

***Christian Concern for our Nation &
the Christian Legal Centre***

***Response to the Equality and
Human Rights Commission's
Consultation on their
Casework and Litigation
Strategy 2010-2012***

May 2010



*Changing Society to put the
Hope of Christ at its Centre*



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About Us

Christian Concern for Our Nation (CCFON) is a policy and legal resource centre that identifies changes in policy and law that may affect the Judeo-Christian heritage of this nation. The team of lawyers and advisers at CCFON conduct research into, and campaign on, legislation and policy changes that may affect Christian freedoms or the moral values of the UK. CCFON reaches a mailing list of 25,000 supporters. <http://www.ccfon.org>

CCFON is linked to a sister and separate organisation, the Christian Legal Centre, which takes up cases affecting Christian freedoms. <http://www.christianlegalcentre.com>

**PROFORMA FOR CASEWORK AND LITIGATION STRATEGY
CONSULTATION RESPONSE**

The consultation has been extended and will now close on Tuesday 1 June 2010.
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.

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Confidentiality

Under the Code of Practice on Open Government, any response will be made available to the public on request, unless respondents indicate that they wish their views to remain confidential. If you wish your response to remain confidential, please tick this box and say why. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

I would like my response to remain confidential (please tick if appropriate):

Please say why

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

As an individual

On behalf of an organisation

Other (please specify)

Background

The casework and litigation strategy is designed to guide how the Commission will use its casework, litigation and intervention powers to support the Commissions strategic objectives, as contained in the Commissions strategic plan and human rights strategy.

MAKING A SUBMISSION

We have written some questions which you might like to use to help you provide us with the information we need. You can feed back to us in a number of ways:

download the questions and e-mail or post your responses back to us

LegalStrategy@equalityhumanrights.com

- **answer online**
- **come and meet us to talk through the issues (or via the phone)**

Tuesday 16th March 2-5pm (London)

Monday 12th April 2-5pm (Manchester)

Tuesday 11th May 2-5pm (London)

Executive Summary

1. The Equality and Human Rights Commission (EHRC) is consulting¹ on its *Draft Casework and Litigation Strategy 2010 to 2012* (“Draft CLS”). From 2009 to 2010 the Commission intends to take on at least 100 legal cases a year, using the Draft CLS as the primary tool for identifying which cases to take.
2. The Draft CLS indicates that its decision-making steps will be taken on the basis of “the Commission’s Strategic Priorities”, the “Priorities for legal casework, litigation and interventions” and on condition that the case meets at least one of the listed “Criteria”. Whilst the Draft CLS maintains that it is based on the overall framework of the *Strategic Plan*² and the *Human Rights Strategy*³, it fails to list, or to take proper account of the *Human Rights* strategic priorities, although it does list the strategic priorities from the Strategic Plan.
3. Instead of sidelining human rights, the EHRC should mainstream human rights in all its activities. Such an approach would ensure that human rights were fully and properly integrated not only into its general method in all of its work, but also in its attitude to its casework and litigation strategy.
4. In our response, we argue that the “priorities”, the areas of work under the priorities, and the “criteria” for casework and litigation strategy decision-making should be based upon the more objective general aims of the EHRC in order to meet its statutory duties under sections 3 and 8 to 12 of the Equality Act 2006.⁴
5. The Draft CLS reflects a “one size fits all” and an “all inclusive” approach to equality law, in which the EHRC perceives itself primarily as an enforcer and regulator. This emphasis on enforcement reflects the view that the more equality law there is the better. The belief that the search for “gaps” in an all-embracing equality law will always have a positive impact is, in our opinion, misguided, because it fails to recognise the negative impact of equality law saturating or grid-locking individuals or organisations in public life. We wish to recommend the adoption of a multifaceted approach to equality law that includes proper and adequate exclusions and exceptions to rules, so as to exclude the possibility that diversity might be suffocated, or human rights undermined.
6. The EHRC was established under the Equality Act 2006. It is vital that the EHRC maintains its focus on what the Equality Act 2006 states its duties to be. In our submission, the Commission ought to go back to basics to discover an appropriate identity and focus. The EHRC was designed to have a multifaceted role in equality matters so as always to preserve diversity and promote human rights, whilst emphasising

¹ See the EHRC’s *Casework and Litigation Strategy Consultation*, at: <http://www.equalityhumanrights.com/legislative-framework/legal-strategy-consultations>

² See EHRC *Our Strategic Plan*, at: <http://www.equalityhumanrights.com/our-job/our-strategic-plan>

³ See EHRC *Our Human Rights Strategy*, at: <http://www.equalityhumanrights.com/human-rights/our-human-rights-strategy>

⁴ See sections 3 and 8 to 10 of the Equality Act 2006 (at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_2#pt1-pb2-11g11) as amended by Schedule 26 of the Equality Act 2010, which retains the substance of these original sections: http://www.opsi.gov.uk/acts/acts2010/ukpga_20100015_en_42#sch26 Note that for the sake of convenience, this response refers to the Equality Act 2006 as opposed to the Equality Act 2006 (as amended).

the underlying principles of “fairness, justice and liberty;”⁵ a role that promotes human rights at the forefront of its work.⁶

7. Unfortunately, some Christians in the UK have found it impossible to manifest their beliefs without losing their jobs (such as Lillian Ladele and Gary McFarlane⁷) due to their employers’ religious intolerance of Christianity and the continuous failure of our courts, the EHRC and the Government, to respect and uphold their fundamental human rights. It is hoped that the EHRC will give human rights centre stage, including the protection of the human rights of freedom of thought, conscience and religion, and of freedom of expression instead of seeking to curtail such human rights.⁸

Response to Questions

Question 1 The strategy at page 5 sets out the process by which the Commission will decide which cases to support. Is this process clear?

No, the process is not clear. It is not until page 5 that the decision-making steps are considered and then it takes the reader some time to work out how they function with the Strategic Priorities, the Priority for Casework and the Decision-Making Criteria.

Appendix A sets out the Commission’s legal powers that relate to this strategy for decision-making. Boxes and flow charts are helpful in illustrating how the decision-making process works.

The overall framework for the use of the Commission’s powers is said to include the Commission’s *Strategic Plan* and *Human Rights Strategy*.⁹ However, the Strategic Priorities for 2009 to 2012 in the *Strategic Plan* are listed under point A. Yet the *Human Rights* strategic priorities are not mentioned in the Draft CLS, nor are they applied, yet they are readily available and listed on the EHRC’s website.¹⁰ In addition, some of the other *Human Rights* objectives highlighted on pages 10 to 14 of the *Human Rights Strategy* could also have been considered to be relevant to a casework and litigation strategy.

⁵ See page 23 of the EHRC’s *Our Human Rights Strategy*, at: <http://www.equalityhumanrights.com/human-rights/our-human-rights-strategy>

⁶ See page 6 of the EHRC’s *Our Human Rights Strategy*, quotation from under “What we will do”.

⁷ See all the cases on the Christian Legal Centre website including the case of Gary McFarlane and Theresa Davies who has a similar case to Lillian Ladele’s, at: <http://www.christianlegalcentre.com> See: <http://www.christianlegalcentre.com/view.php?id=1065> <http://www.christianlegalcentre.com/view.php?id=1062> and <http://www.christianlegalcentre.com/view.php?id=932>

⁸ As the EHRC has done in relation to the recommendation that harassment should be included for religion or belief and sexual orientation in the proposed Article 13 EU Directive on equal treatment in the provision of goods and services.

⁹ See page 2 of the *Draft Casework and Litigation Strategy 2010-2012*.

¹⁰ See the EHRC webpage entitled “Our Human Rights Strategy”, at: <http://www.equalityhumanrights.com/human-rights/our-human-rights-strategy>

There is far too much emphasis in the Draft CLS upon the *Strategic Plan* and upon the role of the Commission as an enforcer of equality, as opposed to the Commission considering its purpose as a custodian of human rights and meeting its duties under the Equality Act 2006, including its duties to further human rights in section 9 of the Equality Act 2006.¹¹

Question 2 The strategy includes a list of criteria (C, page 8) which the Commission will use to help it reach a decision as to whether to support a case. Are these the right criteria? If you want to suggest alternative criteria please state these and give reasons why.

No, in our opinion, these are not the right criteria and our response will consider in more detail each of the 11 criteria listed in turn. The criteria are important, because the Draft CLS states that part of the decision-making process that determines which cases are to be taken on, is that the proposed action has to meet at least one of the criteria listed.

Criterion 1

Would have a significant positive impact in terms of the application of the law or the policies and practices on an organisation, institution or sector.

How will “positive impact” be judged? A positive impact for one organisation, institution or sector may be a negative impact for another, because human rights are often in competition with each other. In view of the value judgment required, this criterion should be deleted.

Criterion 2

Would address significant disadvantage in respect of one or more of the protected grounds (strands) and/or a major abuse or denial of human rights.

It is important that human rights are upheld. It is unclear how a “significant disadvantage” will be judged, or what constitutes a “major abuse or denial” of human rights. The Commission simply has a duty to “promote awareness, understanding and protection” of human rights, not only of “major” abuses of human rights.¹²

Criterion 3

Would have a positive impact, securing greater understanding of rights and obligations under the equality enactments and/or human rights law.

We object to this criterion and think it should be deleted. How would the “positive impact” be guessed at? A greater understanding of rights and obligations under equality enactments could be achieved by the multiplicity of human rights being restricted rather than enlarged.

In view of the above comments, it would be better simply to replace 2 and 3 with:

¹¹ See section 9 of the Equality Act 2006, at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_2#pt1-pb2-11g9 Note that Schedule 26 of the Equality Act 2010 has not amended section 9 of the Equality Act 2006.

¹² See section 9(1)(c) of the Equality Act 2006 at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_2#pt1-pb2-11g9

Would address laws, policies and practices that seek significantly to curtail human rights in respect of any of the protected grounds (strands) in order to have a positive impact upon the protection of human rights and thereby assist in the Commission's section 9 duty to "promote awareness, understanding and protection of human rights".

The advantage of this criterion as a replacement for 2 and 3 is that it is in line with the Commission's duties under section 9(1)(c) of the Equality Act 2006 and seeks to hold the Commission to meeting the more objective statutory duties and uses fewer subjective terms.

Criterion 4

Would contribute substantially to other areas of the Commission's work.

This is too vague. What other areas? How would such a case help? Criterion 4 could be replaced with:

Would contribute substantially to the Commission meeting its general duties outlined in section 3 of the Equality Act 2006 and/or its duties detailed in sections 8 to 12 of the Equality Act 2006.

Criterion 5

Is a cost-effective method of achieving a desired outcome, taking into account its prospect of success.

We object to this criterion. Whilst value for money is important, one person's "desired outcome" may be another's disaster. It is important for the Commission to recognise that human rights are often in competition with each other. Again, there is a need to express desired outcomes in terms of the Commission's duties as outlined in the Equality Act 2006. Like criteria 10 and 11, this criterion should refer to the context of the criteria above it and should not be a stand-alone criterion.

Criterion 6

Clarifies an important point of law under equality enactments and under the forthcoming Equality Act or Human Rights Act; for example, definitions, application of law, exclusions and exceptions, enforcement, remedies and sanctions.

We strongly object to this criterion and think it should be deleted, because it views equality law and human rights law from the perspective of enforcement only, using an analytical approach that would not protect human rights from infringement by other human rights.

Criterion 7

Challenges a policy or practice that is known to cause a significant disadvantage based on the number of people affected or the scale of the disadvantage or injury for the people affected.

We object to this criterion, which we think should be deleted. How will such a vague criterion be judged? "Significant disadvantage" is a relative term and "injury" is not defined. Perhaps it refers to injury to feelings? The problem again is the lack of anchorage to the objective statutory framework of the Commission's duties.

We also think that this criterion is apt to discourage actions that seek to protect the rights of minority groups.

Criterion 8

Will extend or strengthen protections and rights under one or more of the equality enactments (or the forthcoming Equality Act) and, where it also applies, human rights law.

We object to this criterion and maintain that it should be deleted. The extension of one person's protection in the conflict of rights may result in the restriction of another's freedom. There is a need to grasp the complexity of the effects of equality law, because it has many negative aspects. Taking cases with the aim of "extending" or "strengthening" protection may therefore have the effect of distorting the delicate balances of rights in the Equality Act 2010, so that its effects are no longer those intended by Parliament. Human rights appear to be mentioned almost as an afterthought.

The Draft CLS appears to demonstrate an underlying assumption that equality law trumps human rights law. They should instead go hand-in-hand. Equality laws should be enforced in such a way as to ensure that there is no infringement of human rights.

Criterion 9

Tests compliance with one or more of the public sector equality duties and, where it is also relevant, the duty of public authorities under s.6 HRA.

The Public Sector Equality Duty ("PSED") in section 149(1) of the Equality Act 2010 states "A public authority must, in the exercise of its functions, have due regard to the need to...". It therefore requires nothing more than having "due regard to". It is important to note that all the examples given in the Explanatory Notes to the Act use the term "could" not "should".¹³ This criterion is unlikely to be a cost-effective one and for that reason it should be deleted.

Criterion 10

In the context of the above criteria, and the wider social and political context, will draw attention, through raised media profile or Commission's support, to a priority issue and thereby lead to change.

We strongly object to this criterion and suggest that it should be deleted. It is not part of the Commission's statutory duties to act as a political agent, as it is meant to be an independent body. Independence assumes that it should operate in an impartial way. The criterion also provides no context for what a "priority issue" may or may not be. If the criterion referred to a "human rights priority issue" then that would be relevant to the Commission's duties, though not necessarily adequate, because making one human right a priority might result in conflicting rights being infringed.

¹³ See section 149 of the Equality Act 2010 (click "SHOW EN" to see Explanatory Notes), at: http://www.opsi.gov.uk/acts/acts2010/ukpga_20100015_en_16#pt11-ch1-l1g157

Criterion 11

In the context of the above criteria, the absence of other sources of legal support, taking into account the particular circumstances of the individual (in relation to providing assistance under s.28 only).

Lack of legal support is an important issue, but inadequacy of legal support is another. The criterion is confusing because it fails to state which Act section 28 is derived from. We assume that it refers to the Equality Act 2006, which deals with legal assistance by the Commission. We note that section 28(2) of the Equality Act 2006 allows for legal assistance for disabled tenants in relation to the reasonableness of consent of a landlord in refusing disability-related improvements to his/her property, something not mentioned at all as a casework/legal assistance issue.

Many of the criteria operate by means of relative or subjective terms rather than objective, measurable ones and therefore lack impartiality. It would be more appropriate for the criteria to be based upon the framework of the Commission's duties, so that the Commission might fulfil them. Without that framework, it is not at all clear what the criteria are supposed to achieve and what yardstick is to be used in order to judge the impact of the Commission's work.

We therefore suggest that the 11 criteria are replaced with the following 4 criteria, as one part of the process of deciding which cases should be taken on:

- 1. Would address laws, policies and practices that seek significantly to curtail human rights in respect of any of the protected grounds (strands) in order to have a positive impact upon the protection of human rights and thereby assist in the Commission's section 9 duty to "promote awareness, understanding and protection of human rights".*
- 2. Would contribute substantially to the Commission meeting its general duties outlined in section 3 of the Equality Act 2006 and/or its duties detailed in sections 8 to 12 of the Equality Act 2006.*
- 3. In the context of the above criteria, is a cost-effective method of achieving a desired outcome, taking into account its prospect of success.*
- 4. In the context of the above criteria, the difficulty or inadequacy of other sources of legal support, taking into account the particular circumstances of the individual (in relation to providing assistance under s. 28 of the Equality Act 2006 only).*

Question 3 The strategy lists 4 priorities for legal casework, litigation and interventions, with a number of highlighted issues beneath these (see page 1 and pages 6-8). Do you consider these 4 priorities to be the right priorities for casework, litigation and interventions, to support the Commission's strategic plan and human rights strategy? If you want to suggest different priorities, please give these and state why.

Please see our answer to question 4.

Question 4 Under these 4 priorities a number of areas are listed in part B of the strategy, pages 6-8. Do you think these are the right areas for the strategy to

concentrate on? If you would like to suggest other areas, please give these and state why.

No, in some areas, we do not think that these are the right areas for the strategy to concentrate upon. Some of the “priority” title headings also need amendment, together with changes in the importance and ranking of the priorities.

In our response to this question, we comment upon each “priority” and the areas covered in turn, in order to demonstrate how the priorities and the areas covered need to be changed.

EHRC Priority 1: Reinforce, expand and strengthen equality rights for all of the protected grounds under existing and future equality legislation.

We strongly object to priority 1, which should be replaced by the current priority 3, once it has been amended.

The EHRC’s role is only to enforce and monitor existing equality law,¹⁴ not to expand upon it. It is not for the EHRC to usurp Parliament’s role. Therefore the heading for this priority and the areas listed under it are inappropriate.

Casework, therefore, should cover only the protection of existing rights, without any suggestion that they should be developed or expanded. Therefore, the word “expand” is inappropriate and should be deleted.

In order to protect human rights, the EHRC should seek to protect the exceptions in the Equality Act 2010 rather than lessening their effect by looking for a “significant gap”.¹⁵ Therefore the bullet points that address areas where “the scope of protection is unclear and clarity will be in the public interest” and where “there is a significant gap in current protections” under this first “priority” heading should be deleted, because they fail to consider that in conflicts between rights, one person’s protection may be another’s important exception.

One area under this “priority” states that it will:

Develop and expand legal protection against discrimination and harassment on the grounds of sexual orientation, religion or belief, age and gender identity.

This should be deleted and replaced with the following:

Assist in cases of discrimination because of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation where

¹⁴ See section 8(1)(e) (enforcement of the equality enactments), sections 11 and 12 (monitoring) and sections 8(1)(f) and (g) and 34 of the Equality Act 2006, which make it clear that “unlawful” harassment or discrimination only includes what is contrary to a provision of the equality enactments, see: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_1

¹⁵ See page 6 of the Consultation Document under point 1.

such assistance helps to meet the Commission's general duties outlined in section 3 of the Equality Act 2006 and/or its duties detailed in sections 8 to 12 of the Equality Act 2006.

It is inappropriate to cover harassment under the above bullet point, due to the exceptions in the Equality Act 2010 for service provision¹⁶ and education¹⁷ relating to the protected characteristics. Expanding legal protection is the role of Parliament, not that of the EHRC. It is unclear why "gender identity" is used when this is known as "gender reassignment" in the Equality Act 2010.

The phrase "challenge multiple/intersectional discrimination and harassment" should be deleted. The Equality Act 2010 refers to this concept as "combined discrimination: dual characteristics", and there it covers only discrimination, not harassment.

The suggestion of "taking action on areas that develop the linkage between equality and human rights" should have "in order to protect human rights", added to it in order to give a purpose to the sentence.

One area covered relates to the new Article 13 EU Directive on equal treatment in relation to the provision of goods and services. We would prefer the new Article 13 EU Directive to exclude the grounds of "religion or belief" and "sexual orientation", because we are concerned about its likely detrimental impact upon religious freedom generally and on Christian culture and values across Europe in particular.

If the EHRC wishes to include this area then we suggest it is reworded as follows: "Take action that will assist effective implementation of EU Directives that relate to discrimination on grounds of sex (including reassignment of gender), racial origin, ethnic origin, religion, belief, disability, age or sexual orientation, and confers rights on individuals, always giving prior consideration to the need to support diversity,¹⁸ exceptions, the rights of groups,¹⁹ minorities, and human rights,²⁰ whilst monitoring²¹ and preventing any negative impacts of such EU Directives upon the human rights of individuals or groups in a democratic society."

The priority heading refers to "all of the protected grounds" and then only concentrates on a few. We suggest that a more even-handed approach should be adopted and that Priority 1 becomes Priority 3. We suggest that Priority 1 is altered as follows:

Suggested Priority 3 to Replace the EHRC's Current Priority 1:

¹⁶ See section 29(6) in Part 3 of the Equality Act 2010, at:
http://www.opsi.gov.uk/acts/acts2010/ukpga_20100015_en_4

¹⁷ See section 85(10) of the Equality Act 2010, at:
http://www.opsi.gov.uk/acts/acts2010/ukpga_20100015_en_10#pt6-ch1-l1g84

¹⁸ See section 8 of the Equality Act 2006.

¹⁹ See section 9 of the Equality Act 2006.

²⁰ See section 10 of the Equality Act 2006.

²¹ See sections 11 and 12 of the Equality Act 2006.

Maintain equality and diversity rights for all of the protected characteristics, ensuring the need to promote human rights and maintain exceptions to protect competing human rights.

Take action on areas where:*

- Established rights are under threat, provided this action does not infringe upon or narrow existing exceptions and/or infringe upon the human rights of individuals or groups.
- There are significant claims of discrimination because of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex or sexual orientation.
- Action would assist the Commission to meet its general duties under section 3 of the Equality Act 2006 and/or its duties under sections 8 to 12 of the Equality Act 2006 in relation to cases of discrimination because of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; or sexual orientation.
- There is the potential to develop the linkage between equality and human rights in order to protect human rights.

* Note that we have excluded the mention of the EU Directives for the reasons already explained.

EHRC Priority 2: Protect, promote and mainstream human rights.

This should be Priority 1. In our opinion, insufficient stress is being placed upon human rights by the EHRC, which is unfortunate, because it is one of the Commission's statutory duties.²² We object to an aim under this priority being the need to "Clarify the relationship between potentially competing human rights, for example right to freedom of religion and freedom of expression". The objective is unclear; the aim should be to protect these human rights not simply to clarify them. This phrase should be replaced by: "Address laws, policies and practices that seek to curtail the human rights of freedom of thought, conscience and religion and/or the freedom of expression in a democratic society." In fact, the freedom of religion and the freedom to express beliefs often go hand-in-hand and are not usually competing human rights.

We would therefore suggest that Priority 2 becomes Priority 1 and is amended as follows:

Suggested New Priority 1 to Replace the EHRC's Current Priority 2:

Protect, Promote and Mainstream Human Rights:

²² See section 9 of the Equality Act 2006, at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_2#pt1-pb1-11g3

- Promote understanding of the importance of human rights, encourage good practice in relation to human rights and seek to protect human rights²³ and take up cases where the importance of these aims may be under threat.
- Address laws, policies and practices that seek to curtail the human rights of freedom of thought, conscience and religion and/or the freedom of expression in a democratic society.
- Promote implementation of international human rights standards in the UK, particularly as regards the right to freedom of religion or belief and freedom of expression in order properly to give effect to Articles 9 and 10 of the European Convention on Human Rights as implemented by the Human Rights Act 1998.
- Take action where particular rights may be under threat, for example in relation to counter terrorism and security measures.
- Ensure that the new Public Sector Equality Duty does not lead public bodies to infringe human rights, particularly those of religious individuals or groups who are employed by them and/or have or seek funding from them.

EHRC Priority 3: Mainstream equality across the public sector through effective compliance with statutory equality duties (single equality duty on all protected grounds under forthcoming Equality Act).

We suggest that Priority 3 should be deleted in its entirety.

The following areas of focus are currently listed by the EHRC under Priority 3:

- Secure compliance with the public sector equality duties, both the general and specific duties, by key public authorities whose functions have a significant impact on members of protected groups
- Use evidence of non-compliance with equality duties to support actions in relation to allegations of discrimination by public bodies
- Develop and clarify the legal scope of the new social economic duty

To “mainstream equality” suggests a dangerous and inappropriate “one size fits all” approach, which sets a dangerous precedent and fails to take account of the need for diversity and human rights.

In relation to the first two bullet points, which should be deleted, we reiterate that the PSED is nothing more than a duty for public bodies to have “due regard to” various objectives. It is important to note that in all the examples given in the Explanatory Notes to the Act, the term “could” rather than “should”²⁴ is used. Whilst the Commission has powers to assess compliance with public sector duties and to issue compliance notices,²⁵ the enabling section

²³ See section 9 of the Equality Act 2006.

²⁴ See section 149 of the Equality Act 2010 (click “SHOW EN” to see Explanatory Notes), at: http://www.opsi.gov.uk/acts/acts2010/ukpga_20100015_en_16#pt11-ch1-11g149

²⁵ See Sections 31 and 32 of the Equality Act 2006 at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_1 and http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_3#pt1-pb4-11g31

only applies where the Commission thinks that a person has failed to comply with a public sector equality duty.²⁶ Using litigation to secure compliance with the public sector equality duties may be undesirable, because section 149(1) of the Equality Act 2010 frames the duties only in terms of requiring of public bodies to consider the various objectives—to have “due regard to” them. We assume that the reason for this general approach to the PSED, was a desire to make it work by creating “a set of specific duties that are flexible, proportionate and non-bureaucratic”.²⁷ Therefore, a bureaucratic approach to enforcement litigation may be contrary to the Parliamentary intention as to the flexibility with which the public sector equality duty was intended to operate in practice. For this reason, it may be the case that PSED-related cases are unlikely to be cost-effective cases to take on, from a casework and litigation perspective.

It would be more helpful in protecting people’s human rights, to monitor the negative effect of inappropriate, “one size fits all” public sector equality policies and practices and seek to eliminate them. If compliance with the PSED is to be considered in the Draft CLS, it is important to state clearly what the law actually says in relation to public bodies and what the Commission’s duties cover.

We are concerned that the Commission is misinterpreting its duties in relation to the *Strategic Plan*, which forms the overall framework for how the Commission will use its powers in its *Casework and Litigation Strategy 2010-2012*. “Mainstream equality” in the title of this Priority inappropriately suggests that the Commission and the public sector have a duty to “promote equality”. Firstly, the Commission does not have a duty to “promote equality”; the term is not to be found in the Equality Act 2006 or Equality Act 2010. For example, the foreword to the executive summary of the *Commission’s Strategic Plan 2009-2012*, states:

*For the first time, a statutory body has the responsibility to protect, enforce and **promote equality** across the seven ‘protected’ grounds—age, disability, gender, race, religion and belief, sexual orientation and gender reassignment.²⁸ (Our emphasis).*

Instead, the Commission has a duty to promote equality of opportunity,²⁹ which concerns fairness and equal opportunities, not the promotion of an ideology.

We are also concerned that the Commission is incorrectly stating that there is a Public Sector Duty to “promote equality”. For example, an EHRC press release of 17th May 2010, entitled “Commission calls on community leaders to tackle homophobia” stated that:

²⁶ See Schedule 26, paragraph 19 of the Equality Act 2010, which amends section 32 of the Equality Act 2010 at: http://www.opsi.gov.uk/acts/acts2010/ukpga_20100015_en_42#sch26

²⁷ See paragraph 1.7 of the Government Equalities Office’s *Equalities Bill: Making it Work—Policy proposals for specific duties: Policy statement* January 2010, at: http://sta.geo.useconnect.co.uk/staimm6geo/pdf/psdresp_GEO_MakingItWork_acc.pdf

²⁸ See the foreword to *Our Strategic Plan: 2009-2012*, at: http://www.equalityhumanrights.com/uploaded_files/strategicplan2009-2012summary.pdf

²⁹ See section 8(1)(c) of the Equality Act 2006.

*The Equality Act 2010, which recently received Royal Assent, will place a new obligation on public sector organisations **to promote equality**, eliminate harassment and foster good relations on the ground of sexual orientation. The Commission will continue to support public bodies in meeting these duties. (Our emphasis).³⁰*

Instead, the Equality Act 2010 requires public authorities to “have due regard to the need to...**advance equality of opportunity**” (see section 149(1)(b)). The practical effects of these concepts are radically different and must not be allowed to be mistaken for each other.

We are concerned that to date, the Commission appears to have misinterpreted the Equality Act 2010 and that public sector employers may therefore misunderstand the PSED as requiring the promotion of “equality”, which fails to take account of the need for the protection of the diversity of beliefs and opinions in the market place of ideas, which is necessary in turn for a democratic society to be maintained. The PSED is drafted so that it requires public authorities to have regard to the advancement of “equality of opportunity” in the exercise of their functions. We think that this approach helps to ensure that individuals who have protected characteristics do not suffer discrimination that would exclude them from those opportunities. Equality of opportunity helps to ensure the diversity of service providers and the diversity of service provision.

On the other hand, suggesting that a public authority should “promote equality” (which is not a requirement in the Equality Act 2010) may not allow that authority to take account of, or to respect diversity, thus it may result in unfair treatment. In particular, we are concerned that such a requirement may result in public authorities incorrectly asking Christian individuals or groups of individuals who are employees or external contractors to promote other religions or sexual ethics that are contrary to a traditional interpretation of the Bible and their own consciences. It may therefore result in an inadequate protection of their human rights in relation to freedom of thought, conscience and religion and in relation to their freedom of expression. Requiring religious employees to promote or to facilitate such beliefs or ethics effectively obliges them to put aside their beliefs, or even to change them. We do not think that Parliament could have intended the Acts to have this effect.

The problem is that some local authorities fail to see the difference between not discriminating and the promotion of equality as such. For example, some local authorities³¹ policies require religious organisations to sign up to policies that are discriminatory because they insist on the promotion of homosexuality, which is contrary to religious beliefs or they promote a hierarchy of rights with religion at the bottom of the pile (because it appears too often to be viewed as something that is intrinsically private) if anyone else’s rights need to be considered. This is

³⁰ See “Commission calls on community leaders to tackle homophobia”, 17th May 2010 as seen on 24th May 2010, at: <http://www.equalityhumanrights.com/media-centre/2010/may/commission-calls-on-community-leaders-to-tackle-homophobia>

³¹ See page 18 of Stockport Council’s *Diversity & Equality Policy*, which advocates the “promotion of positive images of lesbians, ‘gay’ men and bisexuals.” A church would want to present positive images of all people, but not in such a way as to promote homosexuality. A term such as this that could have an impact on funding would discriminate against those with religious beliefs. On page 20, the Council states it will “Respect beliefs where those beliefs do not impinge on the legitimate rights of others”. Such statements set up a hierarchy of rights whereby religious expression is subservient to other rights, see: <http://www.stockport.gov.uk/2013/2984/53095/55668>

clearly wrong, because international human rights law in the form of the International Covenant on Civil and Political Rights (“ICCPR”) 1966³² (which the UK ratified in 1976³³ and to which the UK should give domestic effect), considers the human right to freedom of religion so important that it should not suffer any derogations—even in times of public emergency. In addition, Article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms prohibits a hierarchy of rights by its prohibition of the abuse of rights.³⁴

We note that Article 10(2) of the Charter of Fundamental Rights of the European Union,³⁵ which forms part of the Treaty of Lisbon, states that the right to conscientious objection is recognised by the EU in accordance with national laws governing its exercise. Whilst the law on performing abortions in Britain in the Abortion Act 1967³⁶ and the Human Fertilisation and Embryology Act 1990 (as amended)³⁷ includes the right to conscientious objection, the same right has not been drafted into our equality laws to date. However, in the interests of fairness, there is no reason why a right of conscientious objection that is similar to the model provided for Scotland in the aforementioned two Acts, cannot be incorporated into equality and diversity policies to allow for reasonable accommodation of religious beliefs, including the right to abstain from facilitating or promoting sexual or religious practices that violate a worker’s conscience. In our opinion, such a right should have been included in the Equality Act 2010. There should be no reason why non-discriminatory public services cannot be provided by other employees who do not have conscientious objections to these practices. Article 22 of the Charter of Fundamental Rights also requires that “The Union shall respect cultural, religious and linguistic diversity”.

We are concerned that the promotion “of equality” can result in the furtherance of an aggressive secularist agenda that seeks to eliminate the right of conscientious objection and does not respect the diversity of beliefs. An “all are equal” philosophy does not allow for the exceptions needed to balance human rights against each other. Without such balancing, some groups’ human rights are at risk of being infringed by the requirement to promote the rights of other groups. We also note that the Commission’s duties in section 8 of the Equality Act 2006 come under the heading “Equality and Diversity”, not simply “Equality”.

The third bullet point under Priority 3, to “Develop and clarify the legal scope of the new social economic duty”, does not seem to be a cost-effective strategy for choosing cases to take. Firstly, the duty has to take account of Guidance yet to be issued by the Secretary of State and

³² See Article 18 and Article 4(2) of the International Covenant on Civil and Political Rights (ICCPR), at: <http://www2.ohchr.org/english/law/ccpr.htm>

³³ See page 16 of the EHRC’s *Our Human Rights Strategy and Programme of Action 2009 to 2012*, at: http://www.equalityhumanrights.com/uploaded_files/publications/our_human_rights_strategy.pdf

³⁴ See Article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms at: <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>

³⁵ See: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

³⁶ See section 4 of the Abortion Act 1967, at: <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1181037>

³⁷ See section 38 of the Human Fertilisation and Embryology Act 1990. Although the Human Fertilisation and Embryology Act 2008 amended the 1990 Act, the 1990 Act retained section 38 (see sections 27 and 28 of the 2008 Act), where changes were not made, see: http://www.opsi.gov.uk/acts/acts1990/Ukpga_19900037_en_1.htm and http://www.opsi.gov.uk/acts/acts2008/ukpga_20080022_en_4#pt1-pb10-11g28

it may be some time before that Guidance is issued as far as this 2-year casework plan is concerned.³⁸ Secondly, the duty is only one that requires an authority to have “due regard” to:

*An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, **have due regard to** the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.³⁹ (Our emphasis).*

Thirdly, the actions suggested in the examples given in the Explanatory Notes only refer to what “could” be done under the new social economic duty as opposed to what “should” or “must” be done. For these reasons it is probably better to examine the new social economic duty from a research or policy perspective, rather than a casework one.

We therefore suggest that this third bullet point under Priority 3 is deleted and that the bullet point that is under our suggested Priority 1 should be sufficient to deal with the whole of current Priority 3:

- *Ensure that the new Public Sector Equality Duty does not lead public bodies to infringe human rights, particularly those of religious individuals or groups who are employed by them and/or have or seek funding from them.*

EHRC Priority 4: Promote good relations and combat prejudice, in particular in respect of those most excluded in society, and where conflict between rights may arise.

The beginning of this heading (“Promote good relations and combat prejudice”) appears to be in line with the Commission’s general duties under section 3 of the Equality Act 2006, which include “encouraging...the development of a society in which people’s ability to achieve their potential is not limited by prejudice or discrimination” . However, the rest of the sentence should be replaced with “ensuring that a hierarchy of rights does not develop”. Subjective judgments must necessarily determine which groups or individuals are considered to be “excluded in society”—a situation that may result in human rights being infringed if care is not taken. For example, if this heading was misinterpreted, it could result in subjective judgments that could be used as an excuse to support cases that continue unfairly to marginalise Christians’ rights, allowing their religious beliefs to be trumped in any conflict of rights by other rights, such as those corresponding to sexual orientation or to other faiths.

It is agreed that under this Priority there is a need to “Address religious intolerance, and policies that impact disproportionately on religious and ethnic minority communities”, however there is also a need to address “practices” and “laws” that have the same effect.

We object to the following bullet point: “Clarify the relationship and extent of protections between freedom of religion/rights to equality on grounds of religion or belief and other rights

³⁸ See section 1(2) of the Equality Act 2010.

³⁹ See section 1(1) of the Equality Act 2010.

under equality laws and the Human Rights Act.” The Commission is under a duty to protect human rights and to promote an understanding of the importance of human rights,⁴⁰ not to seek to narrow them by “clarifying...the extent” of them, suggesting from a narrow, legal, analytical perspective that they should be further limited. The bullet point in question should be replaced with the following:

Address equality policies, laws and practices that have a detrimental impact on the human rights to freedom of thought, conscience and religion and/or to freedom of expression, in order to protect these human rights and to promote understanding of the importance of these human rights in the UK, particularly the rights of Christians, which have been increasingly marginalised.

In order to “promote good relations and combat prejudice” it is important to ensure that religious individuals and organisations are not asked to leave their faith at home. Priority 4 should be promoted to Priority 2, with suggested changes as follows:

Suggested Priority 2:

Promote good relations and combat prejudice, ensuring that a hierarchy of rights does not develop.

- Monitor⁴¹ the new Public Sector Equality Duty to ensure that it is not having a negative or discriminatory impact upon religious individuals or organisations.
- Monitor⁴² and advise on the need for a right of conscientious objection for religious individuals and organisations in equality law, (which is currently found only in the Human Fertilisation and Embryology Act 1990 (as amended) and in the Abortion Act 1967), in order to protect the human right to freedom of thought, conscience and religion. We suggest that the right to conscientious objection should be modelled on the Scottish versions of those provisions in the aforementioned enactments.
- Use the Commission’s duty to promote good relations, in conjunction with the Commission’s equality and human rights mandates, **to develop case law in such a way as to protect human rights.***
- Take action where rights are threatened by the policies and practices of organisations that seek to undermine these rights.
- Address policies and practices that adversely affect migrant and immigrant communities.
- Address religious intolerance, and policies, **laws and practices*** that impact disproportionately on religious and ethnic minority communities.
- Address equality policies, laws and practices that have a detrimental impact on the human rights to freedom of thought, conscience and religion and/or to freedom of

⁴⁰ See section 9 of the Equality Act 2006, at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_2#pt1-pb1-11g3

⁴¹ We note that section 11 of the Equality Act 2006, which deals with the Commission’s monitoring duty, has been amended by the Equality Act 2010 to make it clear that a reference to the “equality and human rights enactments” is a reference to the Human Rights Act 1998, the Equality Act 2006 and the Equality Act 2010: see Schedule 26, paragraph 9 of the Equality Act 2010 at: http://www.opsi.gov.uk/acts/acts2010/ukpga_20100015_en_42#sch26

⁴² *Ibid.*

expression, in order to protect these human rights and to promote understanding of the importance of these human rights in the UK, particularly the rights of Christians, which have been increasingly marginalised.

- Address policies, laws and practices that result in discrimination in employment and the lack of funding opportunities experienced by religious individuals and organisations.

* (Bold denotes a change in the sentence from the original in the Draft CLS).

Question 5 Do you think any of the priorities, or areas under these, should be given greater, or lesser priority than the others?

Yes as outlined in answer to question 4:

- Priority 1 and the areas covered by it should be altered and become Priority 3.
- Priority 2 and the areas covered by it should be altered and become Priority 1.
- Priority 3 should be deleted and its aims dealt with by one of the areas covered in our suggested Priority 1.
- Priority 4 and the areas covered by it should be altered and become Priority 2.

The above changes will help to give greater priority to the *Human Rights Strategy* and to mainstream it and integrate it into the *Casework and Litigation Strategy*.

Question 6 The Strategy does not list in detail all the potential strategic cases and issues that might be considered under the priorities. We would like to know what specific strategic issues you consider we could use our casework, litigation and intervention powers on, within the priorities set out in the strategy. It is unlikely we would include detailed issues in the strategy itself, but these would be useful to inform how we implement the strategy, and our development of strategic casework, litigation and interventions. Please give details of any particular issues you consider are of strategic importance under these.

Please see the suggested changes to the priorities and areas, in answer to question 4.

We consider that monitoring and reviewing the impact of existing equality policies, laws and principles on the rights of individuals and groups to freedom of thought, conscience and religion is of great strategic importance. We have seen numerous examples where we think that the rights of other groups have been given precedence over the right to manifest religious beliefs in public life.⁴³

Question 7 Are there any other comments you would like to submit?

Please see our Executive Summary.

⁴³ See the website of the Christian Legal Centre at: www.christianlegalcentre.com

The protection of the human rights of Christians in the UK requires the following elements, (to name but a few):

- The right of conscientious objection in equality law and in the meantime its recognition in policies and practices.
- Adequate exceptions and exclusions from equality law to protect the diversity of opinions and religious beliefs.
- Prior consideration of any possible negative impact on Christians before any equality and diversity law, policies and practices are implemented.
- Consideration of diversity, human rights and any possible negative impact on Christians in the establishment of all equality law, policies and practices.
- The guarding of exceptions in equality law, policies and practices that protect diversity and human rights, particularly the freedoms of Christians, rather than searching for “significant gaps” in them.
- A “Less is More” approach to equality and diversity, which would allow common sense and reasonableness in finding solutions to issues of conflict.
- Measures to ensure that a hierarchy of human rights does not develop, with the rights of Christians being unfairly trumped by the rights of members of other religions or those of a particular sexual orientation, when such rights would oblige Christians to promote other religions, or to facilitate or promote the practice of homosexuality.
- Efforts on the part of the courts, public bodies and private employers to eliminate all forms of religious intolerance and to take seriously the importance of human rights relating to thought, conscience and religion, particularly those of Christians, which are increasingly being marginalised.

The EHRC should operate in its capacity as a regulator on the principle that more equality legislation is not the answer. The *Hampton* review⁴⁴ (which originally looked at regulators was published together with the *Less is More*⁴⁵ publication by the Better regulation task force) recommended that the *Less is More* idea should be used in relation to reducing regulatory burdens on businesses. We suggest that this idea should also be used in relation to equality legislation. In Australia they have found that the lack of equality legislation means that it is one of the freest nations as far as religious freedom is concerned. Without such legislation, cultural norms and values may result in actions that naturally adopt a commonsense and reasonable approach to resolving conflicts. However, once equality legislation has been put in place, there is then a need to ensure that there are proper exceptions to preserve diversity and the right to act according to conscience as well as a need to balance the rights of all individuals and groups against each other.

⁴⁴ See *The Hampton Review: Final Report 2005*, at: <http://www.berr.gov.uk/files/file22988.pdf>

⁴⁵ See *Regulation: Less is More, BRTF Report 2005: Reducing Burdens, Improving Outcomes*, at: http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/lessismore_exec_summary.pdf

The EHRC's *Human Rights Strategy* correctly states that "Human rights provide a way of balancing the rights of all groups and communities to ensure that people are treated appropriately, and that the rights of one group do not supersede the rights of another group."⁴⁶

The importance of the *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981*⁴⁷ and the subsequent affirmation of the United Nations' General Assembly on the "Elimination of all forms of Religious Intolerance" 1991 should be reasserted as part of the need to eliminate religious intolerance against Christians.

We note that the United Nations' "Elimination of all forms of Religious Intolerance" 1991:

*3. Urges all States to take all appropriate measures to combat intolerance and to encourage understanding, tolerance and respect in matters relating to freedom of religion or belief and, in this context, to examine where necessary the supervision and training of members of law enforcement bodies, civil servants, educators and other public officials to ensure that, in the course of their official duties, they respect different religions and beliefs and do not discriminate against persons professing other religions or beliefs...*⁴⁸

The CARE report entitled *A Little Bit Against Discrimination* discusses the issue of a hierarchy of rights further.⁴⁹

In view of the intolerance to Christianity shown by English judges in recent cases, there is an urgent need to address this issue with the judiciary in the UK. The situation is becoming so serious with regard to Christianity that Lord Carey, the former Archbishop of Canterbury, warned in a *Times* article of 15th April 2010 of "unrest" if judges continue with "dangerous" rulings. Lord Carey said it was "but a short step from the dismissal of a sincere Christian from employment to a 'religious bar' to any employment by Christians."⁵⁰

Thank you for responding to this consultation, if you have any queries please e-mail LegalStrategy@equalityhumanrights.com or call 02031170322.

⁴⁶ See page 18 of the EHRC's *Our Human Rights Strategy and Programme of Action 2009 to 2012*, at: http://www.equalityhumanrights.com/uploaded_files/publications/our_human_rights_strategy.pdf

⁴⁷ See *The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55, of 25th November 1981, at: <http://www.un.org/documents/ga/res/36/a36r055.htm>

⁴⁸ See point 3 of the United Nations General Assembly Resolution on the "Elimination of all form of Religious Intolerance", A/RES/46/131 of 17th December 1991, at: <http://www.un.org/documents/ga/res/46/a46r131.htm>

⁴⁹ See Care's *A Little Bit Against Discrimination*, at: <http://www.care.org.uk/Publisher/File.aspx?ID=46206>

⁵⁰ See *The Times* 15th April 2010, "Lord Carey warns of 'unrest' if judges continue with 'dangerous' rulings", at: <http://www.timesonline.co.uk/tol/comment/faith/article7098299.ece>