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Memorandum on Clause 56 of the Enterprise and Regulatory Reform Bill –HL 45
*(October 2012)*¹

1. I was co-author of the *Cambridge Independent Review of the Enforcement of UK Anti-Discrimination*². Many of our recommendations for a single Equality Commission and a single Equality Act were implemented by the Equality Acts (EqA) 2006 and 2010.³

2. I am alarmed by clause 56 of the Enterprise and Regulatory Reform Bill which proposes to repeal (a) the general duty of the Equality and Human Rights Commission (EHRC) under sections 3 of the EqA 2006, and (b) ss 10 and 19 which imposes a duty on the ECHR to promote good relations between members of different groups. In its parliamentary briefings (July and September 2012) the EHRC says that ‘these changes are unlikely to have a significant adverse impact on its work.’ I disagree with that conclusion which, in my view, seriously misunderstands the function of these provisions.

Repeal of section 3

3. Section 3 EA 2006 provides:

3 General duty

The Commission shall exercise its functions under this Part with a view to encouraging and supporting the development of a society in which—

(a) people's ability to achieve their potential is not limited by prejudice or discrimination,

¹ This is an updated version of the memorandum I prepared for the House of Commons Report and Third Reading stage.

² B.Hepple,M.Coussey, T.Choudhury, *Equality: a New Legal Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination* (Hart Publishing, 2000)

³ For a full account, see Bob Hepple, *Equality: the New Legal Framework* (Hart Publishing, 2011).

- (b) there is respect for and protection of each individual's human rights,
- (c) there is respect for the dignity and worth of each individual,
- (d) each individual has an equal opportunity to participate in society, and
- (e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

4. This section gives effect to the purposes of the EqA s 2006, as stated by the Lord Chancellor, Lord Falconer:

The Bill aims to move us towards a society which reaches out towards its diverse members and communities. It places the emphasis on the positives. The new commission will use its powers to tackle inequality, diversity, the fair treatment of disabled people and human rights, reaching out to a wide audience. It will improve compliance with the law through its enforcement powers. It will benefit public services by embedding human rights at their core. By promoting understanding between communities, it will help to advance a stronger, more cohesive Britain. The new commission will bring a new ethos and style, built on partnership working, responsiveness to stakeholders and to expertise.⁴

Lord Lester of Herne Hill QC (LibDem) [who was Chair of the Advisory Committee of the Cambridge Independent Review] emphasized the importance of ensuring ‘that equality becomes better understood as a fundamental human right to be enjoyed together with other human rights, civil and political, and economic and social. It should be able to promote a culture of human rights.’⁵ The Joint Committee on Human Rights in its 16th Report unanimously welcomed clause 3 saying that it would serve in practice as a unifying factor in the performance of the commission’s duties under clauses 8 to 11. The original wording of the clause was debated and amended in the House of Lords, following objections by the Conservative Opposition that it was too broad. There was no opposition to the amended clause 3 in the House of Commons. Eleanor Laing MP (Conservative), who withdrew proposals for minor changes in the wording, said: ‘the

⁴ House of Lords Debates, 15 June 2005, col 1219.

⁵ Ibid, col 1230.

important thing about clause 3 is that we all admire the aspirational nature of the general duty within it.’

5. The Government’s Consultation Paper, *Building a Fairer Britain: reform of the Equality and Human Rights Commission*, GEO March 2011, para 1.8 stated that section 3 ‘has no specific legal function’ and ‘creates unrealistic expectations...about what the EHRC can achieve.’ The Secretary of State says that clause 51 is simply ‘legislative tidying up’ and the ‘removal of gold-plating’.⁶ This is wrong for the reasons I set out below.

6. First, section 3 EA 2006 does have a legal function. In the absence of a ‘purposes’ clause in the EA 2010, the courts and others enforcing the EA 2010, are able to use section 3 EA 2006, as a helpful guide to the interpretation of the single Equality Act., enabling them to fill gaps and to resolve ambiguities. The Labour Government declined to insert a purposes clause in the 2010 Act believing (mistakenly in my view) that this might conflict with specific provisions of that Act , and could involve the ratification of Optional Protocol 12 of the European Convention on Human Rights, a step which successive governments have resisted. However, the absence of a purposes clause in the single Equality Act was less important than it might otherwise have been, because of the general duty of the EHRC set out in section 3 of the earlier 2006 Act. The repeal of section 3 will deprive those applying the law of interpretative principles and will leave equality law rudderless. It increases the likelihood of inconsistencies in the way in which the single Act is applied.

7. Secondly, and perhaps even more significantly, repeal will remove the unifying principle to which both the Lord Chancellor and Lord Lester referred when promoting the EA 2006. It will remove the link between equality and other fundamental human rights. ‘At the core of the EHRC’s general duty , and implicitly underlying the specific rights

⁶ House of Commons Hansard, 11 June 2012, cols 75-6.

against discrimination, harassment and victimisation and the positive duty to advance equality as set out in the EA 2010, is respect for and protection of each person's human rights.'⁷Section 3 embodies the same approach as Art 2 of the Universal Declaration of Human Rights, which provides that all 'the right and freedoms' embodied in the Declaration are to be enjoyed without any kind of discrimination.. The EA 2006 and 2010 seek to overcome the fragmented approach to different strands of discrimination, which has characterized British legislation in the past. Section 3 of the EA 2006 adopts a unitary human rights perspective. That is not an 'unrealistic expectation', as the Government claims, but the essence of what the new legal framework seeks to achieve. Repealing that provision will undermine the historic reunification of equality and human rights law which was achieved in the Acts of 2006 and 2010.

8. Thirdly, taken in the context of severe cuts in the funding of the EHRC and other changes, the proposed repeals are likely to further weaken the EHRC's case for accreditation by the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) as a status A body in full compliance with the 'Paris Principles .' The International Council on Human Rights has emphasized that ' the most effective national institutions generally have a broad and non-restrictive mandate' and an 'all-encompassing jurisdiction' as well as 'adequate budgetary resources'(*Assessing the Effectiveness of National Human Rights Institutions*, ICC, 2005, p 8). The ECHR's A status is already being questioned (see the correspondence between the Rt Hon Theresa May MP and the ICC and UN High Commissioner for Human Rights, appended to the ECHR's briefing, September 2012). The Government should be using this Bill to implement the ICC's recommendations, and to increase the ECHR's accountability to Parliament, rather than seeking to restrict its mandate.

⁷ Hepple, *Equality*,13.

9. *Repeal of ss 10 and 19*

Section 10 EA 2006 provides

S10 – Groups

(1) The Commission shall, by exercising the powers conferred by this Part—

(a) promote understanding of the importance of good relations—

(i) between members of different groups, and

(ii) between members of groups and others,

(b) encourage good practice in relation to relations—

(i) between members of different groups, and

(ii) between members of groups and others,

(c) work towards the elimination of prejudice against, hatred of and hostility towards members of groups, and

(d) work towards enabling members of groups to participate in society.

.....

This section (which is not set out in full here) together with s.19 re-enacted and extended the ‘good relations’ or ‘communities’ duty which had its origins in earlier race relations legislation. This gave the CRE the duty to promote good relations between persons of different racial groups. It was used by the CRE as the legal basis for campaigns such as Kick Racism out of Football, for challenging anti-semitism and Islamophobia, and for promoting good relations in elections. In my experience as a CRE Commissioner (1986-90), which coincided with the Salman Rushdie affair, the communities duty was essential to the promotional work of the CRE. This duty was expanded in the EqA 2006 to cover relations between other protected groups. The EHRC has used this power, for example, to

undertake research on the impact of counter-terrorism on Muslim communities, to produce reports on Gypsy and Traveller communities and to help disabled and trans people to resist hate crimes. The public sector duty to promote good relations is to remain, but the EHRC will no longer be able to work for good relations between groups in areas such as trade unions, the media, football clubs, and community organizations outside the public sector.

10. Severe cuts are being made in the resources provided to the EHRC, and nearly all the EHRC's frontline activities are being withdrawn or contracted out to less experienced bodies. It is unrealistic to expect voluntary organizations to take over the promotional work that the EHRC has done in the past. Not only are the resources of those organizations limited, but they lack the experience and authority of an independent statutory agency. It is vital that these duties be retained by the EHRC. In order to retain its independence and to ensure the most effective delivery of its services, the Commission, rather than government, should have the discretion to decide which of its services it can best provide itself and which should be contracted out to other providers.

Other equality provisions in the Bill

11. This memorandum deals only with clause 56 of the Bill. I wish also to endorse the reasons given by the Equality and Diversity Forum in their briefing for opposing clause 57 (repeal of third party harassment provisions) and clause 58 (repeal of provisions for obtaining information for proceedings). I welcome clause 74 (provision for equal pay

audits where a tribunal finds there has been a breach of equal pay law), but believe that this should go further . The EHRC should be allowed to require an audit where it has grounds for believing that there is discrimination in an organisation, without the need first to launch a formal investigation which is burdensome to the affected parties and time-consuming. I need not repeat the strong case for audits which has been made on many occasions in the past.⁸.

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⁸ See Hepple, *Equality: the new legal framework* , pp 94-107