the commentary. There is currently no apparent way of correlating the 'matters' to the 140 stated priorities or to the overarching objective.

A separate list entitled 'Summary of Commission's interventions' (undated) does provide some detail of 47 separate third-party public interest 'interventions'. Such interventions are, in principle, attractive: they are relatively cheap; they enable a measure of freedom in selecting strategic arguments, divorced from the awkwardness of the particular facts, and they are relatively surgical, short, sharp and to the point.

The EOC and CRE had used the device rarely, the DRC on 8 occasions, 3 of which were in cases that raised human rights points to do with disability. The EHRC's record in this respect is notable, reflecting perhaps the lack of funding power for HRA cases: 21 of the 47 cases listed concerned human rights. The ECHR Articles cited most frequently in these cases were: Art.2 (x 4), Art.3 (x 2), Art.8 (x 3) and Art.14 (x 4), representing a spread between the classic civil right to life under Art.2, and the evolving 'social' reach of Arts.3, 8 and 14.

A further 8 cases concerned equality rights in an employment context, and, significantly, a further 14 concerned the discharge of public functions, especially in relation to the applicability of the public sector duties (e.g. in planning decisions, school admission, decisions to discontinue criminal prosecutions, taxi licensing, access to social care services, and decisions to evict travellers).

A number of the cases in which the EHRC intervened were relatively high profile (e.g. the Catholic adoption agency cases; the application of Art. 2 to British military personnel; the use of land for Hindu funeral pyres; compulsory retirement at 65; cuts to social care budgets; equal pay; smoking in prison and psychiatric hospitals; post office closures). It would be harsh to blame the EHRC for the potentially deleterious outcome of the House of Lords DDA case of *Malcolm v Lambeth Council* (in which the DRC

had previously intervened successfully in the Court of Appeal). Overall, the EHRC nevertheless appears to have backed winning horses with its interventions. There must, however, be some concern that over-reliance on public-interest intervention has deflected attention and resources from other functions. There is a risk also that the law of diminishing returns will apply and that the force of an EHRC intervention will gradually be dissipated.

The apparent intensity of the EHRC's third-party intervention policy reinforces the conclusion that the EHRC should not be viewed as in practice a 'command and control' regulator. Instead, the use of its powers has for the most part been founded in dialogue and persuasion. To that extent, the potential is for the EHRC to operate as a 'reflexive' regulator, whose mandate is primarily one of influence rather than sanction.

Crucially, however, discharge of that somewhat subtle mandate entails the 'strategic' deployment of legal and quasi-legal powers. Once set in a reflexively regulatory context, even 'soft' powers such as the ability to offer conciliation, to produce statutory codes of practice, to conduct general inquiries and to engage in outreach work can be seen as 'enforcement' (or at least 'giving force') activity if deployed strategically. For that, their use must be visible and targeted, and their impact disseminated and reinforced by follow-up work. They can then serve coherently as a complement to harder 'enforcement' activity (e.g. investigation, compliance notification, and even strategic litigation). In the absence of rigorously strategic deployment of this sort the impression will continue to be one of un-coordinated flay-swatting that undermines both the equality and human rights enactments and the EHRC's guardianship of them.

Background:

S. Fredman, *Discrimination Law* (2002)
S. Fredman. *Human rights transformed: positive rights and positive duties* (2008)
B. Hepple, M. Coussey and T. Choudhury, *Equality: A New Framework* (2000)
B. Hepple and E. Szyszczak (eds.), *Discrimination: the Limits of Law* (1992)
C. McCrudden, 'Equality legislation and Reflexive Regulation: A response to the Discrimination Law Review's Consultative Paper' (2007) 36 *Industrial Law Review* 255-66