



House of Commons
Women and Equalities
Committee

Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission

Tenth Report of Session 2017–19

*Report, together with formal minutes
relating to the report*

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Women and Equalities Committee

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Committee staff

The current staff of the Committee are Jyoti Chandola (Clerk), Radhika Handa and Luanne Middleton (Second Clerks), Holly Dustin, Tansy Hutchinson, Maz Keating and Shai Jacobs (Committee Specialists), Ellie Goodchild (Senior Committee Assistant), Mandy Sullivan (Committee Assistant), and Liz Parratt and Simon Horswell (Media Officers).

Contacts

All correspondence should be addressed to the Clerk of the Women and Equalities Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 6123; the Committee's email address is womeqcom@parliament.uk.

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Summary

Creating a fairer society where people are not treated differently because of the colour of their skin, their sex, gender, sexuality or religion is central to British values. Protecting people from discrimination is central to achieving that. The work of the Committee in many of our reports has uncovered the destructive impact discrimination has on people's lives, as well as the heavy cost that puts on society and public services. Ensuring anti-discrimination and equality laws work effectively could not be more important.

We started this inquiry with a sense from our work over the past four years that for equalities legislation to be more effective the burden of enforcement needed to shift away from the individual facing discrimination. This inquiry has confirmed that not only is this burden too high, but that the individual approach to enforcement of the Equality Act 2010, and its predecessors going back to the 1960s and 70s, is not fit for purpose. While individuals must still have the right to challenge discrimination in the courts, the system of enforcement should ensure that this is only rarely needed. This requires a fundamental shift in the way that enforcement of the Equality Act is thought about and applied. We want to see a model that can act as a sustainable deterrent to achieve system-wide change that tackles institutional and systemic discrimination.

There are methods we have identified in this report readily available to achieve this: developing a 'critical mass' of cases to inform employers and organisations about their legal duties and make adherence to existing equality law a priority for all organisations, moving away from the current model of using individual litigation to create precedents; making obligations on employers, public authorities and service providers explicit and enforceable; and ensuring that all who have powers to change the way in which employers, public bodies and service providers operate use those powers to eliminate discrimination and to advance equality. If their current mandate limits their ability to do this, then the Government must legislate to remove this limitation.

This requires the Equality and Human Rights Commission to refocus its work. Whilst its financial resources have reduced significantly in recent years it continues to have extensive enforcement powers, a staff of more than 200 people and expenditure of £18.4 million per year.¹ As an organisation it must overcome its timidity and be bolder in using the existing powers that only it has; increasing its own enforcement activity; and doing so in a strategic way that acts as a multiplier across entire sectors in the longer term—for example by making regulators, inspectorates and ombudsmen not only key partners in creating a critical mass of enforcement action but also key targets for enforcement action when those same regulators, inspectorates and ombudsmen fail to meet their own equality duties.

We want to see more action taken by regulators, inspectorates and ombudsmen, not least from the Government's Labour Market Enforcement Director who we believe should be playing a fundamental role—alongside the proposed new single labour market enforcement body. If such bodies acted consistently on their obligations the Equality and Human Rights Commission could become the strategic enforcer that it and the Government say that it should be.

¹ Equality and Human Rights Commission, [Business Plan 2019/20](#) (April 2019), p14

Government itself must also make this fundamental shift in the way that enforcement of the Equality Act is thought about and applied. It must act on its own obligations to embed compliance and enforcement of the Equality Act into its most significant strategies and action plans. That it has not yet done so in its recent efforts to improve the quality of work, an area where stopping discrimination is so clearly an essential precondition to any improvements—beggars belief. This must change, and the recommendations of this report provide clear instructions on how to do so.

1 Introduction

Our inquiry

1. We have repeatedly heard that the Equality Act 2010 is breached without challenge and that what little enforcement is happening is insufficient to tackle the systemic or routine discrimination that too many people experience as a simple fact of life. In inquiry after inquiry individuals have reported significant barriers to enforcing their rights under the Act; public sector bodies, including regulators and inspectorates, have shown a lack of knowledge of their duties; we have found widespread, unchecked, discrimination affecting older workers in recruitment, Gypsy, Roma and Traveller communities in health, education and access to services, disabled people in housing, transport and access to the public realm. We have found harassment occurring in employment and public places, pushing women out of jobs and insufficient action being taken to tackle sexual harassment for women and girls in public places. We have found the Equality and Human Rights Commission (EHRC) failing to act in areas of significant inequality and unable to provide an adequate explanation of why it appears not to be able to fulfil the role of a robust enforcer of equality law.

2. We have already made several recommendations related to enforcement of the Equality Act 2010. In inquiries including pregnancy and maternity discrimination, disability and the built environment, workplace dress codes, older people and employment and sexual harassment, we made recommendations about awareness and clarity of the law, access to advice, tribunals and courts, the types of remedies available, enforcement by the EHRC and alternative means of enforcement. These themes are in line with those identified by the 2016 report of the House of Lords Committee on the Equality Act and Disability,² the recommendations of which this Committee has committed to follow up.

3. While some of our recommendations have been implemented, many have not and until now we have mainly looked at the question of enforcement through the lens of specific protected characteristics. We therefore agreed in July 2018 to launch a dedicated inquiry titled *‘Enforcing the Equality Act 2010: the law and the role of the EHRC’*. This inquiry examines the legal aspects of enforcement across all protected characteristics and the effectiveness of the EHRC in fulfilling its enforcement role, following up and building on our past inquiries.

4. The vast bulk of evidence came from individuals and organisations concerned with reducing the burden on those experiencing discrimination, but we were conscious that employers and service providers can also face burdens when faced with law that is unclear, inconsistently applied or not taken properly into account by other enforcement bodies that they interact with. One area where this came through strongly in our evidence was the provision of single-sex services and we consider this in Chapter 7.

The Equality Acts 2006 and 2010

5. The Equality Act 2010 brought together several pieces of equality legislation into one Act. It protects against discrimination on the grounds of the “protected characteristics”

2 House of Lords, Report of the Select Committee on the Equality Act 2010: The impact on disabled people, Session 2015–16, [HL Paper 117](#)

of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation, and requires reasonable adjustments to avoid putting disabled people at a “substantial” disadvantage.

6. These provisions apply to both the public and private sectors in employment, education, housing, goods and services, public services and transport. The Act also contains a duty on public authorities to “have due regard” to the need to eliminate unlawful discrimination, advance equality, and foster good relations (the Public Sector Equality Duty or ‘PSED’, also referred to as the ‘general duty’).

7. The Equality Acts 2006 and 2010 set out the legal details on enforcement, such as which court a case can be brought in, the remedies available and the time limits that apply. Enforcement is also affected by other more general laws that govern the operation and rules of the tribunal and courts system, such as on legal aid, costs and court processes.

The Equality and Human Rights Commission

8. The Equality and Human Rights Commission was created from a merger of the previous Commissions on race, sex and disability with a remit extended to include the remaining protected characteristics, plus human rights. The Equality Act 2006 sets out its duties and powers, which are similar to those held by the previous Commissions. When the EHRC opened its doors in 2007 some of these powers were limited to certain protected characteristics but the 2010 Equality Act updated and harmonised the powers of the EHRC so that they are now broadly the same across all protected characteristics.

Devolution

9. There are some differences in how the Equality Act 2010 applies in England, Wales and Scotland, the most significant being in the public sector equality duty. The ‘general duty’ is the same across all three nations but decisions on the specific duties—designed to support performance of the general duty—are devolved. The action required of public bodies under the Welsh and Scottish specific duties is more extensive than the requirements in England. Northern Ireland has its own anti-discrimination laws, separate from the Equality Act 2010, and a different public sector equality duty.

10. The Equality and Human Rights Commission operates across England, Wales and Scotland, with statutory Committees helping it to “identify opportunities to advance equality and human rights in the specific political, economic and social contexts of Wales and Scotland”.³ In Scotland it shares its remit with the Scottish Human Rights Commission, which is responsible for human rights in devolved matters.

2 The limitations of an individual approach to enforcement

11. Our inquiry was looking for the most effective enforcement approach for the Equality Act 2010. Legal action by individuals against another person or organisation, with compensation or damages as the most common remedy, is currently the main way that rights in the Equality Act 2010 are enforced. This has been criticised on a number of grounds.

The difficulties facing individuals in enforcing their rights

12. The individual approach relies on an individual to initiate legal action, something that many will not be able to do. Inclusion London set out a range of reasons that echoed evidence from other witnesses: poor knowledge of rights; unwillingness to go up against a large organisation with many more resources; complexity of the law; a lack of specialist legal support; the high cost of legal action and very limited access to legal aid.⁴ The EHRC also pointed to a range of challenges that they saw as inherent in “a model of protection for equality rights which relies predominantly on individuals bringing claims through courts”, including the imbalance of power between the parties in a discrimination case and the stress and complexity of bringing a claim. They suggested that the latter point was “heightened by the cost and the low level of compensation available in some cases.”⁵

13. We heard directly from individuals who had brought discrimination claims in employment and goods and services. We spoke to one woman about her experience of challenging discrimination in employment, but cannot quote her because her concern of repercussions if she were to be identified meant that we had to take her evidence in private. This in itself speaks volumes about the barriers facing people in an individualised system.

14. We also heard from two individuals who had both used the Equality Act to challenge discrimination in access to services: Doug Paulley and Esther Leighton.⁶ Mr Paulley is known publicly for his successful litigation, including in the Supreme Court where he was supported by the Equality and Human Rights Commission in a challenge to the failure of First Bus to enable disabled people to use wheelchair spaces.⁷ He nevertheless told us that:

The enforcement mechanisms do not work for me, for the very few other disabled people able to attempt to bring cases or for disabled people in general. Those that do attempt to enforce it are punished in deeply personal and unpleasant ways.⁸

15. Esther Leighton explained how this ‘punishment’ had come in a range of different forms: in one court case the defendant tried to force her to disclose deeply personal

4 Inclusion London ([EEA0187](#)). Example of others raising similar issues are: Action on Hearing Loss ([EEA0035](#)); Dr Michael Toze ([EEA0017](#)); NAT (National AIDS Trust) ([EEA0175](#)); A member of the public ([EEA0022](#)) Ian Lawson ([EEA0008](#)); Salford Welfare Rights Service ([EEA0161](#)); Black South West Network ([EEA0267](#)); NASUWT ([EEA0261](#)); Discrimination Law Association ([EEA0255](#)); Northern Ireland Council for Racial Equality ([EEA0193](#)); Business Disability Forum ([EEA0209](#)); Ms Natalya Dell ([EEA0194](#)); Salford Welfare Rights Service ([EEA0161](#)); Incorporated Society of Musicians ([EEA0036](#))

5 Equality and Human Rights Commission ([EEA0254](#))

6 [Qq235-272](#)

7 [FirstGroup PLC v Paulley \[2017\] UKSC 4](#)

8 [Mr Doug Paulley \(EEA0139\)](#)

medical information, unnecessary to the case, to ‘prove’ she was disabled⁹; she told us that in another a service provider “chased me down the road with [my] complaint letter, put it in the back of my wheelchair, pushed the back of my back rest and moved my body”¹⁰; and another defendant had reported her for blackmail when she threatened court action for discrimination. In the latter case she was even interviewed by the police under caution.¹¹ Adverse media attention had led to her address being published and “even a disablist death threat.”¹²

16. The emotional distress of going through the court process was also cited by others. Jeanine Blamires, who won a claim for disability discrimination against the Local Government Ombudsman, experienced repeated failures to provide reasonable adjustments, including by the civil legal aid service, which left her in “the completely terrifying situation of being a disabled Litigant in Person.”:

Though I won, it took four distressing years which included my having to receive help from a first aider at court and having to be removed from the hearing due to a failure in my health on two occasions.¹³

17. She nonetheless saw the case through, crediting support from her husband, the Personal Support Unit and Leeds Combined Court staff “who ensured I had the reasonable adjustments necessary to access the court service” with enabling her to do so.¹⁴

18. Clearly litigation places a significant burden on individuals. We consider how the litigation process can be improved in Chapter 8, but we also heard evidence that the reliance on individual enforcement in and of itself may be the more significant problem.

The limitations of individual enforcement

19. The RNIB told us that individual claims rarely result in systemic change because “cases are often settled for [an] individual with no wider change”¹⁵. Esther Leighton agreed explaining that “some providers settle repeatedly—at different locations—rather than do something systemic.” Even those, like her, who wanted to push for more found they couldn’t because of the risk of being penalised with costs liabilities for refusing a settlement, combined with the limitations of the remedies available if they did pursue the case to a successful judgment.¹⁶

20. This links to another problem with individual enforcement—that the solutions needed were not always individual compensation for an individual act. RNIB argued that, for example, inaccessible websites and a lack of accessible information were forms of discrimination affecting blind and partially sighted people “as a class” meaning that “relying on individual enforcement is not effective.”¹⁷ While a higher volume of cases could help, Doug Paulley had “taken 60+ Reasonable Adjustment court cases” but even when his cases had resulted in company policy changing—he gives the example of coach

9 Esther Leighton ([EEA0247](#))

10 [Q245](#)

11 Esther Leighton ([EEA0247](#))

12 Esther Leighton ([EEA0247](#))

13 Mrs Jeanine Blamires ([EEA0104](#))

14 Mrs Jeanine Blamires ([EEA0104](#))

15 RNIB ([EEA0199](#))

16 Esther Leighton ([EEA0247](#)).

17 RNIB ([EEA0199](#))

companies that changed their policy to “afford wheelchair users spontaneous travel”—this was not being met in practice and in the example of coaches apparently not being enforced by the relevant regulator.¹⁸ In oral evidence he told us that:

The whole individualising approach, where individual disabled people have to take things to court, is part of the problem. Yes, we have been discriminated against in a specific instance, but what we are trying to achieve is not just for our benefit. The whole individual tort law system does not really do the job.¹⁹

21. The Government Equalities Office argued that the main purpose of the 2010 Act is to provide protections for the individual, and that as “cases depend very much on their particular circumstances” it followed that “the findings of a court or tribunal in one specific case may not be found relevant even in an ostensibly similar case.”²⁰ The GEO did, however, acknowledge that in certain cases such as those concerning “certain uniform duties” with widespread coverage:

the outcome of individual cases may require large numbers of employers, or providers of goods, services or public functions, to take similar action to reduce the risk of later being found in breach of the duty as interpreted in that particular case.²¹

22. Baroness Williams agreed that some cases could have a wider impact, citing as examples *FirstGroup Plc v Paulley*, which she told us “ended up with public transport having to make provision for disabled people” and *Seldon v. Clarkson Wright and Jakes* which “was around age discrimination”.²²

23. We do not disagree that there are many examples of case law that makes the obligations on employers, service providers and public bodies clear. Despite this, many such organisations still do not meet these obligations and go unchallenged under the current individualised approach. While individuals must still have the right to challenge discrimination in the courts, the system of enforcement should ensure that this is only rarely needed. This requires a fundamental shift in the way that enforcement of the Equality Act is thought about and applied.

18 Mr Doug Paulley ([EEA0139](#))

19 [Q270](#)

20 Government Equalities Office ([EEA0259](#))

21 Government Equalities Office ([EEA0259](#))

22 [Q626](#)

3 The enforcement role of the Equality and Human Rights Commission

24. The Equality and Human Rights Commission is the ‘national equality body’ for England, Wales and Scotland. It is required by statute to promote understanding of the importance of and encourage good practice in relation to equality and diversity; promote equality of opportunity; promote awareness and understanding of rights under the Equality Act; enforce the Equality Act; and work towards the elimination of unlawful discrimination and unlawful harassment.²³

25. It came into being on 1 October 2007 as a merger of the three former equality commissions on race, gender and disability,²⁴ with the addition of responsibilities on religion or belief, sexual orientation, age, gender reassignment and human rights. It has a range of powers that include: provision of information and advice; issuing codes of practice and other guidance; and advising government on the effects of laws and proposed laws on equality and human rights. It also has substantial powers to enforce the Equality Act, many of which it inherited from the previous equality commissions.

Box 1: Powers of the Equality and Human Rights Commission

The Equality Act 2006 gives the Commission powers to:

Conduct investigations into compliance with the Equality Act 2010. Where a person is found to have committed an unlawful act it may issue a notice to this effect and may require the preparation of an action plan to avoid the act being repeated or continued.

Conduct assessments of compliance with the public sector equality duty and issue a compliance notice where it finds a breach. This may require the public authority concerned to provide a written proposal on steps to ensure compliance.

Enter into binding agreements with organisations who commit to take, or refrain from taking, specified action. This could be used as an alternative to taking other formal enforcement action.

Apply to the court for an injunction restraining a person from committing an unlawful act.

Breach of a notice or court order issued under the above powers can be enforced in court and lead to an unlimited fine.

Support individual complainants to bring a case (including financial support), bring judicial review proceedings in its own name and intervene in cases brought by others.

Conduct inquiries leading to recommendations of potentially wide application.

Provide information, advice, guidance, education and training, and undertake research.

Issue Codes of Practice (subject to the approval of the Secretary of State).

23 Equality Act 2006. The Equality and Human Rights Commission is also one of the United Kingdom’s National Human Rights Institutions and has both duties and powers in respect of human rights that we do not consider in this report as they are outside the inquiry’s terms of reference.

24 The Commission for Racial Equality, the Equal Opportunities Commission (which dealt with gender equality) and the Disability Rights Commission.

26. The most widely known of the EHRC's enforcement powers are its ability to fund or otherwise support discrimination cases brought by individuals or other organisations, and to bring a judicial review in its own name to challenge the decision of a public authority. These are activities that others, such as trade unions or charities can also undertake. The Commission also has enforcement powers that only it can exercise, including conducting investigations into suspected breaches of the Equality Act that can result in notices requiring compliance which are enforceable in the court and could result in an unlimited fine. The Commission can also apply to the Court for an injunction to prevent a breach of the Act, which can also lead to an unlimited fine if it is breached.

The big bad wolf?

27. Given the powers it has, many witnesses wanted the EHRC to be more proactive in taking enforcement action²⁵ and David Isaac when he was appointed Chair of the EHRC in 2016 made a commitment that the Commission would become a “more muscular regulator”²⁶. In 2017 David Isaac told the Committee:

I am very keen that the Commission uses its investigatory and legal powers much more than it has done in the past, because these are powers that uniquely sit with the Commission and we must use them²⁷.

28. It is, however, clear from the evidence we have heard that many experts, organisations and individuals do not believe this is happening. While feeling that things had improved, Sam Smethers of the Fawcett Society argued that the Commission could “be more on the front foot, and not wait for someone to say, “Are you going to enforce this?””²⁸ Doug Paulley, an individual who has brought a number of disability discrimination cases, including with support from the EHRC, told us that he had found the Disability Rights Commission “much more proactive and easy to interact with”:

To be honest, it felt like they lost their mojo completely when they joined the other equality bodies and became the Equality and Human Rights Commission.²⁹

29. Jeanine Blamires, who had brought a successful disability discrimination claim against the Local Government Ombudsman as a Litigant in Person, spoke for many when she told us that the absence of proactive enforcement by the Commission meant that “organisations are not fearful of breaching the Equality Act and [...] behave with impunity.”³⁰ We asked a range of our other witnesses if they thought organisations and business worried about the EHRC taking enforcement action against them. Not one thought so.³¹

25 [Q35](#)(Sam Smethers); Equality Network ([EEA0121](#)); Mind ([EEA0182](#)); Mrs Jeanine Blamires ([EEA0104](#)); RNIB ([EEA0199](#)); [Q242](#) (Doug Paulley); Nathalie Abildgaard ([EEA0270](#)); Black South West Network ([EEA0267](#)); Yvonne Hall ([EEA0203](#)); Ms Natalya Dell ([EEA0194](#)); Salford Welfare Rights Service ([EEA0161](#)); Spinal Injuries Association ([EEA0149](#))

26 Equality and Human Rights Commission, ‘[Prioritising our legal work](#)’, accessed 18 July 2019

27 Oral evidence taken on 18 January 2017, HC (2016–17) 932, [Q6](#) [David Isaac]

28 [Q41](#)

29 [Q242](#)

30 Mrs Jeanine Blamires ([EEA0104](#))

31 [Q136](#) (Nick Whittingham; Richard Miller; Christine McAnea; Alex Hayes)

30. For many, this was because the Commission lacked “organisational confidence”³² to act. Karon Monaghan QC spoke for many when she told us that “they need money, but they also need to have a culture of, “We’re going to go in there and we’re going to show them””³³ Catherine Rayner agreed, suggesting that “even with the funding that they have, they could [...] do more with it on the enforcement side.”³⁴ She also wanted to see the Commission “shouting” a lot more about what it does on enforcement.³⁵

31. Barbara Cohen, a discrimination law expert and former legal officer at the Commission for Racial Equality was stronger in her criticism. She told us that the EHRC “does not advertise itself as an enforcer”. Instead it “funds interesting research” or “will have one announcement and nothing more will happen.” She wanted to see the Commission “just beginning to shout, “We are the big bad wolf and we are coming for you.””³⁶

The Commission’s role in the new enforcement approach

32. Razia Karim and Barbara Cohen—both past legal officers for the Commission for Racial Equality who made a joint submission to the inquiry—shared with us EHRC enforcement data obtained by a Freedom of Information request.³⁷ The table (below) covers the period from when the Commission was created until March 2018.

32 [Q41](#) (Sam Smethers)

33 [Q10](#)

34 [Q4](#)

35 [Q50](#)

36 [Q147](#)

37 Barbara Cohen and Razia Karim ([EEA0265](#))

Table 1: EHRC's use of litigation and enforcement powers

Unless stated otherwise, table below shows approximate number of times that EHRC agreed or agreed in principle to the use of each of the powers listed, even if matter subsequently did not proceed or decision was later revoked (or in the case of litigation, settled or concluded without a hearing).

	Oct 07 to Mar 09	Apr 09 to Mar 10	Apr 10 to Mar 11	Apr 11 to Mar 12	Apr 12 to Mar 13	Apr 13 to Mar 14	Apr 14 to Mar 15	Apr 15 to Mar 16	Apr 16 to Mar 17	Apr 17 to Mar 18
s28 legal assistance										
s28 full assistance ¹	64	50	31	13	21	9	16	5	6 ²	19 ³
s28 limited / pre-assistance cases ⁴ :	n/r	n/r	n/r	2	3	7	7	7	3 ⁵	20 ⁶
s28 disability: access to justice pilot: Stage 1	N/A	90 ⁷	N/A							
s28 disability: access to justice pilot: Stage 2	N/A	28 ⁸	N/A							
s28 Legal Support Project (Eng and Wales) ⁹	N/A	48 ¹⁰								
s28 Legal Support Project (Scotland)	N/A	3 ¹¹								
Interventions	37	28	23	12	17	20	18	18	15	26
Agreements¹²	2	2	1	3	1	1	4	7	0	2
Inquiries¹³	4	2	1	0	0	0	2	0	1	0
Investigations¹⁴	3	0	0	0	0	0	1	0	0	0 ¹⁵
Injunctions	0	1	2	0	0	1	0	0	1	2
Assessments	6	2	1	0	0	0	0	0	0	0
Compliance Notices	0	7	0	0	0	0	0	0	0	0
Judicial Review	1	1	1	1	0	0	0	1	0	14 ¹⁶
Other formal enforcement action	0	0	1	0	0	0	0	0	0	0
s27 - referred to conciliation¹⁷	180	73	59	51	N/A	N/A	N/A	N/A	N/A	N/A
s27 - concluded at conciliation	214	45	57	45	16	N/A	N/A	N/A	N/A	N/A

33. This table shows a significant decrease in enforcement activity over time, although with a notable increase in 2017/18. It also shows a tendency to favour use of powers to intervene in existing cases over other powers, particularly those enabling the Commission to initiate action without an identifiable complainant. Some of these ‘unique’ powers have never been used, and others used very infrequently. Since 09/10 the Commission has issued no compliance notices—which could be enforced in the court with a potentially unlimited fine if they were not acted on. It has applied for injunctions to prevent unlawful discrimination in seven instances, none of which we could find information about on their website. Only one formal investigation had been initiated since 09/10 and there had been no assessments of compliance with the single public sector equality duty brought in by the Equality Act 2010.

34. The result of this is that the burden of enforcement has been borne by individuals, even where the EHRC has become involved. Barbara Cohen and Razia Karim explain why this is problematic:

it is wrong to place the main burden of equality law enforcement on individual litigants—for whom the discrimination or harassment they have experienced may have been extremely traumatic and demoralising as well as leaving them unemployed or homeless or deprived of essential services.³⁸

They spoke for many when they argued that it was “too much to expect the individual to bring about a change in a workplace, a police force or a government department or a particular sector”.³⁹

35. This is not to say that support from the EHRC had not been important for those individuals that had received it. Doug Paulley had been supported to bring his most significant case, *Firstgroup plc v Paulley*, to the Supreme Court with EHRC funding.⁴⁰ Nick Webster argued that “when you work with the EHRC it is incredibly effective.” He gave the example of one of his recent cases that they had supported “which did change the legal landscape [...] and could benefit potentially thousands of other people.” He was clear that:

Had the EHRC not been involved and taken a significant risk in using its limited budget, the case would not have happened and we would be in a worse place for it.⁴¹

36. Nor would we argue that the Commission’s enforcement work has not had any impact. The Equality and Diversity Forum highlighted a series of important cases that the Equality and Human Rights Commission had been involved with, telling us that it believed these showed that “the Commission does use its powers effectively”.⁴²

38 Barbara Cohen and Razia Karim ([EEA0265](#))

39 Barbara Cohen and Razia Karim ([EEA0265](#)). See also: Guide Dogs for the Blind Association ([EEA0258](#)); Mind ([EEA0182](#)); The Access Association ([EEA0044](#)); Nathalie Abildgaard ([EEA0270](#))

40 *FirstGroup PLC v Paulley* [2017] [UKSC 4](#)

41 [Q142](#)

42 Equality and Diversity Forum ([EEA0177](#)). See also: Dr Jenny Morris ([EEA0049](#)); Ms Louise Whitfield ([EEA0157](#))

37. Our concern is not that such individual action is not positive, it is that this piece by piece approach is insufficient in the face of the systemic and routine discrimination, a concern reflected in the tailored review recommendation “that the EHRC [...] reset its vision to focus on use of its unique powers as an enforcer and regulator of equality law.”⁴³

Developing enforcement action: A critical mass

38. We heard strong support for the Commission developing a critical mass of casework—of a type and scale that would drive real change. Niall Crowley, an international expert on national equality bodies, told us how this question was being dealt with internationally:

One of the issues—and it is an issue that is not unique to here—is about strategic litigation and the search for cases that set a legal precedent or change court procedures. When it comes to the type of institutional change you are talking about, that is not sufficient. That is too narrow an understanding of strategic litigation.⁴⁴

39. Nick Webster agreed that one-off cases rarely changed behaviours. This, he argued was because they could be settled, and the employer carry on as before “whereas if [...] there are 10 maternity leave claims being pursued against the same employer and that then results in the EHRC being able to do something instantly—then they may decide, “We need to look at how we deal with people that are on maternity leave”.”⁴⁵

40. The strategic litigation approach advocated for in recent standards issued by the Council of Europe had at its centre supporting a critical mass of casework.⁴⁶ Niall Crowley argued that:

The critical mass of cases [...] does generate a public debate, does generate stakeholder engagement and does generate a duty bearer engagement that is quite different [...] That can lead to that type of cultural change, whether it is a culture of compliance or a more ambitious culture of equality and non-discrimination.⁴⁷

This was not only about building a critical mass of discrimination cases brought by individuals. Nick Webster suggested that EHRC enforcement powers could also be used, especially if they were able to act more quickly, “imposing fines and not having to go through the process it has to go through.”⁴⁸ It was unclear if a change in the law was needed to do this, a question that we return to below.

41. When we asked David Isaac, the Chair of the EHRC, why their volume of case work seemed so low, he suggested that this was due to a focus on “pre-enforcement [...] where we write letters and threaten to take action”. He explained that:

That is something historically that the commission hasn’t really talked about, but we are doing a lot more of that. Sometimes that means that organisations

43 HM Government, *Tailored Review of The Equality and Human Rights Commission* (November 2018), p4

44 [Q150](#)

45 [Q170](#)

46 Council of Europe, *ECRI General Policy Recommendation No 2: Equality Bodies to Combat Racism and Intolerance at a National Level* (December 2017)

47 [Q152](#)

48 [Q154](#)

or individuals put their hands up straight away, and sometimes we enter into formal agreement. We don't necessarily need to use the full range of our legal powers to drive change and to get compliance.⁴⁹

42. The Commission's Legal Director, Clare Collier, told us that in the previous year around 350 people had come to them and in most of those there had been "some kind of contact" and that most cases reached agreement "very quickly and easily" avoiding the need to start what could be a resource-intensive investigation.⁵⁰ These resolutions are, of course, important to those individuals, but 350 cases does not come close to addressing the scale of the problem. The Commission's own research estimates that 50,000 women a year feel they have no choice but to leave their jobs when pregnant,⁵¹ and that only accounts for one form of discrimination, affecting one of the nine protected characteristics the Commission is responsible for. It is clear the EHRC's strategic approach is not proportionate to the scale of the problem, even more so when we consider that the vast majority of those 350 cases will have received little or no publicity—a point we address below.

The use of the EHRC's 'unique' enforcement powers

43. As outlined above, the EHRC has a set of enforcement powers that only it can exercise. The most commonly discussed is its power to conduct formal investigations, but it also has powers to apply to the court for an injunction and to enter into formal, legally binding, agreements on actions that a private or public body will take. Barbara Cohen explained that "what is really special about the EHRC" is that:

We do not need to have 25 people suffering the same experience because once you have had a number, the Commission could apply for an injunction. Once you have one employer doing it more than once, you can see that there is a possibility or a likelihood this employer will discriminate again; you can apply for an injunction and publicise it, so that the world knows that if somebody is continuing to discriminate, they will have more sanctions imposed.⁵²

The Commission's powers can also be used where a punitive approach isn't necessary: if the issue is a lack of understanding the Commission can sign a binding agreement, with the possibility of sanctions if it is not implemented.

44. Barbara Cohen was adamant that the Commission should be making much greater use of these powers:

I cannot stress more strongly how useful that can be in terms of changing practice and changing policy within an organisation and within a sector. It is not necessarily unduly burdensome. It is not necessarily expensive in terms of resources. You can do it in a particularly targeted way.⁵³

49 [Q574](#)

50 [Q574](#)

51 Equality and Human Rights Commission, *Pregnancy and maternity-related discrimination and disadvantage: summary of key findings* (March 2016), p6

52 [Q150](#)

53 [Q153](#)

Box 2: The power of formal investigation: a case study

Barbara Cohen gave an example of when the Commission for Racial Equality had used formal investigation powers “absolutely identical” to those now held by the Equality and Human Rights Commission to achieve impact.

“The Commission for Racial Equality—the CRE—had been concerned for a long time about race discrimination in the armed forces but there had not been any cases. Finally there was a case. A black soldier who was in one regiment wanted to transfer into the Household Cavalry. The Household Cavalry rejected him. There were no black soldiers in the Household Cavalry. One of their arguments was that it would be okay if there were two because they could talk to each other. Anyway, the case went to the employment tribunal and the case was upheld completely.

In order to carry out an investigation you need to have some suspicion that the organisation will have committed an unlawful act. We had a finding of the employment tribunal. On the back of that case, the CRE began an investigation into the Household Cavalry [...]. The investigation was very simple. It did not cost a lot and did not take a lot of time, because it simply meant that CRE staff interviewed all of the people up the chain of command who had any role in making the decision not to allow this black soldier to join.

Very quickly we were able to make a finding that discrimination had occurred, which enabled us then to introduce a sanction [...] Then we wrote to the Ministry of Defence and said that we were about to issue a non-discrimination notice against the Household Cavalry, a very old and distinguished part of the Army, which would be very bad for the reputation of the Army. The Ministry of Defence paused and the CRE said, “Well, alternatively we can enter into an agreement with you, not just for the Household Cavalry and not just for the Army, but for the Army, the Navy and the Royal Air Force [...]. We are going to give you some requirements to carry out. We are going to meet with you very frequently to see what happens.”

The MoD, concerned about reputation [...] said, “Okay, we will do the deal. On the basis that you do not enter the non-discrimination notice, we will enter into this agreement with you,” and they did. [...]

Change began to happen. [...] and they went from no black soldiers to about 10 very quickly. That did not happen in the other services. They looked to see what happened. When people made inquiries, why did they not apply? If they made applications, what happened with applications? [...] We went through the whole thing.

At the end of the three years, the MoD said, “There we are. Done.” We said, “Actually, you have not made enough progress,” so we could still serve the non-discrimination notice. We stuck with this agreement for another two years. [...] We had meetings with General Guthrie about the war in Iraq because it went all the way up to the top of the chain of command at the armed forces. [...] That was on the back of one case.

Source: [Q162](#)

45. We do not understand why, over a decade since it came into being, the Equality and Human Rights Commission does not have a similar example of having initiated enforcement action using those powers specific to it. When we asked Barbara Cohen why this was she replied “Pass. I do not know.”⁵⁴

'Shouting' about enforcement work

46. As we highlighted above, many witnesses were concerned that the Commission did not 'shout' about its enforcement work.⁵⁵ It publishes information on a selection of enforcement action on its website but does not routinely publish data on the numbers and outcomes of enforcement actions that it takes. Two of our witnesses had to resort to requests under the Freedom of Information legislation to access this data.⁵⁶

47. This lack of publicity was a problem for some, including those who felt that there was good enforcement work being done by the EHRC. Sam Smethers told us that:

Sometimes they are slightly undershooting in telling the world about the enforcement work they are doing and how they can use that dissemination to shape the behaviour of others.⁵⁷

48. This did not appear to be a new problem: Mike Smith, a former Disability Commissioner, reflected on his experience of a significant case that the EHRC had supported and won:

What was unfortunate was that the comms machinery did not then kick in and work out how to capitalise on that by persuading a larger number of organisations that there were cost and financial consequences.⁵⁸

49. Communication was an essential part of the 'critical mass' approach advocated by Niall Crowley. This required a "very particular legal strategy", linked to a communication strategy "about motivating change, rather than instilling fear and anxiety."⁵⁹ Litigation needed to be put "centre stage" with a link to powers of investigation, the organisation needed to be accessible so that people could report discrimination and it needed to show people that change is possible if they do so. Formal engagement with civil society was also important. Communication was crucial, specifically:

communication as a tool for change; communication that can build a culture of rights where people are supportive of people who take a stand on discrimination. It is about the culture of compliance [...] in terms of employers and service providers, and a culture within communities experiencing discrimination that change is possible.⁶⁰

50. Clare Collier suggested that the Commission was trying to improve the way it publicised its work. Speaking about the 'pre-enforcement' work that the Commission does, she told us that:

what we are more often trying to do differently with those kinds of cases is to publicise them. In the past, there has been a tendency for that to happen behind closed doors and for us not to talk about it [...] It was between us

55 [Q50](#) (Catherine Rayner); [Q147](#) (Barbara Cohen)

56 Barbara Cohen and Razia Karim ([EEA0265](#))

57 [Q16](#)

58 [Q150](#)

59 [Q150](#)

60 [Q154](#)

and them, a little bit. Now we are saying that we would like to talk about it so that other employers or service providers are aware that that is something that has happened and that we are drawing it to everyone's attention.⁶¹

51. Individuals are facing discrimination because employers and service providers are not afraid to discriminate, knowing that they are unlikely to be held to account. A critical mass of cases is needed to build a culture where compliance with the Equality Act 2010 is the norm. This requires the changes to the Courts and Tribunals system that we outline in Chapter 8, but also significantly greater action by the Equality and Human Rights Commission.

52. The Equality and Human Rights Commission should significantly increase the volume, transparency and publicity of its enforcement work by making much greater use of its unique enforcement powers, publicising that work and reducing its reliance on individual complainants.

53. Publicising the enforcement action that you are taking and doing so in a way that not only enables compliance but also acts as a deterrent, is a crucial foundation to the work of any effective enforcement body. If service providers, employers and other organisations do not see that the Equality Act is being robustly enforced then a key driver for compliance is missing. Likewise, if those whose rights are not being upheld do not see the EHRC as an active enforcer then they will not come forward with the intelligence the Commission needs to take such action.

54. We recommend that the EHRC publish data on its enforcement activity, including both formal and informal compliance work. This should include summaries of the facts of cases, along with information on the outcomes in a way that can act as case studies on what compliance looks like and act as a deterrent to discrimination.

Why has the Commission not acted more robustly?

55. We heard a number of explanations as to why the Commission has not used its enforcement powers more robustly, most frequently access to intelligence particularly changes to the telephone helpline, the cumbersome nature of some of its powers and significant reductions in financial resources.

Access to intelligence

56. If the Commission is to become more proactive it needs significantly to improve its ability to identify and set priorities.⁶² This requires access to intelligence on where discrimination is happening and who it is happening to. Nick Webster and Niall Crowley were both concerned that the EHRC may not have access to this information because it no longer ran the public helpline,⁶³ now known as the Equality Advisory Support Service and currently run by G4S under a contract managed by the Government Equalities Office. This change was also criticised by Sam Smethers of the Fawcett Society, who told us that when she was at the Equal Opportunities Commission, one of the predecessor bodies to the EHRC, the helpline was “a great source of connecting up lived experience of women

61 [Q574](#)

62 HM Government, [Tailored Review of The Equality and Human Rights Commission](#) (November 2018)

63 [Q174](#)

on the ground [...] and the policy work, campaigning work and legal enforcement work we did.” She viewed the absence of the helpline as “a weakness in its overall architecture.”⁶⁴ Mike Smith, a former Disability Commissioner at the EHRC reflected on his experience when the helpline was run in-house:

I remember getting reports on advice line cases and we said, “Did you think about going back to them and talking to the lawyer again about this element of the case?” because they might pursue that, and that would then feed the generation of a potentially good case. By having the practical conversations that happened within one organisation between different offices around the coffee machine, in the staff meeting or whatever, you ended up with a different kind of dialogue where there were 360-degree conversations around the issues that were arising, with corporate responses and how they might link to the use of strategic powers and so on.⁶⁵

57. The Commission has argued for management of the helpline to be returned to it, because of its importance as a source of intelligence allowing it to “take targeted action to support more people to resolve complaints, as well as to challenge systemic discrimination.”⁶⁶

58. Despite such concerns, it does appear that intelligence is being passed to the EHRC. Alex Hayes, who manages the helpline for G4S, told us that as well as proactively sending information they “give the EHRC literally anything they ask for.” There were weekly calls with EHRC lawyers to discuss cases and “hotspots that have come from the week” and any other information was sent as well as “all the high-level numbers”. Ms Hayes acknowledged concerns about sharing of information but argued that “speaking to my teams and how they are working with the EHRC, I think it has got better”. She explained that:

How it used to work in the past was that we would speak to them about what was strategic and we would send them those cases. Now we just kind of send them everything so they can decide what is strategic, systemic or what they need information on.⁶⁷

59. Access to intelligence was considered by the recent tailored review of the EHRC. It examined the call from the Commission and others for the helpline to be brought back in house, but also considered the wider range of methods that the EHRC has for gathering intelligence and engaging with stakeholders. It concluded that:

The helpline may not work to EHRC’s satisfaction in terms of advice provision or intelligence gathering but it is only one component of a relatively weak system for identifying where the EHRC should intervene, especially in England.⁶⁸

60. The review did not see the helpline as the long-term solution to advice provision and evidence gathering. Rather it recommended that the EHRC “reset its approach to intelligence gathering capability to ensure it has genuine intelligence from the front line”

64 [Q16](#)

65 [Q174](#)

66 Equality and Human Rights Commission ([EEA0254](#))

67 [Qq97–100](#)

68 HM Government, [Tailored Review of The Equality and Human Rights Commission](#) (November 2018), p23

and work with the GEO to “plan a broader user-focused, multi-channel, approach to advice provision” of which the helpline could be one part.⁶⁹ Our scrutiny of the EHRC suggests that its current view of what constitutes ‘intelligence’ is far too narrow: as MPs we are frequently made aware of problems through social media, letters from constituents, local and national media, debates in the House of Commons Chamber and the reports of other select committees. We are at a loss as to why the EHRC cannot use a similarly wide range of information sources.

61. While noting the number of witnesses who emphasised the importance of the helpline, we are not convinced that that the Commission is not able to use it to access intelligence and we agree with the tailored review that this is one part of a much wider challenge for the EHRC—one that needs to be addressed through its broader strategy of engagement and intelligence gathering, rather than a narrowly focussed telephone helpline.

Cumbersome procedures

62. Another concern was the amount of time that using the Commission’s specific enforcement powers could take. Rebecca Hilsenrath admitted that in the past they would only be “doing either an inquiry or an investigation at any one time” and that those would normally take “around [...] two or three years”. She contrasted this with their present activity, where they were running “two concurrent investigations and three inquiries” most of which they expected to be concluded by the end of the year.⁷⁰

63. We asked the Commission about two quite different areas that were at that time the subject of enforcement action: unequal pay at the BBC and organisations that failed to publish their gender pay gap information on time. Both involved the use of the Commission’s power of formal investigation. The action against the BBC has taken considerable time, as can be seen in the box below setting out key activity in the two years since the first significant evidence emerged in the public domain.

69 HM Government, [Tailored Review of The Equality and Human Rights Commission](#) (November 2018), p24

70 [Q574](#)

Box 3: EHRC formal investigation of equal pay at the BBC: a timeline**2017**

July

BBC publishes pay data for its highest earners. Concerns raised in the media and in Parliament about equal pay at the corporation.

2018

January

BBC China Editor, Carrie Gracie, resigns over unequal pay.

Reports in the press that the Commission intends to write to the BBC regarding reports of alleged pay discrimination; further debate in Parliament.

February

Chair of Women and Equalities Committee writes to the EHRC asking for information on enforcement plans and the deadline given to the BBC to reply to its January letter.

March

BBC journalists give evidence to the Digital, Culture, Media and Sport Select Committee detailing evidence of unequal pay at the BBC.

October

The Digital, Culture, Media and Sport Select Committee publish a report recommending action by the BBC to tackle unequal pay in the Corporation.

2019

January

The Digital, Culture, Media and Sport Select Committee publish a second report, finding that the BBC has failed to acknowledge that a pay discrimination problem exists within the Corporation.

March

The EHRC announce it is launching a formal investigation into unequal pay at the BBC 18 months after the BBC originally published data that indicated there could be equal pay issues in the organisation.

Media reports that a BBC manager has turned down a promotion after finding out that she had been offered £12,000 less than a man doing the same job.

June

The EHRC confirms that it can receive evidence from individuals who have signed a non-disclosure agreement.

64. We asked the EHRC why it had taken over a year from their first interest in the area and nearly two years since evidence was in the public domain to finally decide to use their formal enforcement powers against the BBC. The response we received reflected the 'timidity' and 'lack of organisational confidence' referred to previously by other witnesses

and short comings in its own policies. This can be seen in the way the BBC succeeded in delaying the EHRC's investigation for 18 months, despite significant evidence already being in the public domain. Clare Collier told us:

we were in protracted and detailed discussions with both the complainants and the BBC in relation to this matter. We progressed quite a long way with the BBC [...] it was in May when we reached the point where we said, “Actually, this has to be a statutory investigation, because we need to use our power to compel evidence.”⁷¹

65. In contrast, the Commission appeared to find it more straightforward to act reasonably quickly on failures to publish gender pay gap information: the deadline was in April and by June the Commission had launched a number of formal investigations. Rebecca Hilsenrath explained the difference as being primarily due to the ease of understanding “whether somebody is in breach of the law”. For the gender pay gap regulations this was a simple binary issue “you either publish or you do not publish”, which was why they had been able to act in a shorter timescale.⁷² It appears, then, that the key factor behind the slow response to unequal pay at the BBC and the quicker response to failures to publish gender pay gap information came down to the Commission feeling that it had sufficient evidence of unlawful activity.

66. It is true that the Commission can only launch a formal investigation if it reaches the threshold of information to show that “it suspects that the person concerned may have committed an unlawful act.”⁷³ David Isaac argued that this meant the Commission was “completely dependent upon the good will of the individuals who are being threatened with the investigation” to obtain the evidence to “establish that the threshold has been met.”⁷⁴ He also expressed concern that the Commission not find itself acting outside of its powers, with the subsequent risk of being judicially reviewed.⁷⁵ Mike Smith recalled similar concerns when he was a Commissioner at the EHRC. These had sometimes led to an “expensive and drawn-out process to get to the stage where you were sure that you were using those powers appropriately” and fears of the expense of “big organisations countersuing or claiming that we were not using our powers correctly”.⁷⁶

67. Rebecca Hilsenrath's solution for the delays in bringing enforcement action was for the EHRC to have more powers, arguing that “if all we had to do was turn around and say, “You have not published—here's a fine,”” when someone failed to publish the pay gap regulations they could act much more quickly than under the rules on formal investigations.⁷⁷ Other witnesses did support the Commission's request for additional powers. Mike Smith thought they were “pretty sensible suggestions” and could not see a “logical reason” why they had not been agreed to through the tailored review⁷⁸—which concluded that the Commission should address “issues of effectiveness and impact” before resorting to extending its powers.⁷⁹

71 [Q593](#)

72 [Q609](#)

73 Equality Act 2006, [Section 20](#)

74 [Q599](#)

75 [Q610](#)

76 [Q155](#)

77 [Q609](#)

78 [Q171](#)

79 HM Government, [Tailored Review of The Equality and Human Rights Commission](#) (November 2018), p25

68. The Committee is deeply concerned that the EHRC found it difficult to challenge an organisation like the BBC in a reasonable amount of time given the scale of the problem, the publicly available data and the number of individuals affected. We are not convinced by the Commission’s argument that additional powers are the way to enable swifter action, rather than a change to its own policies. The tailored review was not persuaded that the problem lies with the Commission’s legal powers, and nor are we.

69. We recognise that the law sets out a threshold to be met before launching enforcement action, but it appears to us that the EHRC is applying too high a standard of proof for that threshold. Rebecca Hilsenrath referred to evidence of “whether somebody is in breach of the law”⁸⁰, when the legislation only refers to a ‘suspicion’ that a person ‘may’ be in breach—albeit a reasonable one—and David Isaac felt there was a need to access information held by the suspected discriminator⁸¹ when extensive information on unequal pay at the BBC was already available in the public domain.⁸²

70. The Commission has acknowledged that its own policies have hindered action in the past by deciding “that to use a statutory power you had to be at the last resort.”⁸³ This is a policy of the organisation and is not based on the legislation that set out the EHRC’s powers. While the Regulators Code requires proportionality, it in no way rules out swift, public, enforcement action and the Equality Act 2006 already sets out processes to ensure fairness to those being investigated.⁸⁴ The Commission is now producing a new enforcement policy intended to enable action to be taken “when we think it is appropriate to do so and when the threshold is met” on the basis of factors such as “whether we are going to achieve impact, and whether the issue is sufficiently serious and those kinds of things.”⁸⁵

71. We share the view of the tailored review that the EHRC should address the shortcomings in its own policies and the concerns with how it uses its existing powers before Parliament considers granting new powers. While we have sympathy with the desire to act more quickly by, for example, issuing fines, we do not understand why the Commission cannot already do so using its existing powers which include the ability ask the county court to issue a potentially unlimited fine for failure to comply with enforcement notices under the Equality Act 2006.

72. We note the concerns about how the Commission can gather the information that it needs to reach the threshold of evidence to suspect a breach of the Act, and so be able to launch a formal investigation. **It should have been possible for the EHRC to reach the threshold for suspecting an unlawful act in a case such as that of unequal pay at the BBC—where data had been released by the BBC and media reports, select committee inquiries and evidence from those affected all provided evidence of discrimination. If this is not possible under the current law, then that law must be changed.**

73. *We recommend that the EHRC assesses its enforcement policies and practices to ensure that the threshold for suspecting an unlawful act may have taken place is no*

80 [Q609](#)

81 [Q599](#)

82 See above, box 3

83 [Q612](#)

84 [Q159](#) (Barbara Cohen)

85 [Q612](#)

higher than required by the law. It should publicly set out the type and level of evidence that will allow it to meet that threshold. If, after changing its policies, the Commission still struggles to meet that evidence threshold then the law must be changed accordingly.

Resourcing

74. In terms of the volume of enforcement action, the EHRC argued that:

the Commission was not established, and has never been resourced, to support large numbers of individual discrimination cases or high-volume enforcement activity.⁸⁶

75. The Government Equalities Office similarly told us that the Commission “was never envisaged as a classic inspectorate/regulator”. Nor was it expected to provide legal assistance to “anything beyond a small minority of those individuals seeking to bring discrimination claims”. They argued that:

If the EHRC was significantly to expand its enforcement and/or the number of individual cases it becomes involved in, clear choices would need to be made about its purpose as an organization and the extent to which it should continue to carry out other functions.⁸⁷

76. The EHRC has faced significant budget and staffing reductions in recent years. It now employs 206 staff, down from 530 in 2010. Its budget has been reduced from a peak of £70.3 million in 2007 to £18.55 million in 2019, following successive spending reviews. Some of this reduction is accounted for by changes to the Commission’s functions estimated to account for £10.2 million of the Commission’s budget (for example the outsourcing of the helpline). Even leaving aside this reduction, the EHRC has had its budget reduced by nearly £42 million since 2007. The EHRC is now arguing for an increase of 30% in its current budget.⁸⁸

77. The tailored review of the EHRC considered the question of the reduction in funding for the Commission. While acknowledging the reductions in both budget and staffing levels, the review also highlights that the EHRC has had “consistent underspends” including over £500,000 in 2017/18. The EHRC told the review that it had put in place “a more robust business planning and budget monitoring framework” to address this problem.⁸⁹ Despite having done so, the March 2019 EHRC Board minutes, the most recent available, forecasted an underspend of £689,000 for 2018/19.⁹⁰

78. Significant evidence given to this inquiry strongly suggests that the effectiveness of the EHRC is not solely linked to funding levels. Furthermore, if there was more ‘organisational confidence’ and existing powers were being used effectively there would be a far stronger case to ask Government to consider future funding levels for the organisation.

86 Equality and Human Rights Commission ([EEA0254](#))

87 Government Equalities Office ([EEA0259](#))

88 HM Government, [Tailored Review of The Equality and Human Rights Commission](#) (November 2018), p27

89 HM Government, [Tailored Review of The Equality and Human Rights Commission](#) (November 2018), p27

90 Equality and Human Rights Commission, [Minutes of the 82nd meeting of the Board of the EHRC](#) (March 2019), p3

79. **The tailored review of the EHRC did not come to a conclusion on whether or not its budget was adequate, instead emphasising the need for a clear purpose and set of priorities as the starting point to determine the right level of resources. The review recommended that, once these had been set, the GEO and the EHRC work together to set out the case for a new budget settlement. We agree that this is a sensible approach, especially given the pivotal organisation and policy issues contained within this report and as well as the consistent underspends outlined above.**

Resourcing for 'risky' strategic litigation

80. One area where we do think that the Government should consider the resourcing of the EHRC, however, is in respect of what witnesses described as 'risky' strategic litigation. Even with a move towards greater use of its own enforcement powers and a focus of resources on building a critical mass of cases, the EHRC will still be uniquely placed to bring those strategic cases that develop the law and bring legal clarity. Such cases are inherently risky, as Richard Miller, Head of Justice at the Law Society explained:

One of the real challenges with test cases [...] is the fact that even an organisation like the EHRC has the risk of an adverse costs order. Therefore, at any one time they could have a potential liability that they have to account for, as well as the ongoing actual costs of running that case.⁹¹

81. We do not believe the burden of that risk should rest with individuals—as it does when the Commission intervenes in but does not fund such cases. Mr Miller's solution was a simple one: he suggested that if the Government were to provide an indemnity for any adverse costs in such cases, "that might enable the organisation to do more with the resources it has."⁹²

82. This would be a fairly simple measure for the Government to put in place and would enable the EHRC to shift its focus, and resources, to the kind of routine strategic enforcement action that we envisage in this report without losing its ability to bring strategic cases in the more traditional sense where they are necessary.

83. ***We recommend that the Government launch a consultation with a view to introducing a scheme to indemnify the EHRC against the risk of high costs for strategically important cases.***

Is the Equality and Human Rights Commission fit for purpose?

84. The above discussion, and the extent of the criticism of the EHRC, raises one important question: is the Commission itself fit to deliver the kind of enforcement strategy that can tackle the systemic and routine discrimination that too many people experience as a simple fact of life? The Commission has itself acknowledged that in a system of enforcement based on individual litigation it "can support and supplement this system, but it cannot replace it."⁹³

91 [Q133](#)

92 [Q133](#)

93 Equality and Human Rights Commission ([EEA0254](#))

85. It is safe to say that, in terms of effectiveness, the Commission has a chequered history. Mike Smith, a former commissioner told us that when he joined in 2009 “the organisation was still struggling with the combination of three legacy commissions with three quite different cultures” and that:

I do not think it was incredibly well organised and did not have a well-functioning comms department and had not worked out how to link together its different internal organisations.⁹⁴

86. Since then it has been through a number of restructures, most recently in 2017 when the Commission implemented its new ‘Target Operating Model’. It has recently published a new Strategic Plan for the period 2019–2022 and is consulting on a new litigation and enforcement policy. The question remains of whether these changes on paper will lead to changes in practice.

87. David Isaac told us that the “development and finalisation” of the Commission’s new strategic plan “has given us the opportunity to make enforcement centre stage”. He told us that they had “a new legal enforcement policy” and “a new team that is focused on legal enforcement, with dedicated resources.”⁹⁵ The Government Equalities Office supported this change in direction, suggesting that “identification of areas of employment or service provision where discrimination or harassment is widespread albeit perhaps low-level is a more effective approach”.⁹⁶

88. These changes are too recent for many of our witnesses to comment on, but some had seen the draft strategic plan. Barbara Cohen was concerned that the Commission still seemed to “shy away from using its unique enforcement powers” and that it seemed to reflect a preference “to do the things you know you already do well” with the risk of being “reluctant to take on the things you have not done very much of and think might be difficult.” She was particularly concerned that the draft was unclear on how exactly it intended to deliver general commitments on ‘compliance’ and which enforcement powers it expected to use.⁹⁷

89. Sam Smethers was more optimistic. She felt that they were “getting their act together a bit more”, and saw the new strategic plan as an opportunity to get that strategy “really right”.⁹⁸ The Equality and Diversity Forum also saw the way that the Commission had consulted on their strategic plan as positive, enabling them to engage with a wide range of stakeholders in setting the priorities it contained.⁹⁹

90. While, as highlighted above, the Commission does not publish numerical data on its enforcement work it does appear that it may be increasing enforcement activity. As of 16 July 2019 it was engaged in: two large scale formal investigations; enforcement action against a care home for using pre-employment health questionnaires and five employers for failing to publish their gender pay gap information; and had threatened around 40 more such employers with enforcement action. It has also spoken more publicly about this action.

94 [Q149](#)

95 [Q572](#)

96 Government Equalities Office ([EEA0259](#))

97 [Q153](#)

98 [Q16](#)

99 Equality and Diversity Forum ([EEA0177](#))

91. Another matter arose towards the end of our inquiry: we questioned the Commission on how it handles disputes with its own staff, especially when they concern discrimination. While the Chief Executive initially stated that there had been no such grievances,¹⁰⁰ the Chair, David Isaac, later acknowledged that discrimination issues had featured in grievances emerging during its latest restructure and resulting redundancy situations.¹⁰¹ Mr Isaac insisted, however, that they had “not done anything to make it difficult for those individuals to assert their claims.”¹⁰²

92. We were subsequently contacted by former staff of the Commission who were among those affected. One individual submitted evidence to the inquiry in which she argued strongly that the Commission had not made it easy for her or any of the others affected to bring their claims and had not treated them well during the process. She described staff feeling like they “were being treated like common criminals” and disadvantaged in access to alternative employment by administrative decisions on payment in lieu of notice. She told us that the EHRC had made public statements about the reasons for their redundancy that “had a serious and significant impact on our ability to find alternative employment”, explaining that:

I had worked for twenty years in equality and human rights yet the Chair of the EHRC was publicly stating that I didn’t have the requisite skills to work in the sector. [...] the actions of the EHRC were seemed designed to ensure I would not secure employment in the future.¹⁰³

Initially financially supported to bring an employment tribunal claim by her trade union and then her insurance company, a statement by the EHRC that it would seek costs against her “irrespective of whether or not [Ms Kelly] succeeds in her claim” led to this support being withdrawn and advice that she settle. She explained that:

an insurance company has no interest in exploiting the potential of the Act to improve society and eliminate discrimination. They do not care about the public interest in examining the conduct of officials employed by our national equality and human rights regulator. So I never got a public hearing or a chance to restore my reputation.¹⁰⁴

93. We gave the Commission the opportunity to respond to this evidence, and Rebecca Hilsenrath wrote to us on 11 July 2019 apologising for inadvertently giving incorrect information about grievances. She reiterated David Isaac’s view that the cases discussed in the evidence session had mainly arisen from the Commission’s most recent re-organisation, telling us that “seven employees who were made redundant took the decision to make employment tribunal claims” which involved claims of discrimination or trade union victimisation, but that the Commission was “satisfied that the processes we followed were fair, robust and transparent.”¹⁰⁵ Her basis for this belief appeared to be that they had

100 [Qq579–583](#) (Rebecca Hilsenrath)

101 [Qq584–585](#)

102 [Q 588](#)

103 [Finola Kelly \(EEA0272\)](#)

104 [Finola Kelly \(EEA0272\)](#)

105 [Letter from the Equality and Human Rights Commission, a response to Ms Finola Kelly, additional evidence, dated 11 July 2019](#)

“worked closely with colleagues from HM Treasury to ensure that we complied with all procedures”. The Treasury had agreed with the decision to settle, which was made to avoid “the cost and disruption of defending seven claims”.¹⁰⁶

94. While we cannot comment on whether or not the claims made against the Commission would have been successful, we are deeply concerned by the way in which the Commission has handled the dispute. The Commission may believe that the settlements they made were agreed consensually, but the threat of being pursued for costs left the staff concerned feeling pressured to settle for financial compensation, when equally important was a remedy for what they felt to be unfair damage to their professional reputations. We explain in Chapter 8 how problematic such pressure is in the context of discrimination claims, where financial compensation is frequently an inadequate remedy.

95. The EHRC is not simply another non-departmental public body. It is one of the United Kingdom’s national equality bodies and a national human rights institution. It should not be following the minimum required, it should be setting the standard for others to follow. That this does not appear to have been the case to date is disappointing.

96. While we understand that the EHRC intends to make significant changes in direction and agree that changes such as establishing a new dedicated legal enforcement team have the potential to support this, the Commission has not yet demonstrated the ability to act effectively. It was ignored in Sir David Metcalf’s Labour Market Enforcement Strategy and received only small mention in the Government’s Good Work Plan. It was found wanting by this Committee in action on older workers, sexual harassment, inequalities facing Gypsy, Roma and Traveller communities, maternity discrimination and inequalities in the built environment. The Commission has acted on some of these areas, but it should not have needed prompting by a Parliamentary Committee before it did so and the Commission continues to rely on affected individuals seeking it out and convincing it to act, instead of leading work to tackle endemic and structural inequalities.

97. *The EHRC must take further action to address the problems identified in the tailored review conducted in 2018. We see little evidence of the kind of clarity and focus that the tailored review recommended. Despite some progress in setting priorities and numerous restructures, the Commission still fails to have the kind of focus on impact and influence that good management should be delivering.*

106 [Letter from the Equality and Human Rights Commission, a response to Ms Finola Kelly, additional evidence, dated 11 July 2019](#)

4 Mainstream enforcement bodies

The role of enforcement bodies

98. The Equality and Human Rights Commission is only one enforcement body that can act on protections in the Equality Act 2010. This chapter examines the strategic opportunity to reinforce the role of regulators, inspectors and ombudsmen to enforce anti-discrimination law alongside the EHRC, something that appears to be relatively under-utilised at present.

99. Discrimination happens in places that are already highly regulated, inspected and where those who operate within them are judged on their behaviour. Whilst this cuts across the full scope of the Equality Act, with enforcement bodies operating in employment, education, health, housing, transport and regulating both public and private service providers, the regulators' treatment of how unlawful discrimination affects the standing of those regulated organisations and individuals appears to be patchy at best.

100. In this report we will use 'enforcement bodies' to refer to the full range of regulators, inspectorates and, which some witnesses refer to as 'RIOs'. Classic examples, some of whom we heard evidence from, are Ofsted in education, the Care Quality Commission in health and social care, the Financial Ombudsman Service, the Health and Safety Executive, the Gangmasters and Labour Abuse Authority and, of course, the proposed new single labour market enforcement body.¹⁰⁷ Others who perform similar functions as part of their remit are also included: for example the Department for Education delivers enforcement functions in education¹⁰⁸ and HMRC enforces the statutory national living wage.

101. Each of these organisations are not only already bound by the non-discrimination provisions of the Equality Act, but also by the public sector equality duty in section 149 of the Act. Guidance from the Equality and Human Rights Commission states:

Regulators, inspectorates and ombudsmen [...] need to have due regard to the aims of the general equality duty in their functions. For example, this could mean inspectorates ensuring that their assessments of performance of public sector bodies include consideration of performance on equality.¹⁰⁹

102. The original Race Equality Duty was the first of the 'public sector equality duties' in Great Britain, the model of which was followed and built on in the later duties on gender and disability and ultimately the single public sector equality duty across all grounds contained in the Equality Act 2010. Barbara Cohen and Razia Karim were both legal officers at the Commission for Racial Equality at the time the race equality duty was being introduced and they told us that:

It was recognised that the CRE would never have the capacity to monitor compliance of the more than 25,000 public authorities in England, Scotland and Wales that were to be subject to this duty. In discussions

107 [PQ 230890 \[on Employment: Enforcement and Inspections\], 15 June 2019](#)

108 [Q180](#)

109 Equality and Human Rights Commission, [The Essential Guide to the Public Sector Equality Duty England \(and Non-Devolved Public Authorities in Scotland and Wales\) \(July 2014\)](#), p34

with Home Office officials we were satisfied that the primary mechanism for enforcement should be exercised by those bodies already established to monitor performance of public authorities and to apply sanctions when performance was not at the required standard. We were also aware that from the perspective of public authorities their specialist regulators, with sector specific enforcement powers, carried far more clout than the CRE ever would.¹¹⁰

103. That such a role is necessary was supported by many of our witnesses. Derby City Council felt that challenging discrimination should be the responsibility of local authorities “as with Health and Safety and licensing laws.”¹¹¹ The Runnymede Trust and Race on the Agenda wanted to see:

regulators or inspectorates (for example Ofcom or Ofsted) [...] do more to gather data on equality, to determine whether, e.g., schools are adequately complying with the law, or are directly or indirectly discriminating against ‘protected’ groups. The EHRC would then examine these reports to determine whether further monitoring or enforcement action is required.¹¹²

104. The kind of role envisaged by Barbara Cohen and Razia Karim was also reflected in evidence from Karon Monaghan QC, who argued that “however much money you give [the EHRC], the reality is that they are not going to be able to scrutinise compliance by every single public authority in the country.” She wanted to see other enforcement bodies taking responsibility for ensuring compliance in their area.¹¹³ Dr David Barrett, a researcher who had looked specifically at the role of regulators, inspectorates and ombudsmen in enforcing the Equality Act, agreed that such a role would be particularly effective:

Regulators, inspectorates and ombudsmen are better equipped to monitor remedial action and be proactive, enforcing equality law before an individual has been harmed. In particular, by integrating equality law into their regulation/inspection frameworks, regulators and inspectorates can ensure organisations comply with their responsibilities under the Equality Act, an important additional avenue of enforcement. Furthermore, and potentially more significant in achieving widescale change, regulators and inspectorates can encourage regulated organisations (for example, through ratings or other incentives) to go further and take ownership and leadership of equality and exceed the formal legal requirements of the Equality Act.¹¹⁴

Compliance with existing duties

105. Witnesses agreed that these enforcement bodies already have legal duties under the public sector equality duty, but suggested that there were varying levels of adherence to these duties in practice. Nick O’Brien, an honorary fellow at Liverpool University and former Director of Legal Services and Operations at the Disability Rights Commission told us that he “would be surprised” if regulators, inspectors and ombudsmen were not

110 Barbara Cohen and Razia Karim ([EEA0265](#))

111 Derby City Council ([EEA0250](#))

112 The Runnymede Trust and Race on the Agenda ([EEA0213](#))

113 [Qq3-4](#)

114 Dr David Barrett ([EEA0029](#))

aware of their existing public sector equality duty, but that this was “probably at a fairly abstract level.” He suspected that the duty was not a priority for many.¹¹⁵ From his research into regulators, inspectorates and ombudsmen Dr Barrett concluded that:

Some organisations have taken great ownership of equality law and integrated it heavily into their work, whereas other organisations have not seen enforcing equality law as part of their core business (due to a lack of confidence and/or competing priorities).¹¹⁶

106. The Financial Ombudsman Service, which deals with disputes between consumers and financial businesses, was one organisation that had taken such ownership. Annette Lovell, their Director of Engagement, explained that they would consider the requirements of the Equality Act when deciding what was “fair and reasonable”. This could be in response to a complaint of discrimination, but this wasn’t always necessary:

It is enough for someone to come to us and say that they have a problem with their financial services provider or that they think the way they have been treated is unfair. [...] It is our job to think about aspects like the Equality Act.¹¹⁷

While they did not have general enforcement powers their decisions, once accepted by the complainant, are binding on the financial business concerned.¹¹⁸

107. Nevertheless, our inquiries have found example after example of mainstream enforcement bodies failing to meet their duties in respect of the rights under the Equality Act 2010. Our inquiry into disability and the built environment found the Planning Inspectorate had been making decisions with insufficient regard to the needs of disabled people. We recommended that the Equality and Human Rights Commission take enforcement action¹¹⁹ and it emerged from their subsequent engagement with the Inspectorate that the training for Planning Inspectors was in breach of the PSED. This has now been rectified¹²⁰ but it remains to be seen if this has resulted in the necessary changes in practice.

108. Similarly, our inquiry into sexual harassment in the workplace found “passivity and indifference of regulators in the face of widespread workplace sexual harassment.” We were astonished to find that the Health and Safety Executive did not see tackling or investigating sexual harassment as a part of its remit, despite having an explicit remit for work-related violence.¹²¹

109. We invited Sir David Metcalf, the Government’s Director of Labour Market Enforcement and author of the Labour Market Enforcement Strategy whose work will form the foundation for the Government’s new single Labour Market Enforcement body, to give evidence on his approach to the Equality Act. He explained that he did

115 [Q233](#)

116 Dr David Barrett ([EEA0029](#))

117 [Q178](#)

118 Financial Ombudsman Service ([EEA0060](#))

119 Women and Equalities Committee, Ninth Report of Session 2016–17, [Building for Equality: Disability and the Built Environment](#), HC 631, para 70

120 [Letter from Inquiry Head, Equality and Human Rights Commission, regarding an update on EHRC work on housing for disabled people, dated 5 October 2018](#)

121 Women and Equalities Committee, Fifth Report of Session 2017–19, [Sexual Harassment in the Workplace](#) HC 725, para 62

not “know very much about” the Equality Act¹²² and was entirely unaware of the public sector equality duty, although he was now taking steps to remedy this.¹²³ The very first requirement for compliance with the PSED is that a decision maker is aware of the duty, and the second is that it is fulfilled both before and during consideration of a particular policy with a “conscious approach and state of mind”. Yet Sir David Metcalf told us that he did not know what it was and that “Frankly, it is not something that has ever come up”¹²⁴.

110. The Government seems to have taken on board some of these concerns. Charles Ramsden, Deputy Director at the Government Equalities Office admitted that:

To be honest, I agree that the Committee’s current inquiry—you referred to the labour market enforcement side—has been a bit of an eye-opener in terms [...] of the very disparate understanding of equality issues across regulators, from possibly Ofsted at one end of the scale, to a number of other bodies towards the other end.¹²⁵

He referred to a cross-Government working group “that looks at PSED best practice and developments” and told us that the Government were “now thinking of involvement of regulators specifically, not just sector sponsor Departments” in that group.¹²⁶

Need for an explicit duty?

111. Dr David Barrett, having noted “a great disparity in the performance of regulators, inspectorates and ombudsmen in relation to equality enforcement”, attributed this to the “implicit” nature of their obligations:

despite the significant potential of regulators, inspectorates and ombudsmen in enforcing equality, this enforcement role is not explicitly set out in statute. Instead the requirement for regulators, inspectorates and ombudsmen to enforce equality law is said to be implicitly based on these organisations being subject to the public sector equality duty. The implicit nature of this duty has thus been easy to evade.¹²⁷

112. Barbara Cohen and Razia Karim, reflecting on discussions with the Government when the original race equality duty was introduced, told us an explicit duty was not included because at that time it was clear that existing enforcement bodies would have an important role. They explained that Ofsted was expected to monitor and enforce the duty in schools and “similar roles would be carried out by the regulators of NHS bodies in England, Scotland and Wales” and that officials at the National Audit Office had “reassured [the CRE] that if the amended Race Relations Act imposed duties on government departments then it would automatically fall to the NAO to monitor their compliance and take appropriate steps where performance was inadequate.” They had therefore concluded that “it would have been otiose to state this explicitly in the amended

122 [Q278](#)

123 [Q295](#)

124 [Q295](#)

125 [Q651](#)

126 [Q651](#)

127 [Dr David Barrett \(EEA0029\)](#)

Race Relations Act.” They acknowledge, however, that the idea of “active involvement of sectoral regulators was [...] not given any prominence during parliamentary debates” on the Equality Act 2010 and the role has “never been fully taken on by these bodies”.¹²⁸

113. The House of Lords Committee on the Equality Act 2010 and Disability considered the role of sectoral enforcement bodies to be important, recommending that the Government “amend the mandates of those regulators, inspectorates and ombudsmen that deal with services most often accessed by disabled people to make the securing of compliance with the Equality Act 2010 a specific statutory duty.”¹²⁹ Dr Barrett made a similar recommendation to us, arguing that:

if the potential enforcement power of regulators, inspectorates and ombudsmen is to be realised, there needs to be an explicit duty on these bodies to integrate equality law into their work.¹³⁰

114. We are not the only House of Commons Select Committee that has considered this question. The Treasury Committee’s recent report into consumers access to financial services considered compliance and enforcement of the Equality Act, and recommended that:

the Government should give the FCA the power to take on the enforcement of individual cases relating to financial firms’ compliance with the Equality Act, in addition to the EHRC.¹³¹

Proposals for a new single labour market enforcement body

115. On 6 March 2019 the Secretary of State for Business, Energy and Industrial Strategy (Greg Clark) announced his intention to consult on the creation of a single labour market enforcement body. In a statement to the House on “Leaving the EU: Protection for Workers” he stated his intention to “consult broadly on establishing a new body to bring together the relevant enforcement functions of the Gangmasters and Labour Abuse Authority, Her Majesty’s Revenue and Customs, and the Employment Agency Standards Inspectorate.”¹³² Given the arguments outlined above, this struck us as a possible opportunity to strengthen compliance with the Equality Act 2010 in employment.

116. We asked Sir David Metcalf what he thought about this proposal. He told us that it was “a matter for the politicians to decide” but agreed it was worthy of consideration.¹³³ When pressed on whether enforcement action on maternity discrimination might fit within the work of a body looking at enforcement of employment rights, he conceded that:

128 Barbara Cohen and Razia Karim ([EEA0265](#))

129 House of Lords, Report of the Select Committee on the Equality Act 2010: The impact on disabled people, Session 2015–16, [HL Paper 117, para 450](#)

130 Dr David Barrett ([EEA0029](#))

131 Treasury Committee, Twenty-Ninth Report of Session 2017–19, [Consumers’ access to financial services](#), HC 1642, para 131

132 HC Deb, 6 March 2019, [col 980](#) [Commons Chamber]

133 [Qq313–314](#)

If we were to take a couple of “easier” bits, maternity pay and holiday pay seem to fall naturally under the remit of any merged or new inspectorate. [...] It strikes me that the investigations would be that much more difficult, but that is not a reason for not doing it.¹³⁴

117. He subsequently wrote to us, emphasising that as the question of a single enforcement body was still subject to consultation all discussions “are theoretical at this stage”. He told us that he did not believe “there is a strong case of synergy or increased efficiency or effectiveness for issues of equalities to be included within the single enforcement body.” He explained that this was because, in his view, the “areas of non-compliance” covered by the existing three labour market enforcement bodies “are very different from the majority of those covered by [the Equality Act]”.¹³⁵ This, he argued, was because the employers targeted and the workers affected were likely to be different and the mechanism of enforcement was different:

The three bodies enforce minimum standards set out by the state and target the employer. They do not need an individual to make a complaint to take action against an employer who has exploited them in some way. In contrast, the Equality Act 2010 enforces individual rights, with cases of discrimination investigated and enforced at the individual level, requiring the worker to present their evidence to a tribunal to secure redress.¹³⁶

He was also concerned that the nature of discrimination was too different from the kind of standards the bodies he works with enforce, which he felt were “mostly clear cut”:

employers are either paying NMW or not, abiding by EAS regulations or breaking them, staying within the GLAA licensing regulations or not. Discrimination on the other hand is an area of nuance and assessment of proof (such as reasonableness or proportionately). The types of evidence and data required to prove the case against each type of behaviour are very different.¹³⁷

118. When we posed the same question to the Government, Baroness Williams noted that the consultation was ongoing but said that “I would not like to see a body that did not have equality and anti-discrimination at its heart.”¹³⁸ Charles Ramsden elaborated:

There is, I think, an extent to which equality law is possibly developing a second dimension beyond the individual and the individual case, with equal pay as a kind of crossover area which involves both. There may be an extent to which a single enforcement body is more able to get to grips with bulk compliance by employers with what might be termed the newer-style equalities law—not necessarily with discrimination against an individual.¹³⁹

134 [Q321](#)

135 [Letter from Sir David Metcalf CBE, regarding enforcement of the Equality Act, dated 30 May 2019](#)

136 [Letter from Sir David Metcalf CBE, regarding enforcement of the Equality Act, dated 30 May 2019](#)

137 [Letter from Sir David Metcalf CBE, regarding enforcement of the Equality Act, dated 30 May 2019](#)

138 [Q652](#)

139 [Q653](#)

119. The Government has now published its consultation on establishing a single labour market enforcement body. The document came too late for us to address in this report, but we note that it asks if the new enforcement body could ‘address gaps’ in the enforcement tools and approach available to the EHRC.¹⁴⁰

120. EHRC guidance already sets out that regulators, inspectorates and ombudsmen need to have due regard to the aims of the general equality duty in their functions and that this could mean inspectorates ensuring that their assessments of performance of public sector bodies include consideration of performance on equality. **As public bodies all enforcement bodies (including regulators, inspectorates and ombudsmen) should be using their powers to secure compliance with the Equality Act 2010 in the areas for which they are responsible. Such bodies are far better placed than the Equality and Human Rights Commission could ever be to combat the kind of routine, systemic, discrimination matters where the legal requirements are clear and employers, service providers and public authorities are simply ignoring them because there is no realistic expectation of sanction. Examples include equal pay, direct discrimination including failure to make a reasonable adjustment, harassment, and victimisation. This would supplement the work of the EHRC enabling it to focus on its strategic enforcement role and act where its expertise and unique powers are most needed, a question that we address in Chapter 3. We also agree that there is scope to consider aspects of compliance currently outside the remit of the EHRC, such as action against employers who do not comply with tribunal rulings.**

121. *We recommend that each Government Department be put under a legal duty to ensure that the enforcement bodies (including regulators, inspectorates and ombudsmen) for which they are responsible are using their powers to secure compliance with rights under the Equality Act 2010 in the sector for which they are responsible. If the mandate of the enforcement body does not already provide them with the ability to do this, then it must be amended to explicitly do so.*

122. *Any new enforcement body, including the planned new labour market enforcement body, must have an explicit mandate to secure compliance with the Equality Act 2010 using its enforcement powers. This should, as a minimum, include discrimination matters where the legal requirements are clear. Examples include equal pay, direct discrimination including failure to make a reasonable adjustment, harassment, and victimisation.*

The future role of the EHRC

123. This report argues for a fundamental shift in the burden of enforcement, with mainstream enforcement bodies taking up the bulk of the work. Dr David Barrett supported this shift, but also pointed out that it required a change in the role of the Equality and Human Rights Commission. He envisaged three main roles for the EHRC:

- (i) To act where no other enforcement mechanism can act such as tackling complex, societal wide inequalities (for example the Commission’s inquiry into disability related harassment);

140 Department for Business Energy and Industrial Strategy, [‘Good work plan: establishing a new single enforcement body for employment rights’](#), Accessed 18 July 2019

- (ii) To overcome some of the limitations of courts (e.g. supporting legal action to overcome access to justice issues or intervening in ongoing proceedings to provide additional evidence to the court);
- (iii) To co-ordinate and support the actions of regulators, inspectorates and ombudsmen.¹⁴¹

We would add a fourth to this list: taking enforcement action against those enforcement bodies that do not live up to their responsibilities.

124. Dr Barrett felt that this change could be beneficial, helping the Commission balance the ability to use its “wide ranging powers” with the reduction in its budget.¹⁴²

125. The EHRC’s relationship with other enforcement bodies will be key to its ability to deliver its functions effectively in the future. This should have already been given a much higher priority but will become even more important with a shift of emphasis as the improvements set out in this report are implemented and the burden of enforcement shifts.

126. We recommend that the Equality and Human Rights Commission make enforcement bodies, in the broad sense used in this report, a priority target for investigation and enforcement action for failure to implement their public sector equality duty in their enforcement functions.

127. We recommend that the Equality and Human Rights Commission establish memoranda of understanding with all relevant enforcement bodies within the next 12 months. These memoranda should explicitly set out which enforcement matters under the Equality Act 2010 the enforcement body will undertake and which will remain within the strategic role of the EHRC, as well as a mechanism for dialogue and joint working in less clear-cut cases. For example, we expect that any new labour market enforcement body would have to take on enforcement of routine employment discrimination matters, such as reasonable adjustments by employers, leaving the EHRC free to fulfil its strategic enforcement role and act where its expertise is most needed.

141 Dr David Barrett ([EEA0029](#))

142 Dr David Barrett ([EEA0029](#))

5 Enforcing the Equality Act at the heart of Government policy

128. We have been faced with numerous examples where the Government failed to consider the Equality Act, or its enforcement, in their wider strategies and plans. Our 2018 inquiry into Older Workers found that the Government had failed to include action to improve compliance with the Equality Act 2010 in its Fuller Working Lives Strategy. We recommended that

[The Government] engage with the Equality and Human Rights Commission with a view to agreeing enforcement actions that can be included as specific commitments in the [Fuller Working Lives] strategy.¹⁴³

Sadly, this recommendation was not accepted and the Fuller Working Lives strategy still omits action to tackle age discrimination in employment.

129. We explain above how the Government’s Director of Labour Market Enforcement had given no consideration to discrimination in employment or the Equality Act.¹⁴⁴ The failure of the Government to raise Equality Act compliance with Sir David was particularly disappointing, given the fact that his own Labour Market Enforcement Strategy identifies the importance of Government policies that “coherently create incentives for firms to be compliant” and “removes [an] environment in which non-compliance can be part of a business model.”¹⁴⁵

130. When we asked the Minister and the Government Equalities Office why there was nothing referring to discrimination in Sir David Metcalf’s work and only minimal mention in the Government’s own Good Work Plan, Baroness Williams told us that:

Equality and discrimination should underline absolutely—they should be the baseline for everything we do. Maybe we should have explicitly mentioned it, but I think it is quite important that they underline everything that we do, both as a Government and through business. It is almost a given, but maybe we should have explicitly mentioned it.¹⁴⁶

131. We welcome this acknowledgement, but it was clear to us that the omission of equality and non-discrimination from Sir David Metcalf’s Strategy was not because it was so implicit that it did not need a mention. It was because he did not know his obligations under the Equality Act and because Ministers and officials failed to ensure he was fully aware of them.¹⁴⁷

132. In May 2018 we published a report into the role of the Minister for Women and Equalities and the place of GEO in government. We were concerned that instability in the position of equalities in the machinery of government had led to disruption and

143 Women and Equalities Committee, Fourth Report of the Session 2017–19, [Older People and Employment](#), HC 359, para 30

144 [Q295](#)

145 HM Government, [United Kingdom Labour Market Enforcement Strategy 2018/19](#) (May 2018), p18

146 [Q630](#)

147 [Qq301–304](#)

confusion and gave the impression that equality is a low priority for the Government.¹⁴⁸ The examples above suggest that the decision to move the GEO into the Cabinet Office has not yet remedied its lack of impact across Government.

133. We have seen repeated examples of Government Strategies that fail to recognise discrimination, let alone contain actions to secure compliance with the Equality Act. This failure leaves the Government at serious risk of breaching the public sector equality duty in its most important strategies and means that individuals facing discrimination continue to bear the full burden of enforcement, even in policy areas that the Government has identified as of central importance to the country. We are disappointed that the Government Equalities Office has not been able to secure greater compliance with the law by other Government Departments.

134. The Government must put in place a mechanism to ensure that every one of its strategies, plans, and policies, such as the Good Work Plan, the Industrial Strategy and Fuller Working Lives contain explicit plans to improve enforcement of rights under the Equality Act 2010 in the area that it deals with. The Government Equalities Office must be empowered to oversee this mechanism and no significant strategy, plan or policy should be signed off by a Minister without them assuring themselves that such plans are included.

148 Women and Equalities Committee, Second Report of Session 2017–19, [The role of Minister for Women and Equalities and the place of GEO in government](#), HC 356, para 25

6 The need for proactive and preventative duties and obligations

135. Our report on sexual harassment in the workplace found an “epidemic of inaction and poor practice” on tackling sexual harassment in the workplace. Employment lawyer Clare Murray contrasted this with data protection and preventing money laundering, where there are “really stringent regimes that have criminal and civil sanctions.” She argued that:

we should be willing to consider placing as much importance on protecting people’s safety and their wellbeing at work as we do on their data and on preventing money laundering through businesses.¹⁴⁹

136. This same message was heard time and again throughout this inquiry. When we were taking evidence many witnesses were dealing with new data protection rules. Karon Monaghan QC reflected the views of many¹⁵⁰ when she told us that:

We are all incredibly stressed about data protection—I am responsible as an individual because I am a sole practitioner—and I have spent half my summer holidays doing it. I haven’t spent half my summer holidays working out whether our women cleaners are being paid the same as our caretakers.¹⁵¹

137. Health and safety enforcement was also contrasted to the reactive, individual nature of Equality Act enforcement. Unite the union argued for the same rights for union equality reps as exist for their health and safety reps so that they could “support action to prevent [discrimination] and to promote equality” in a similar way.¹⁵²

Existing and proposed duties

138. There are currently two sets of duties that require a proactive approach: the public sector equality duty and the gender pay gap regulations.

The public sector equality duty

139. Probably the most prominent of the duties on organisations is the public sector equality duty. The 2010 Act replaced separate race, disability and gender equality duties with a single duty across all protected characteristics. This duty was designed to require active consideration of how to eliminate discrimination and advance equality more generally. The EHRC website explains that:

Prior to the introduction of the race equality duty, the emphasis of equality legislation was on rectifying cases of discrimination and harassment after they occurred, not preventing them happening in the first place. The race equality duty was designed to shift the onus from individuals to organisations, placing for the first time an obligation on public authorities to positively promote equality, not merely to avoid discrimination.¹⁵³

149 Women and Equalities Committee, Fifth Report of Session 2017–19, [Sexual Harassment in the Workplace](#) HC 725, para 24 citing Clare Murray at Q2

150 [Q12](#) (Sam Smethers); Mrs Jeanine Blamires ([EEA0104](#)) Working Out ([EEA0134](#)); Nathalie Abildgaard ([EEA0270](#)) [Q14](#)

151 [Q14](#)

152 Unite the union ([EEA0127](#))

153 Equality and Human Rights Commission, ‘[Public Sector Equality Duty](#)’, Accessed 28 July 2019

Box 4: The public sector equality duty (PSED)

The public sector equality duty is made up of a **general equality duty** supported by **specific duties**. The general equality duty is set out in section 149 of the Equality Act 2010. This is the same for England, Scotland and for Wales and it came into force on 5 April 2011. The specific duties are created via secondary legislation. These are different for England, Scotland and Wales.

The public sector equality duty is the title of the duty, and how it is referred to in the Equality Act. It consists of the general equality duty which is the overarching requirement or substance of the duty, and the specific duties which are intended to help performance of the general equality duty.

The general equality duty

The general equality duty applies to public authorities. In summary, those subject to the general equality duty must, in the exercise of their functions, have **due regard** to the need to:

Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.

Advance equality of opportunity between people who share a protected characteristic and those who do not.

Foster good relations between people who share a protected characteristic and those who do not.

These are often referred to as the three aims of the general equality duty. The Equality Act explains that the second aim (advancing equality of opportunity) involves, in particular, having due regard to the need to:

Remove or minimise disadvantages suffered by people due to their protected characteristics.

Take steps to meet the needs of people with certain protected characteristics where these are different from the needs of other people.

Encourage people with certain protected characteristics to participate in public life or in other activities where their participation is disproportionately low.

The specific duties

The general duty is supported by a set of 'specific duties' set out in Regulations made by the Secretary of State "for the purpose of enabling the better performance by the authority" of the public sector equality duty.¹⁵⁴ These apply to a defined list of public authorities, which can itself be extended by the Secretary of State by Regulations under the Equality Act. Those currently in force are set out in the Equality Act 2010 (Statutory Duties) Regulations 2011 and require those bound by them to:

publish information annually to demonstrate compliance with the general equality duty.

publish one or more equality objectives that it thinks it needs to achieve to further the aims of the general equality duty.

Source: adapted from EHRC PSED Essential Guide

140. The Women’s Budget Group believed that this duty “has the greatest potential to effect wide change”, arguing that its “structural approach is more effective than individual litigation.”¹⁵⁵ Catherine Rayner, a barrister and Chair of the Discrimination Law Association, highlighted how it had been used to “flag up difficulties” at an early stage through judicial review, but also by “smaller community groups that were looking at services—whether it was about disabled people having access to buildings, or using planning committees or whatever.” Such use could help identify “a responsibility or a concern at an early stage of decision making” making clear the responsibilities of, for example, a council committee to “look at the equality impact and take it into account in a serious way, and to ensure that there are changes in the way that things are done.”¹⁵⁶

141. The duty was, however, criticised by many for its limited impact—not least because they saw the duty to have “due regard” as insufficient. The House of Lords Committee on the Equality Act and Disability concluded that this was a “fundamental flaw” in the duty because it allowed a public authority to “make no progress towards the aims of the general duty and yet be judged compliant with it”. They therefore recommended that it be amended to require a public authority to “take all proportionate steps” towards the achievement of the goals set out in the duty.¹⁵⁷ This recommendation was endorsed in evidence to our inquiry by Disability Rights UK¹⁵⁸ and similar recommendations were made to us by Nordic Model Now!, which wanted to see the duty strengthened by replacing “due regard” with “take reasonable steps”.¹⁵⁹

142. We have sympathy with these arguments, but such changes would require more detailed consideration than the scope of this inquiry into enforcement allows. We did, however, receive substantial evidence that the specific duties could be used more effectively to support compliance with the general duty, even in its current form.

143. The Women’s Budget Group were highly critical of the current specific duties’ requirement to “publish a single equality objective [...] and some equality information”. They felt that it was “difficult to see how these two duties help to hold public bodies to account”, and were critical of the lack of duties to “set out steps to meet equality objectives”, to “consult or involve”, to publish “specific information on the pay gap” and to “consider equality in procurement”.¹⁶⁰ Nordic Model Now! wanted changes to the specific duties to make equality schemes, action plans and impact assessments mandatory and introduce a statutory inspection mechanism for compliance.¹⁶¹ Inclusion Scotland argued in favour of the EHRC being given “enforcement powers requiring public bodies to produce clear and measurable targets for promoting equality and tackling discrimination, or face [a] penalty”.¹⁶² Runnymede Trust and ROTA wanted to see equality impact assessments strengthened “to ensure action rather than tick boxing.” They argued that “Impact assessments need to not only outline disproportionality but also meaningful remedies to mitigate the impact.”¹⁶³

155 Women’s Budget Group ([EEA0045](#))

156 [Q12](#)

157 House of Lords, Report of the Select Committee on the Equality Act 2010: The impact on disabled people, Session 2015–16, [HL Paper 117](#), para 346

158 Disability Rights UK ([EEA0142](#))

159 Nordic Model Now! ([EEA0070](#))

160 Women’s Budget Group ([EEA0045](#))

161 Nordic Model Now! ([EEA0070](#))

162 Inclusion London ([EEA0187](#))

163 The Runnymede Trust and Race on the Agenda ([EEA0213](#))

144. The Equality and Human Rights Commission also focussed on the specific duties in their recommendations for action. Melanie Field told us that “[w]e would like the public sector equality duty to be much more focused and strategic”.¹⁶⁴ Their written evidence proposed that “Governments across Britain [...] review how the PSED specific duties could be amended to focus public bodies on taking action to tackle the key challenges in the Commission’s *Is Britain Fairer?* reports.” They suggested that objectives could be set using the key findings of that report with “evidence of action and progress” in relation to those key findings being published.¹⁶⁵

145. This is similar to the approach taken in our inquiry into sexual harassment in the workplace, which recommended a specific duty under the Public Sector Equality Duty requiring relevant public employers to conduct risk assessments for sexual harassment in the workplace and to put in place an action plan to mitigate those risks.¹⁶⁶

146. The Minister, in contrast, argued that the PSED was “deliberately a broad duty” and warned that:

If you start to specify across various different strands, there could be situations where employers would argue that it was not specified. It is quite important to have that broader due regard.¹⁶⁷

147. We agree with the Equality and Human Rights Commission that the specific duties should be more focussed and strategic. Aligning obligations with evidence of particular inequalities or aspects of discrimination strikes us as an effective means of doing so. While the EHRC’s work on *Is Britain Fairer?* is a good starting point there are similarly robust sources that Government can draw on, including expert research organisations, the Race Disparity Audit and indeed from the reports of Parliamentary Select Committees.

*148. We recommend that the Cabinet Office work across Government to identify a small number of evidence-based issues of inequality or discrimination suitable for action either within a specific sector or cross-departmentally and that the Government introduce new specific duties under the Equality Act 2010 to direct the relevant Department and public authorities to take action on these identified inequalities. These specific duties should be reviewed at least every three years in line with new data available from the EHRC’s report *Is Britain Fairer?* and the Government’s Race Disparity Audit, among other sources.*

Duties in the private sector: sexual harassment

149. In our inquiry into sexual harassment in the workplace we also recommended a mandatory duty on private sector employers to protect workers from harassment and victimisation in the workplace, alongside the duty on public sector employers outlined above.¹⁶⁸ Had the Government agreed to implement our recommendations, breach of this

164 [Q404](#)

165 Equality and Human Rights Commission ([EEA0254](#))

166 Women and Equalities Committee, Fifth Report of Session 2017–19, [Sexual Harassment in the Workplace](#) HC 725, para 35

167 [Q638](#)

168 Women and Equalities Committee, Fifth Report of Session 2017–19, [Sexual Harassment in the Workplace](#) HC 725, para 72

duty would have been an unlawful act enforceable by the Equality and Human Rights Commission and carry substantial financial penalties. It would have been supported by a statutory code of practice on sexual harassment and harassment at work setting out just what employers need to do to meet the duty.¹⁶⁹

150. Unfortunately, the Government did not accept our recommendations, although it did agree to consult on the potential for a new mandatory duty on employers and to work with the EHRC on a more detailed Code of Practice under the current legislation.¹⁷⁰ When we asked why the Government had not accepted our recommendations, the Minister replied “But employers should always take action if their employees are the subject of sexual harassment.”¹⁷¹ She did not elaborate further.

151. Since the Government response to our previous inquiry, the Trade Unions Congress (TUC) has published research showing high levels of sexual harassment and sexual assault against LGBT people in UK workplaces. In response the TUC makes similar recommendations to those made by the Committee, specifically it recommends:

- a new legal duty to prevent all forms of harassment and victimisation;
- a statutory code of practice on sexual harassment and harassment at work; and
- legislation to tackle third-party harassment.¹⁷²

152. Business in the Community also suggested that a duty should extend beyond sexual harassment. They were concerned that a “fragmented approach” was “one of the greatest impediments to successful enforcement of the Equality Act”. They praised the EHRC initiative of asking companies “to prove what they were doing to tackle sexual harassment in the workplace”, agreeing that this was “a positive step towards a more inclusive workplace.” They were also “pleased to note” the EHRC call for a mandatory duty on employers to protect workers from harassment and victimisation in the workplace. They were, however, disappointed that these actions “were announced in the context of sexual harassment alone, rather than encompassing the range of discriminatory behaviours covered in the Equality Act.”¹⁷³

153. While we remain of the view that specific actions are needed to tackle sexual harassment in the workplace, we agree that this risks the kind of fragmentation that concerns business. We do not want a shift in the burden away from the individual to add disproportionately to that on employers. On the other hand, we have seen evidence of how duties that focus minds on particular issues, such as the gender pay gap, can have greater impact. We believe that extending our recommendation to include all forms of harassment and victimisation strikes the right balance between retaining this focus and minimising the fragmentation of employer responsibilities.

169 Women and Equalities Committee, Fifth Report of Session 2017–19, [Sexual Harassment in the Workplace](#) HC 725, para 32

170 Government Equalities Office ([EEA0259](#))

171 [Q640](#)

172 TUC, [‘Sexual harassment of LGBT people in the workplace’](#), Accessed 18 July 2019

173 Business in the Community ([EEA0165](#))

154. *We re-iterate our recommendations in the report of our inquiry into sexual harassment in the workplace that:*

- *The Government should place a mandatory duty on employers to protect workers from harassment and victimisation in the workplace. Breach of the duty should be an unlawful act enforceable by the Commission and carrying substantial financial penalties. The duty should be supported by a statutory code of practice on sexual harassment and harassment at work which sets out what employers need to do to meet the duty; and*
- *The Government should introduce a specific duty under the Public Sector Equality Duty requiring relevant public employers to conduct risk assessments for sexual harassment in the workplace and to put in place an action plan to mitigate those risks. Action plans should set out how cases will be investigated and include guidance on penalties for perpetrators.*

155. *We further recommend that these duties should extend to all unlawful harassment and victimisation covered by the Equality Act 2010, not just sexual harassment.*

7 Balancing rights in single-sex services

156. In recommending the fundamental shift in the approach to enforcement set out above, we recognise that the EHRC should retain its strategic role in ensuring that the law is clear and both enforced and enforceable by others. Our evidence suggested two particularly difficult areas where this role needs to be exercised: that of commissioning single-sex services, where the law is clear but frequently misunderstood and unenforced; and the ability of organisations to use Equality Act exceptions that allow service providers to choose if and how to provide single-sex services, where worries about the legal definition of ‘sex’ and its relationship to the protected characteristic of gender reassignment under the Equality Act appear to be acting as a barrier.

What is a single-sex service?

157. When reading through the evidence on this issue, it struck us that different people were using the term ‘single-sex’ in different ways. For some, references to single-sex or women-only services meant services that did or would apply the exceptions to exclude trans women. One submission from a member of the public who described herself as “a woman who is increasingly concerned about the erosion of my rights” stated that “[a]s soon as you say that transwomen are women, single sex spaces become mixed sex.”¹⁷⁴ Another individual, who described themselves as a “PTSD sufferer whose symptoms are triggered by males” felt that:

When a previously single sex provision becomes single gender it then it also becomes mixed sex, and unsafe for me and the multitudes of other women like me.¹⁷⁵

158. Others were equally clear in their view that the inclusion of trans women had no effect on the single-sex status of an organisation.¹⁷⁶

What the Equality Act defines as single-sex

159. Most of the rights under the Equality Act are ‘symmetrical’—the ban on sex discrimination applies to men and women, the ban on race discrimination applies to people from all ethnic backgrounds and the ban on sexual orientation discrimination applies to straight people as much as to gay, lesbian or bisexual people. The law has, however, always recognised that discrimination and inequality are not symmetrical and that there are certain circumstances when treatment that may otherwise be discriminatory should be allowed. The provisions that allow for single-sex services are among these.

160. There are four exceptions under the Equality Act 2010 relevant to single sex services, outlined in the box below.

174 [Dominica Maxted \(EEA0152\)](#)

175 [A member of the public \(EEA0072\)](#)

176 [Q521 \(Diana James\); Stonewall \(EEA0266\)](#)

Box 5: Single-sex services under the Equality Act 2010**Exceptions allowing services to be provided only to women (or only to men)**

The first two relevant exceptions (Schedule 3, Paragraphs 26 and 27) allow service providers to provide separate services for men and women, or to provide services to only men or only women in certain circumstances. The symmetrical nature of the ban on sex discrimination means without these exceptions it would be illegal, for example, to hold women-only sessions at a leisure centre or a new fathers' support group at a nursery.¹⁷⁷

Exception allowing single sex services to discriminate because of gender re-assignment

The third exception (Schedule 3, paragraph 28) allows providers of separate or single-sex services to provide a different service to, or to exclude, someone who has the protected characteristic of gender reassignment. This includes those who have a Gender Recognition Certificate (GRC), as well as someone who does not have a GRC but otherwise meets the definition under the Equality Act 2010.

Application of this exception must be objectively justified as a means of achieving a legitimate aim. An example given in the explanatory notes to the Act is that of a group counselling service for female victims of sexual assault where the organisers could exclude a woman with the protected characteristic of gender reassignment if they judge that clients would be unlikely to attend the session if she was there.

Schedule 23, paragraph 3 of the Equality Act 2010 also allows a service provider to exclude a person from dormitories or other shared sleeping accommodation, and to refuse services connected to providing this accommodation on grounds of sex or gender reassignment. As with paragraph 28 and other exceptions under the Equality Act, such exclusion must be a proportionate means of achieving a legitimate aim.

161. The Equality and Human Rights Commission has published a series of Codes of Practice explaining the Equality Act. These Codes are statutory guidance, prepared by the EHRC, approved by the Secretary of State and laid before Parliament. While interpretation of the law is ultimately for the courts the Code can be used in evidence in legal proceedings brought under the Act and must be taken into account by the courts and following the Code can help service providers demonstrate that they are acting lawfully.¹⁷⁸ The Equality Act Goods and Services Code of Practice advises that:

If a service provider provides single or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present. However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim.¹⁷⁹

177 [Explanatory Notes to the Equality Act 2010](#), paragraph 738

178 [Services, Public functions and Associations: Statutory Code of Practice](#), Equality and Human Rights Commission January 2011, para 1.5

179 [Services, Public functions and Associations: Statutory Code of Practice](#), Equality and Human Rights Commission January 2011, para 13.57

162. On this interpretation of the legislation, a service is single-sex whether or not it includes trans women. If providers of such single-sex services have reason not to admit a trans person (including a person who has a Gender Recognition Certificate), they should be using the exception allowing providers of single-sex services to discriminate because of gender re-assignment.

Commissioning and procurement of single-sex and specialist services

163. The first area of concern we felt was relevant to enforcement was that public authority commissioners appeared to be commissioning gender-neutral services in breach of the public sector equality duty. Janet McDermott, Head of Membership at Women’s Aid, told us that the most significant problem facing their members was “resourcing, funding and the commissioning that is not honouring the public sector equality duty”, but that under the current enforcement system they were not able to challenge these decisions:

In all these years, I have only known of one case where the public sector equality duty was used. [...] We do not have the resources to fight these cases.¹⁸⁰

164. This did not seem to be a problem with the clarity of the law. More than a decade ago the decision in *R (Kaur & Shah) v London Borough of Ealing* found that the (then) race equality duty “may only be met by specialist services from a specialist source.”¹⁸¹ The same principle applies to the provision of single-sex services, as is made clear in the EHRC Technical Guidance on the public sector equality duty:

The [Equality] Act recognises that, in certain circumstances, substantive equality will only be achieved if people with different protected characteristics can be treated differently, for example, to reflect their particular needs.¹⁸²

The Guidance goes on to say that the duties will almost always be relevant when public services are being commissioned, and further dedicated guidance has been produced on how the duties should be used in procurement by public authorities.¹⁸³

165. We nonetheless heard that public authorities were increasingly commissioning ‘gender-neutral’ services “that will not enable the aims of equality set out in the Equality Act to be full achieved.”¹⁸⁴ Agenda, who campaign for “women who face violence, abuse, poverty and multiple disadvantage” were particularly concerned that:

commissioning of services at a local level is currently disadvantaging this group of women, with movements towards “gender-neutral” approaches to commissioning, and commissioning of larger contracts which see smaller, specialist women’s organisations lose out, and put some at risk of closing altogether.¹⁸⁵

180 [Q513](#)

181 *R (Kaur & Shah) v London Borough of Ealing* [2008], [EWHC 2062](#) (Admin)

182 Equality and Human Rights Commission, [Equality Act 2010 Technical Guidance on the Public Sector Equality Duty: England](#) (August 2014), para 4.2

183 Equality and Human Rights Commission, [Buying better outcomes](#) (undated)

184 Welsh Women’s Aid ([EEA0208](#))

185 Agenda ([EEA0156](#))

166. They cited examples from research into mental health services, which found many Clinical Commissioning Groups were taking a gender-neutral approach, reflected in comments like “[A]ll our commissioned services are for men and women equally”.¹⁸⁶ They call for the EHRC to produce national guidance “to support services and commissioners to ensure they understand the provisions of the Equality Act, the use and application of the Public Sector Equality Duty and the importance of gender-specific commissioning for women facing multiple disadvantage.”¹⁸⁷

167. While the apparent failure of significant numbers of public sector commissioners to properly apply the public sector equality duty to their decision making is a problem of understanding and not of the law itself, it is a clear example of what is going wrong because of the current system of equality law enforcement. This cannot be left to affected organisations to fix. As Women’s Aid made clear, they do not have the resources to do so.

168. We recommend that the Government Equalities Office issue a clear statement of the law on single-sex services to all Departments, including the requirement under the public sector equality duty for commissioners of services to actively consider commissioning specialist and single-sex services to meet particular needs.

The ability of service providers to use the exceptions

169. The second particularly difficult issue that emerged was the ability of organisations to use the Equality Act exceptions that allow service providers to choose if and how to provide single-sex services. While not strictly speaking an enforceable ‘right’ these exceptions are a part of the way in which the Equality Act 2010 seeks to balance the rights of all protected characteristics in a single Act of Parliament and it is in everyone’s interest that these are clearly understood.

170. This is also an area where the current individual approach to enforcement is clearly problematic: normally, the most effective way to bring about legal clarity would be through significant case law. This does not yet exist in this area, and the only way in which it can be created is for either a potentially vulnerable individual or the EHRC to bring legal action against an organisation that may well be providing essential services to equally vulnerable people. The EHRC was clear in its evidence that this was not its preferred route either:

We do not want people to have to bring cases; we want people to understand what their obligations and rights are and for people to comply with the law. We have a role in helping them to do that.¹⁸⁸

What was leading people to be concerned?

171. Many of those who wrote to us felt that the Government planned to make changes to the Gender Recognition Act, to remove certain barriers to the granting of a Gender Recognition Certificate (GRC), which they felt could undermine women’s rights and specifically threaten the use of single sex-exceptions by service-providers. For example, one member of the public argued that:

186 Agenda ([EEA0156](#))

187 Agenda ([EEA0156](#))

188 [Q463](#)

We desperately need legal clarity on the terms ‘transgender’ ‘transsexual’, and ‘gender reassignment’—I think [the] way they are currently being used, and the way the [Equality Act] interacts with the GRA 2004, is being abused, misused, misapplied and misrepresented¹⁸⁹

Another member of the public argued that “The combined effect of the [Gender Recognition Act] and the [Equality Act] is to conflate sex and gender irretrievably, and what remains is a rat’s nest of contradictions, where sex-based rights cannot be properly invoked.”¹⁹⁰

172. The Government has yet to report on its consultation into its review of the Gender Recognition Act, so the Committee asked Karon Monaghan QC, an expert equality law barrister, if the Gender Recognition Act as it currently stands, or any changes to it, would impact on the Equality Act and undermine women’s rights in the way set out in submissions to the committee. She was clear that:

If there is a change so that self-identification becomes the route to a GRC [...] you will not need to change the model of the Equality Act. A trans woman with a GRC will still enjoy protection against discrimination because she is a trans woman, and she will enjoy protection as a woman because she has a GRC, but she will still be subject to the exemptions in relation to single-sex services. Whether or not she has a GRC [...] she can still lawfully be excluded from single-sex services such as rape crisis centres and so on, subject to thresholds being reached. It cannot be an arbitrary refusal: “We’re calling this a single-sex space. You can’t come in.” It cannot be that. It has to reach a certain threshold of proportionality and so on.¹⁹¹

173. She did, however, report concerns that in practice many organisations may be fearful of using the exceptions due to a “chilling effect” from what she believed was a lack of clarity in the law. This meant that many smaller organisations “do not feel confident about where the boundaries are.”¹⁹² FiLiA, a charity that describes itself as ‘a women-led volunteer organisation’ reflected similar concerns, telling us that women’s organisations were worried that “invoking the single sex exemptions of the [Equality Act] will leave them vulnerable to costly and difficult legal proceedings, or cost them their funding.”¹⁹³ A women-only holiday centre was worried about how they could “reliably enforce our application of the exemptions” when “it would not be proportionate for us to ask to see birth certificates, and anyway, those transwomen with a GRC would have one that stated they were born female”. In this context, they told us they could “only rely on crossing our fingers that transwomen respect our intention of providing a single-sex service.”¹⁹⁴

189 Miss Rebecca Turner ([EEA0081](#))

190 A member of the public ([EEA0189](#))

191 [Q9](#)

192 [Q2](#)

193 FiLiA ([EEA0188](#))

194 An organisation ([EEA0073](#))

The exceptions in services supporting victims and survivors of domestic and sexual violence

174. In order to explore this question in more detail we held an oral evidence session with witnesses from Women’s Aid, Nia, an organisation providing support to survivors in East London and the Cornwall Refuge Trust.¹⁹⁵

175. Diana James spoke on behalf of the Cornwall Refuge Trust and explained that:

Our experience is that we have never actually used [the exceptions]. We have never considered needing to use the Equality Act because we have been inclusive within the women’s refuge.

[...]

We have had trans women through the women’s refuge and we have had transmen through the men’s refuge, and lesbian, gay and bisexual people through our refuge all the time.¹⁹⁶

176. In contrast, Karen Ingala Smith speaking for Nia argued that a women’s refuge that admitted trans women was a mixed-sex refuge, stating that “[i]f you are saying you have inclusive refuges, then you have refuges where men and women are housed together.”¹⁹⁷ On this basis Nia had developed a specific “prioritising women policy”. Ms Ingala Smith explained:

We decided to do that because we decided as an organisation we wanted to protect single-sex women-only services as much as possible. Because of the way commissioning and the Equality Act work at the moment, we are able to provide single-sex services to our refuges, our women’s service, our rape crisis and domestic and sexual violence group work situations. In our other services, we are contracted to provide services, in most cases to women as well as men. Where that is the case, we provide services to everybody.¹⁹⁸

177. She explained that they made use of both the exception allowing for single-sex services and the exception allowing such services to exclude individuals on the grounds of gender reassignment. It was clear from her evidence that she believed that excluding people with the protected characteristic of gender reassignment was the only way in which Nia’s service could be considered women-only.¹⁹⁹

178. Not unsurprisingly given that they are an umbrella organisation for a diverse range of services, Women’s Aid had a more mixed picture of how those services were deciding when and if to use these exceptions. Janet McDermott explained that:

A lot of members would not have a specific policy related to the Equality Act, but the existence of the Equality Act gives a confidence and presumption to services that they are doing the right thing in delivering women-only provision and that the law is behind them.²⁰⁰

195 [Qq464–571](#)

196 [Q472](#)

197 [Q524](#)

198 [Q502](#)

199 [Qq502–506](#) & [Q524](#)

200 [Q520](#)

179. The panel discussed how the services they provided or worked with handled problems that may arise. Diana James told us that any problems in the refuge in which she worked were of the type that you would expect in the service they provided, and were unconnected to their inclusive approach:

[i]f you get half a dozen traumatised women in a refuge, not everybody is going to get on with each other. There is going to be, “My abuse was worse than yours. What are you doing here?” If you get a lesbian in a refuge, “Women do not hit as hard as men do. Your abuse was not as tough as mine”.²⁰¹

180. Such problems were dealt with “through policies, sitting down and speaking to people about issues they are facing and you work it through.”²⁰² The Cornwall Refuge Trust also had robust safeguarding processes in place to ensure that no-one who may be a risk could access their services, regardless of their trans status:

We do the prior stuff, everything, all the procedures before someone gets in, because you could have a woman come along who is a lesbian and we could have her ex-partner in the refuge. Therefore, we have to be really careful about everybody who gets into a refuge.²⁰³

181. Janet McDermott similarly explained that their members used risk and needs assessments “to pick up any malicious, vexatious or disruptive intention by anyone trying to access the service.” This was not just about an initial assessment, but also “managing relationships in communal living situations and managing group work.” This was particularly important for refuge services because of the nature of domestic abuse:

Domestic abuse is about an abuse of power and control, so all our practice has to be about challenging any hint of perpetuating coercive behaviours in residents in refuge and in our services. The services can be unsafe places for all sorts of reasons [...] because of racism, because of homophobia, because of different levels of access to privilege, status, power and so on. We have to manage those power dynamics all the time within our service-user population and in relation to looking at a new referral and how safe our service is going to be with its current service users for this new potential referral.²⁰⁴

182. Karen Ingala Smith was less confident that the concerns Nia had identified could be managed through risk assessment, explaining that:

When you first take a referral, it is over the telephone. Sometimes a woman is in an immediate place of danger and she has to get to the refuge quickly. Anybody who knows about refuges knows that sometimes you get women turning up, if they are lucky, with a bin bag full of stuff and the bin bag full of stuff is sometimes just the children’s toys [...] You do not get time to do a massively detailed risk assessment usually before the woman arrives.²⁰⁵

201 [Q479](#)

202 [Q479](#)

203 [Q482](#)

204 [Q489](#)

205 [Q489](#)

She felt that it would be too difficult for a refuge in such circumstances to assess the likely risks that she felt would result from transgender people accessing Nia’s services.²⁰⁶

183. We asked our panel of witnesses if they had ever had any complaints from service users about their approach to providing single-sex services, or if they had ever had to turn someone away because they were trans. Janet McDermott reported one incident shared informally with her by a member of Women’s Aid where there appeared to have been concerns about the presence of a trans woman in refuge accommodation, but she was unclear of the precise nature of the concern and it had not come as a complaint.²⁰⁷ She was not aware of anyone having been turned away because they were trans.²⁰⁸ Diana James told us that they had turned people away for other reasons, but they did not know if they had been trans and no members of staff could remember ever having had to turn someone away because they were.²⁰⁹ Nia had turned trans people away from the refuge “for reasons other than because they were trans”, but Karen Ingala Smith was also clear that if they had needed to rely on the exceptions in the Equality Act to turn people away they would have done so.²¹⁰

184. It became clear that guidance on what organisations can and can’t do was lacking. Women’s Aid were working to produce guidance for their members, but this was taking time because they were seeking to ensure consistency with others in the sector.²¹¹ Janet McDermott also argued in favour of national guidance from the Government—particularly to ensure that those commissioning support services for victims and survivors of domestic and sexual abuse were aware of the need for women-only services.²¹²

185. Karen Ingala Smith felt that the current guidance on single-sex services made the law more, not less, difficult to understand,²¹³ particularly where it “points towards a case-by-case analysis” of whether the exception allowing the exclusion of someone on the basis of gender reassignment can be used. She was particularly concerned that ‘proportionality’ could be interpreted in a number of different ways.²¹⁴

186. Diana James agreed that greater legal clarity was needed “so everybody knows where they are coming from legally.” She also called for guidance to be written clearly and with the involvement of all groups:

You have to include people who are trans women who have been through or work in the refuge system, but you also need to include those people who have feelings that are diametrically opposed to that. It is going to be a really difficult way of doing it, but if we are going to come to some organisational and legal arrangement where this is going to work, there is not really a lot of choice. We have to come to an agreement.²¹⁵

206 [Q490](#)

207 [Q537](#)

208 [Q527](#)

209 [Q535](#)

210 [Qq531–532](#)

211 [Q539](#)

212 [Qq551–553](#)

213 [Q555; Qq561–562](#)

214 [Q562](#)

215 [Q566](#)

Bringing clarity

187. Karon Monaghan QC also felt that there was not enough clarity:

it is not enough to have a paragraph in a code of practice saying, “You can exclude people on the grounds of trans status if you need to.” It needs to say, “These are the circumstances and these are the factors you need to consider,” and so on.²¹⁶

188. She suggested that this clarity could be brought either through “carving out” exceptions allowing services such as rape crisis centres to apply a blanket policy or, if this was not possible, more “nuanced guidance”. She argued that this was not about exclusion, but “about where the lines are drawn and ensuring that there are adequate services across the board.”²¹⁷

189. We asked the Equality and Human Rights Commission, whose Equality Act Code of Practice on Goods and Services currently contains the most significant guidance on the operation of the exceptions available to providers of single-sex services, if they felt that current law and guidance was sufficient. Melanie Field told us that she was confident that the Equality Act provisions “are fit for purpose” as “[t]hey allow inclusion and also allow exclusion when it is objectively justified and there is a good reason for it.” She did, however believe that people would welcome more information “about how that plays out in practice”, which would also help ensure that “misconceptions, misunderstandings and genuine fears and concerns” do not promote a climate of intolerance and damage good relations between groups.²¹⁸

190. We do not believe that non-statutory guidance will be sufficient to bring the clarity needed in what is clearly a contentious area. We recommend that, in the absence of case law the EHRC develop, and the Secretary of State lay before Parliament, a dedicated Code of Practice, with case studies drawn from organisations providing services to survivors of domestic and sexual abuse. This Code must set out clearly, with worked examples and guidance, (a) how the Act allows separate services for men and women, or provision of services to only men or only women in certain circumstances, and (b) how and under what circumstances it allows those providing such services to choose how and if to provide them to a person who has the protected characteristic of gender reassignment.

216 [Q52](#)

217 [Q54](#)

218 [Qq460-461](#)

8 Individual action in Courts and Tribunals

191. We saw in Chapter Two just how oppressive and difficult individuals can find the court system. The Ministry of Justice acknowledged that “many people will find the court and tribunals proceedings difficult, complex and daunting.” They put this down to the “nature of adversarial disputes and the challenge of enforcing one’s rights”.²¹⁹ This is undoubtedly true and is one of the reasons the fundamental shift in the approach to enforcement of the Equality Act set out in this report is so badly needed. Nonetheless, the right to bring legal action to challenge discrimination remains vital and the difficulties faced by individuals can be reduced.

192. Individual enforcement will also remain an important part of any enforcement model. The Government has acknowledged that individual litigation can create precedents leading to wider change.²²⁰ It is also another means by which we create the ‘critical mass’ of discrimination cases needed to build a culture where compliance is the norm because employers, service providers and public authorities know they will face consequences for discrimination.²²¹

Costs of litigation

193. The most frequently cited barrier was the cost of bringing a claim.²²² Bringing a discrimination claim can undoubtedly be expensive—the Equality and Human Rights Commission estimated their cost for funding an individual case as anywhere between £4,000 and £80,000. The average was £28,000.²²³ Such costs can include court fees (although no longer employment tribunal fees), fees for legal advice and more generally the cost of being involved in litigation. The fear of becoming liable for the costs of the other party was also a significant concern for many.²²⁴

Legal Aid for discrimination claims

194. Legal aid is the most significant way that costs can be met for individuals seeking to enforce their rights under the Equality Act 2010. Civil legal aid generally falls into two categories: legal help, which encompasses initial advice and assistance, including help to correspond and negotiate with the other party and legal representation by a solicitor or a barrister. Legal representation is not available in the Employment Tribunal other than on

219 Ministry of Justice ([EEA0273](#))

220 Government Equalities Office ([EEA0259](#)); [Q626](#) (Baroness Williams)

221 See Chapter Three

222 See for example Ian Lawson ([EEA0008](#)); Business Disability Forum ([EEA0209](#)); Fry Law ([EEA0176](#)); Gendered Intelligence ([EEA0043](#)); Inclusion London ([EEA0187](#)); Mind ([EEA0182](#)); Mrs Angie Bennetton ([EEA0021](#)); Women’s Budget Group ([EEA0045](#)); Nathalie Abildgaard ([EEA0270](#)); Sam Walker ([EEA0257](#)); Vikki Barnard ([EEA0253](#)); Birmingham and Black Country Sight Loss Councils ([EEA0195](#))

223 Equality and Human Rights Commission ([EEA0254](#))

224 See for example: [Q3](#) (Karon Monaghan); Ms Louise Whitfield ([EEA0157](#)) Leigh Day & Co ([EEA0069](#)); National Deaf Children’s Society ([EEA0143](#)); Finola Kelly ([EEA0272](#)); Nathalie Abildgaard ([EEA0270](#))

appeal, meaning that individuals must either pay privately or represent themselves. Civil legal aid for discrimination claims is ‘means’ and ‘merits’ tested and is currently only available via a telephone gateway.²²⁵

195. The EHRC has recently conducted a formal inquiry into access to legal aid for discrimination cases. It found that “recent years have seen access to justice restricted to such an extent that many people experiencing discrimination are not getting the help they need to seek redress.” Problems included very low numbers of referrals for face-to-face advice, due in part to a lack of legal aid providers able to provide such advice, and low numbers receiving support beyond telephone advice—such as casework or other forms of legal help; failures to make reasonable adjustments for those accessing telephone advice; and very low numbers receiving funding for representation in court—just 0.5% of discrimination cases. They also found problems with exceptional case funding, financial eligibility and more generally awareness of legal aid.²²⁶

The telephone gateway

196. Concerns about the mandatory telephone gateway for civil legal aid have been well rehearsed, not just in evidence to this Committee²²⁷ but also by the Joint Committee on Human Rights²²⁸ and most recently by the findings of the Equality and Human Rights Commission’s formal inquiry²²⁹. We were therefore pleased to hear that the Ministry of Justice plans to remove the mandatory requirement to access legal advice for discrimination cases through the telephone gateway by 2020.²³⁰

197. We were also pleased to learn that the Ministry of Justice plans to launch a campaign to raise awareness of the availability of legal support, including legal aid, and to advertise its availability in autumn 2019.²³¹ We heard evidence the Government had treated the existence of even the advice available via the telephone gateway as “almost [...] a state secret”²³² and the awareness campaign will need to overcome this history to reach groups affected by discrimination.

198. Lastly, we were relieved to see the Ministry recognise that it needs to take a proactive approach to procuring expert advice on discrimination cases, to ensure that it is available in practice.²³³ Catherine Rayner told us that the last five to 10 years had seen “a massive reduction” in both legal aid and the funding for advice organisations dealing with discrimination issues. She told us that the area she lived in was “a legal help desert” with only two lawyers in the area doing discrimination work.²³⁴ Nick Whittingham, Chief Executive of Kirklees Citizens Advice and Law Centre told us that since the LASPO

225 [Ministry of Justice - written evidence](#), to the Women and Equalities Committee inquiry into the use of Non-Disclosure Agreements in discrimination cases

226 [Discrimination going unchallenged in legal aid system](#), Equality and Human Rights Commission, 19 June 2019

227 [Action on Hearing Loss \(EEA0035\)](#); [Age UK \(EEA0167\)](#); [Discrimination Law Association \(EEA0255\)](#) Equality and Diversity Forum ([EEA0177](#)) Ms Louise Whitfield ([EEA0157](#)); [Inclusion London \(EEA0187\)](#) Scope ([EEA0186](#))

228 [Joint Committee on Human Rights](#), Tenth Report of Session 2017–19, [Enforcing human rights](#), HC 669 HL 171, Chapter Three ‘The damaging effects of legal aid reforms’

229 [Discrimination going unchallenged in legal aid system](#), Equality and Human Rights Commission, 19 June 2019

230 [Ministry of Justice, Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(LASPO\)](#), [CP 37](#), February 2019

231 [Ministry of Justice \(EEA0273\)](#)

232 [Richard Miller Q65](#)

233 [Ministry of Justice \(EEA0273\)](#)

234 [Q3](#)

reforms were brought in they had lost all funding for discrimination claims and were either supporting such cases as part of broader issues where they had funding or were doing so pro bono, i.e. for free.²³⁵

199. The Equality and Human Rights Commission has similarly welcomed such actions by the Government,²³⁶ but following its formal inquiry into legal aid in discrimination cases—published after the changes discussed above were announced—has stated that it remains concerned that “victims of discrimination are not getting the help they need to enforce their rights in the courts.”²³⁷

200. The Ministry of Justice has committed to monitor take up of legal aid for discrimination cases and to assess the level of face to face provision once the planned round of procurement of specialist telephone advice and face to face contracts has been completed. This is to be welcomed but must also explicitly evaluate their effectiveness in securing legal aid for those facing discrimination in a way that genuinely improves access to justice.

201. We recommend that the Ministry of Justice monitor and evaluate the effectiveness of the removal of the mandatory requirement to access legal advice for discrimination cases through the telephone gateway, the planned legal aid awareness campaign and the procurement of specialist advice services in increasing the number of individuals being granted legal aid, including legal representation, for discrimination claims.

Recognising the social value of individual litigation: the legal aid ‘merits’ test

202. As explained above, eligibility for legal aid is subject to a ‘merits’ test. This includes a cost benefit test, the purpose of which is to ensure that legal aid is only awarded for cases where the “potential benefit to be gained from a case must justify its anticipated costs.”²³⁸

203. The Equality and Human Rights Commission examined the impact of this criteria as applied to applications for legal representation—to cover the costs of representation by a solicitor or barrister—in discrimination claims and found that failing the cost benefit test was the most common reason for such claims to be rejected. They concluded that this was because many were being classified as ‘primarily a claim for damages’, which made it very difficult for discrimination claims to pass the test.²³⁹ This may be because they are not, in fact, primarily a claim for damages, but is also because the damages available for discrimination are so low. The EHRC report explains:

Taking our indicative average case cost of £28,000 and assuming that the claim has a good prospect of succeeding (meaning that likely damages must outweigh the likely costs by a ratio of two to one), the likely damages would need to exceed £56,000 in order for this cost benefit test to be met.²⁴⁰

235 [Qq64–70](#)

236 Equality and Human Rights Commission, [Access to legal aid for discrimination cases \(June 2019\)](#) introduction

237 Equality and Human Rights Commission, [Access to legal aid for discrimination cases \(June 2019\)](#) p. 7

238 Equality and Human Rights Commission, [Access to legal aid for discrimination cases \(June 2019\)](#) p. 28, citing Reg 42, Civil Legal Aid (Merits Criteria) Regulations 2013.

239 Equality and Human Rights Commission, [Access to legal aid for discrimination cases \(June 2019\)](#) p. 28

240 Equality and Human Rights Commission, [Access to legal aid for discrimination cases \(June 2019\)](#), p30

204. In discrimination claims the bulk of a claim for damages is likely to be injury to feelings, where the upper limit for an award is £44,000. The EHRC therefore concluded that “most discrimination cases (even those with a good prospect of success) would fail the relevant cost benefit test.”²⁴¹

205. We highlight this problem not only because of the barrier that it creates, but also because it is another example of the current enforcement system failing to recognise the importance to society of ensuring that the Equality Act is properly enforced. There are two other categories that discrimination claims could be considered under: the first is that a ‘reasonable private paying individual’ would fund it, and the second that the case is of significant wider public interest.

206. The Equality and Human Rights Commission has recommended that the Government amend the Lord Chancellor’s guidance for civil legal aid to “[r]ecognise the importance to the individual and to society of challenging discrimination, and advise that, as a general rule, a discrimination claim that seeks other remedies in addition to damages should not be assumed to be ‘primarily a claim for damages.’”²⁴² This is a sensible recommendation, but we do not think it goes far enough. **If the necessary critical mass of cases is to be achieved, the starting point for the cost benefit test for civil legal aid should be a presumption that enabling discrimination cases to be brought is in the wider public interest.**

207. We recommend that the Government amend the rules on application of the cost benefit test for civil legal aid to reflect the non-financial value, to the individual and to society, of enabling a discrimination claim to be brought. The rules should require the cost benefit assessment to start from an assumption that discrimination claims are not primarily claims for damages and are likely to be in the wider public interest.

Risk of becoming liable for the other parties’ costs

208. Fixing access to legal aid will, of course, only benefit those who are eligible for it. Many will not be eligible but will still find the costs involved in bringing a discrimination claim,²⁴³ and the actual or perceived risk of becoming liable for the costs of the other party, to be a significant deterrent.²⁴⁴

209. In employment tribunal claims each party will usually bear its own costs. Costs orders requiring the other side to pay a claimant’s cost, or for a claimant to pay those incurred by a defendant, will only be made where there has been ‘unreasonable conduct’. As highlighted in our report into non-disclosure agreements, such orders are rare.²⁴⁵ However, the rules in the county court are different. There is a higher risk of cost orders being made and, as Nick Whittingham explained:

When you are dealing with a big opponent—a Government Department or a large company—you know that the lawyers’ fees will be immense, enough

241 Equality and Human Rights Commission, [Access to legal aid for discrimination cases \(June 2019\)](#), p30

242 Equality and Human Rights Commission, [Access to legal aid for discrimination cases \(June 2019\)](#), p9

243 Nathalie Abildgaard (EEA0270); Sam Walker (EEA0257); Vikki Barnard (EEA0253); Business Disability Forum (EEA0209); Birmingham and Black Country Sight Loss Councils (EEA0195)

244 Leigh Day & Co (EEA0069); National Deaf Children’s Society (EEA0143); Finola Kelly (EEA0272); Nathalie Abildgaard (EEA0270)

245 Women and Equalities Committee, Ninth Report of Session 2017–19, [The Use of Non-disclosure Agreements in Discrimination Cases](#), HC1720, para 59

to wipe out the cost of somebody's home. It is a huge risk for somebody to take. What they might get from that is minimal in terms of compensation. [...] Where we had legal aid, legal aid gives the client cost protection. There is presumption that the client will not have to pay costs. Without legal aid, there is no protection²⁴⁶

Reducing the risk in county court claims: qualified one-way costs shifting

210. One solution to the risk of costs in the county court proposed by a number of witnesses was to extend 'qualified one way costs shifting' to discrimination claims—a proposal supported by the EHRC²⁴⁷ and recommended by the House of Lords Committee on the Equality Act and Disability.²⁴⁸ Louise Whitfield, an expert discrimination lawyer, explained that in the past claimants could use conditional fee agreements and insurance schemes to protect themselves from the risk of having to pay significant costs. However, "those arrangements were scrapped" and for personal injury claims replaced with 'qualified one-way costs shifting' (QOCS), a scheme that was not extended to cover discrimination claims.²⁴⁹ Ms Whitfield explains that this means:

if you have a personal injury claim and you lose, you only have to pay the winning party's costs in very limited circumstances. But if you want to bring a discrimination claim, QOCS is not available, and if you lose you could find yourself liable for tens of thousands of pounds²⁵⁰

211. Chris Fry, another expert discrimination lawyer, similarly argued for QOCS to be extended to discrimination claims. He felt that this would be relatively straightforward to do, requiring only a simple amendment to the Civil Procedure Rules, by Statutory Instrument. He even provided us with a draft of the necessary amendment:

amend the Civil Procedure Rules, by Statutory Instrument, by the insertion, after CPR 44.13(1)(c), of:

(d) under section 114 of the Equality Act 2010²⁵¹

212. We recommend that the Government amend the Civil Procedure Rules to introduce qualified one-way costs shifting for discrimination claims in the county court.

Costs orders and settlements

213. We also heard that claimants in discrimination cases all too often felt forced into settling a claim because they fear that if they do not do so they will become liable for the costs of the other party. This fear applied in both employment tribunal claims and claims in the county court²⁵² and appeared to be as much due to the tactics employed by

246 [Qq83–84](#)

247 [Qq427–429](#) See also: Esther Leighton ([EEA0247](#)); Fry Law ([EEA0176](#)); Inclusion London ([EEA0187](#)); Ms Louise Whitfield ([EEA0157](#)); Leigh Day & Co ([EEA0069](#)); Doug Paulley ([EEA0268](#))

248 House of Lords, Report of the Select Committee on the Equality Act 2010: The impact on disabled people, Session 2015–16, [HL Paper 117](#)

249 Ms Louise Whitfield ([EEA0157](#))

250 Ms Louise Whitfield ([EEA0157](#))

251 Fry Law ([EEA0176](#))

252 See, for example: Fry Law ([EEA0176](#)); Finola Kelly ([EEA0272](#)); Nathalie Abildgaard ([EEA0270](#)); Catherine Casserley ([EEA0248](#)); Jeffrey Harvey ([EEA0180](#))

defendants and their legal teams as to the rules of the court.²⁵³ Costs orders will only be made in employment discrimination cases where there has been “unreasonable behaviour”. Nonetheless, the law firm Leigh Day told us that should a tribunal claimant reject the offer of a confidential settlement and continue to pursue the claim “they may be threatened with significant adverse costs consequences” and that they were seeing “increasing costs/ deposit orders made against claimants in pursuing race discrimination cases which are complicated cases to evidence”²⁵⁴.

214. In our inquiry into non-disclosure agreements we expressed our concern that “fears about being pursued for employers’ legal costs may be driving individuals to agree to settlement terms such as confidentiality clauses that they do not want”.²⁵⁵ We recommended that the Government ensure that there is adequate guidance for tribunal judges and litigants on when a refusal to settle a claim may be considered “unreasonable”, including that refusal to agree to an NDA should never, in itself, be deemed unreasonable behaviour in this regard.²⁵⁶

215. In this inquiry we heard these concerns repeated and extended to include county court claims where the threat of a costs order is more significant than in the employment tribunal. As outlined in Chapter Two, Esther Leighton told us that she had felt forced to settle before achieving the kind of systemic impact she wanted, at least in part due to the risk of being penalised with costs liabilities for refusing a settlement.²⁵⁷ She had been put under pressure to sign a non-disclosure agreement as part of such settlements, and while she had resisted so far was afraid that if she continued to do so and it went to court “the court will penalise me for not having accepted a reasonable offer.” As such she said that she would like “really clear guidance for the courts that says that refusing an NDA is an acceptable reason not to settle”.²⁵⁸ We agree.

216. We recommend that the Government work with the Courts and Tribunals Service to issue guidance to judges and the legal profession on when refusing to enter a settlement agreement or agree to a non-disclosure agreement will and will not constitute grounds for awarding costs in discrimination claims, with a strong presumption that such a refusal, on its own, will not lead to an award of costs against an individual.

Achieving wider impact through individual litigation

Publicity

217. One simple change that can enable individual litigation to achieve wider change is enabling people to access and learn from previous judgments. This is now done in employment tribunals, but not for county court judgments where there is also a lack of statistical data on claims. The Equality and Human Rights Commission told us that as a result there is no clear picture of how many Equality Act claims are brought in the county courts and it is more difficult to identify “repeat offenders” in relation to whom

253 Esther Leighton ([EEA0247](#)); [Qq266–267](#)

254 Leigh Day & Co ([EEA0069](#))

255 Women and Equalities Committee, Ninth Report of Session 2017–19, [The Use of Non-disclosure Agreements in Discrimination Cases](#), HC1720, para 60

256 Women and Equalities Committee, Ninth Report of Session 2017–19, [The Use of Non-disclosure Agreements in Discrimination Cases](#), HC1720, para 60

257 Esther Leighton ([EEA0247](#))

258 Esther Leighton [Q266](#)

enforcement action by the Commission might be appropriate.²⁵⁹ Explaining this situation, the Ministry of Justice told us that some judgments are published online “for example on legal websites such as BAILII or in weekly law reports” but suggested that the “significant volume of business” in the county court was a barrier to more routine publication. They also felt that some judges “may prefer to provide an ex tempore judgment (which will not be published)”, with the caveat that “such proceedings are recorded, and a transcript can be produced if necessary”.²⁶⁰ We do not find this explanation adequate.

218. It cannot be beyond the ability of our courts system to be able to publish something as important to those involved as the judgment of their case. The Equality and Human Rights Commission is correct to argue that this would increase transparency and provide comprehensive, accessible information about discrimination cases in the county court.²⁶¹

219. We recommend that the Courts and Tribunals Service publish the judgments in county court discrimination cases online, with suitable use of anonymity to protect individuals where appropriate.

Remedies as preventative actions

220. As a committee we and our predecessor have repeatedly made recommendations for improvements to the remedies available for discrimination claims.

259 Equality and Human Rights Commission ([EEA0254](#))

260 Ministry of Justice ([EEA0273](#))

261 Equality and Human Rights Commission, [Access to legal aid for discrimination cases \(June 2019\)](#), p. 35

Box 6: Recommendations on remedies for discrimination claims made by the Women and Equalities Committee from 2010–July 2019

The Government must substantially increase the financial penalties for employers found by employment tribunals to have breached the law. Penalties should be set at such a level as to ensure that employees are not deterred from bringing claims, and to deter employers from breaching the legislation. (Report into high heels and workplace dress codes, jointly with the Petitions Committee)²⁶²

The Government should improve the remedies that can be awarded by employment tribunals and the costs regime to reduce disincentives to taking a case forward. Tribunals should be able to award punitive damages and there should be a presumption that tribunals will normally require employers to pay employees' costs if the employer loses a discrimination case in which sexual harassment has been alleged. (Report into sexual harassment in the workplace)²⁶³

We support the EHRC's recommendation that the Government should introduce a statutory code of practice on sexual harassment in support of the mandatory duty. This code would specify the steps that employers should take to prevent and respond to sexual harassment, and which can be considered in evidence when determining whether the duty has been breached. Tribunals should have the discretion to apply an uplift to compensation of up to 25 per cent in harassment claims where there has been a breach of mandatory elements of the statutory code. (Report into sexual harassment in the workplace)²⁶⁴

A toxic organisational culture or poor management practices have the potential to make sexual harassment, along with other types of workplace discrimination, more prevalent. The ability of tribunals to make wider recommendations that draw on the lessons of individual cases to encourage a joined-up organisational response could have an important part to play in tackling these factors as part of a scheme of wider changes. The Government should consider reintroducing tribunals' powers to make wider recommendations to employers in discrimination cases. (Report into sexual harassment in the workplace)²⁶⁵

The Government should also make it quicker and easier for the claimant to resolve a legal problem with their dress code by allowing employment tribunals to award injunctions in these types of cases. (Report into high heels and workplace dress codes, jointly with the Petitions Committee)²⁶⁶

We call again on the Government to urgently improve the remedies that can be awarded by employment tribunals as well as the costs regime to reduce disincentives to taking a case forward. Tribunals should be able to award punitive damages and there should be a presumption that tribunals will normally require employers to pay employees' costs if the employer loses a discrimination case in which sexual harassment has been alleged. The bands in the Vento guidelines should be increased significantly to take into account the non-financial impact of discrimination. These changes should be made within the next two years. (Report into non-disclosure agreements in discrimination cases)²⁶⁷

262 Petitions Committee and Women and Equalities Committee, First Joint Report of Session 2016–17, [High heels and workplace dress codes](#), HC 291, para 85

263 Women and Equalities Committee, Fifth Report of Session 2017–19, [Sexual harassment in the workplace](#), HC 725, para 85

264 Women and Equalities Committee, Fifth Report of Session 2017–19, [Sexual harassment in the workplace](#), HC 725, para 68

265 Women and Equalities Committee, Fifth Report of Session 2017–19, [Sexual harassment in the workplace](#), HC 725, para 105

266 Petitions Committee and Women and Equalities Committee, First Joint Report of Session 2016–17, [High heels and workplace dress codes](#), HC 291, para 86

267 Women and Equalities Committee, Ninth Report of Session 2017–19, [The Use of Non-disclosure Agreements in Discrimination Cases](#), HC1720, para 67

221. We have made these recommendations because the current remedies for discrimination tend to be focussed on remedying the ‘wrong’ suffered by the individual, most often through financial remedies. This pays insufficient regard to the social benefit of enforcing the Equality Act and unjustifiably limits the role that individual claims can play in achieving that benefit. The Government has explained its view that:

claims made under the Equality Act are brought by individuals and so the remedies—normally compensation, but sometimes also damages—therefore apply to the individual and are designed to provide the individual with restitution for the detriment they have suffered.²⁶⁸

222. This is an accurate description of the current situation. Our evidence, in this and numerous past inquiries is that this situation needs to change. Throughout this report we have given examples of where individual enforcement, and individual remedies, were insufficient—from inaccessible websites and buses, to race discrimination in the armed forces.

223. There are two key areas where the most urgent improvement to the remedies available for breaches of the Equality Act is needed: the financial consequences of discrimination need to be such that they act as a significant deterrent and the courts and tribunals need the power to ensure that their judgments can achieve change beyond the individual case.

224. We recommend that the Government bring forward legislation to make exemplary damages for discrimination claims more widely available in both employment tribunals and in county courts.

225. We recommend that the Government bring forward legislation to empower both employment tribunals and county courts to make remedial orders that require organisational change and to make wider recommendations where this can support change within the wider sector.

Conclusions and recommendations

The limitations of an individual approach to enforcement

1. We do not disagree that there are many examples of case law that makes the obligations on employers, service providers and public bodies clear. Despite this, many such organisations still do not meet these obligations and go unchallenged under the current individualised approach. While individuals must still have the right to challenge discrimination in the courts, the system of enforcement should ensure that this is only rarely needed. This requires a fundamental shift in the way that enforcement of the Equality Act is thought about and applied. (Paragraph 23)

The enforcement role of the Equality and Human Rights Commission

2. Individuals are facing discrimination because employers and service providers are not afraid to discriminate, knowing that they are unlikely to be held to account. A critical mass of cases is needed to build a culture where compliance with the Equality Act 2010 is the norm. This requires the changes to the Courts and Tribunals system that we outline in Chapter 8, but also significantly greater action by the Equality and Human Rights Commission. (Paragraph 51)
3. *The Equality and Human Rights Commission should significantly increase the volume, transparency and publicity of its enforcement work by making much greater use of its unique enforcement powers, publicising that work and reducing its reliance on individual complainants.* (Paragraph 52)
4. Publicising the enforcement action that you are taking and doing so in a way that not only enables compliance but also acts as a deterrent, is a crucial foundation to the work of any effective enforcement body. If service providers, employers and other organisations do not see that the Equality Act is being robustly enforced then a key driver for compliance is missing. Likewise, if those whose rights are not being upheld do not see the EHRC as an active enforcer then they will not come forward with the intelligence the Commission needs to take such action. (Paragraph 53)
5. *We recommend that the EHRC publish data on its enforcement activity, including both formal and informal compliance work. This should include summaries of the facts of cases, along with information on the outcomes in a way that can act as case studies on what compliance looks like and act as a deterrent to discrimination.* (Paragraph 54)
6. While noting the number of witnesses who emphasised the importance of the helpline, we are not convinced that that the Commission is not able to use it to access intelligence and we agree with the tailored review that this is one part of a much wider challenge for the EHRC—one that needs to be addressed through its broader strategy of engagement and intelligence gathering, rather than a narrowly focussed telephone helpline. (Paragraph 61)
7. It should have been possible for the EHRC to reach the threshold for suspecting an unlawful act in a case such as that of unequal pay at the BBC—where data had been

released by the BBC and media reports, select committee inquiries and evidence from those affected all provided evidence of discrimination. If this is not possible under the current law, then that law must be changed. (Paragraph 72)

8. *We recommend that the EHRC assesses its enforcement policies and practices to ensure that the threshold for suspecting an unlawful act may have taken place is no higher than required by the law. It should publicly set out the type and level of evidence that will allow it to meet that threshold. If, after changing its policies, the Commission still struggles to meet that evidence threshold then the law must be changed accordingly.* (Paragraph 73)
9. The tailored review of the EHRC did not come to a conclusion on whether or not its budget was adequate, instead emphasising the need for a clear purpose and set of priorities as the starting point to determine the right level of resources. The review recommended that, once these had been set, the GEO and the EHRC work together to set out the case for a new budget settlement. We agree that this is a sensible approach, especially given the pivotal organisation and policy issues contained within this report and as well as the consistent underspends outlined above. (Paragraph 79)
10. *We recommend that the Government launch a consultation with a view to introducing a scheme to indemnify the EHRC against the risk of high costs for strategically important cases.* (Paragraph 83)
11. While we cannot comment on whether or not the claims made against the Commission would have been successful, we are deeply concerned by the way in which the Commission has handled the dispute. The Commission may believe that the settlements they made were agreed consensually, but the threat of being pursued for costs left the staff concerned feeling pressured to settle for financial compensation, when equally important was a remedy for what they felt to be unfair damage to their professional reputations. We explain in Chapter 8 how problematic such pressure is in the context of discrimination claims, where financial compensation is frequently an inadequate remedy. (Paragraph 94)
12. The EHRC is not simply another non-departmental public body. It is one of the United Kingdom's national equality bodies and a national human rights institution. It should not be following the minimum required, it should be setting the standard for others to follow. That this does not appear to have been the case to date is disappointing. (Paragraph 95)
13. While we understand that the EHRC intends to make significant changes in direction and agree that changes such as establishing a new dedicated legal enforcement team have the potential to support this, the Commission has not yet demonstrated the ability to act effectively. It was ignored in Sir David Metcalf's Labour Market Enforcement Strategy and received only small mention in the Government's Good Work Plan. It was found wanting by this Committee in action on older workers, sexual harassment, inequalities facing Gypsy, Roma and Traveller communities, maternity discrimination and inequalities in the built environment. The Commission has acted on some of these areas, but it should not have needed prompting by a

Parliamentary Committee before it did so and the Commission continues to rely on affected individuals seeking it out and convincing it to act, instead of leading work to tackle endemic and structural inequalities. (Paragraph 96)

14. *The EHRC must take further action to address the problems identified in the tailored review conducted in 2018. We see little evidence of the kind of clarity and focus that the tailored review recommended. Despite some progress in setting priorities and numerous restructures, the Commission still fails to have the kind of focus on impact and influence that good management should be delivering.* (Paragraph 97)

Mainstream enforcement bodies

15. As public bodies all enforcement bodies (including regulators, inspectorates and ombudsmen) should be using their powers to secure compliance with the Equality Act 2010 in the areas for which they are responsible. Such bodies are far better placed than the Equality and Human Rights Commission could ever be to combat the kind of routine, systemic, discrimination matters where the legal requirements are clear and employers, service providers and public authorities are simply ignoring them because there is no realistic expectation of sanction. Examples include equal pay, direct discrimination including failure to make a reasonable adjustment, harassment, and victimisation.

This would supplement the work of the EHRC enabling it to focus on its strategic enforcement role and act where its expertise and unique powers are most needed, a question that we address in Chapter 3. We also agree that there is scope to consider aspects of compliance currently outside the remit of the EHRC, such as action against employers who do not comply with tribunal rulings. (Paragraph 120)

16. *We recommend that each Government Department be put under a legal duty to ensure that the enforcement bodies (including regulators, inspectorates and ombudsmen) for which they are responsible are using their powers to secure compliance with rights under the Equality Act 2010 in the sector for which they are responsible. If the mandate of the enforcement body does not already provide them with the ability to do this, then it must be amended to explicitly do so.* (Paragraph 121)
17. *Any new enforcement body, including the planned new labour market enforcement body, must have an explicit mandate to secure compliance with the Equality Act 2010 using its enforcement powers. This should, as a minimum, include discrimination matters where the legal requirements are clear. Examples include equal pay, direct discrimination including failure to make a reasonable adjustment, harassment, and victimisation* (Paragraph 122)
18. The EHRC's relationship with other enforcement bodies will be key to its ability to deliver its functions effectively in the future. This should have already been given a much higher priority but will become even more important with a shift of emphasis as the improvements set out in this report are implemented and the burden of enforcement shifts. (Paragraph 125)

19. *We recommend that the Equality and Human Rights Commission make enforcement bodies, in the broad sense used in this report, a priority target for investigation and enforcement action for failure to implement their public sector equality duty in their enforcement functions. (Paragraph 126)*
20. *We recommend that the Equality and Human Rights Commission establish memoranda of understanding with all relevant enforcement bodies within the next 12 months. These memoranda should explicitly set out which enforcement matters under the Equality Act 2010 the enforcement body will undertake and which will remain within the strategic role of the EHRC, as well as a mechanism for dialogue and joint working in less clear-cut cases. For example, we expect that any new labour market enforcement body would have to take on enforcement of routine employment discrimination matters, such as reasonable adjustments by employers, leaving the EHRC free to fulfil its strategic enforcement role and act where its expertise is most needed. (Paragraph 127)*

Enforcing the Equality Act at the heart of Government policy

21. We have seen repeated examples of Government Strategies that fail to recognise discrimination, let alone contain actions to secure compliance with the Equality Act. This failure leaves the Government at serious risk of breaching the public sector equality duty in its most important strategies and means that individuals facing discrimination continue to bear the full burden of enforcement, even in policy areas that the Government has identified as of central importance to the country. We are disappointed that the Government Equalities Office has not been able to secure greater compliance with the law by other Government Departments. (Paragraph 133)
22. *The Government must put in place a mechanism to ensure that every one of its strategies, plans, and policies, such as the Good Work Plan, the Industrial Strategy and Fuller Working Lives contain explicit plans to improve enforcement of rights under the Equality Act 2010 in the area that it deals with. The Government Equalities Office must be empowered to oversee this mechanism and no significant strategy, plan or policy should be signed off by a Minister without them assuring themselves that such plans are included. (Paragraph 134)*

The need for proactive and preventative duties and obligations

23. We agree with the Equality and Human Rights Commission that the specific duties should be more focussed and strategic. Aligning obligations with evidence of particular inequalities or aspects of discrimination strikes us as an effective means of doing so. While the EHRC's work on *Is Britain Fairer?* is a good starting point there are similarly robust sources that Government can draw on, including expert research organisations, the Race Disparity Audit and indeed from the reports of Parliamentary Select Committees. (Paragraph 147)
24. *We recommend that the Cabinet Office work across Government to identify a small number of evidence-based issues of inequality or discrimination suitable for action either within a specific sector or cross-departmentally and that the Government introduce new specific duties under the Equality Act 2010 to direct the relevant*

*Department and public authorities to take action on these identified inequalities. These specific duties should be reviewed at least every three years in line with new data available from the EHRC's report *Is Britain Fairer?* and the Government's Race Disparity Audit, among other sources. (Paragraph 148)*

25. While we remain of the view that specific actions are needed to tackle sexual harassment in the workplace, we agree that this risks the kind of fragmentation that concerns business. We do not want a shift in the burden away from the individual to add disproportionately to that on employers. On the other hand, we have seen evidence of how duties that focus minds on particular issues, such as the gender pay gap, can have greater impact. We believe that extending our recommendation to include all forms of harassment and victimisation strikes the right balance between retaining this focus and minimising the fragmentation of employer responsibilities. (Paragraph 153)
26. *We re-iterate our recommendations in the report of our inquiry into sexual harassment in the workplace that:*
 - *The Government should place a mandatory duty on employers to protect workers from harassment and victimisation in the workplace. Breach of the duty should be an unlawful act enforceable by the Commission and carrying substantial financial penalties. The duty should be supported by a statutory code of practice on sexual harassment and harassment at work which sets out what employers need to do to meet the duty; and*
 - *The Government should introduce a specific duty under the Public Sector Equality Duty requiring relevant public employers to conduct risk assessments for sexual harassment in the workplace and to put in place an action plan to mitigate those risks. Action plans should set out how cases will be investigated and include guidance on penalties for perpetrators. (Paragraph 154)*
27. *We further recommend that these duties should extend to all unlawful harassment and victimisation covered by the Equality Act 2010, not just sexual harassment. (Paragraph 155)*

Balancing rights in single-sex services

28. While the apparent failure of significant numbers of public sector commissioners to properly apply the public sector equality duty to their decision making is a problem of understanding and not of the law itself, it is a clear example of what is going wrong because of the current system of equality law enforcement. This cannot be left to affected organisations to fix. As Women's Aid made clear, they do not have the resources to do so. (Paragraph 167)
29. *We recommend that the Government Equalities Office issue a clear statement of the law on single-sex services to all Departments, including the requirement under the public sector equality duty for commissioners of services to actively consider commissioning specialist and single-sex services to meet particular needs. (Paragraph 168)*
30. *We do not believe that non-statutory guidance will be sufficient to bring the clarity needed in what is clearly a contentious area. We recommend that, in the absence*

of case law the EHRC develop, and the Secretary of State lay before Parliament, a dedicated Code of Practice, with case studies drawn from organisations providing services to survivors of domestic and sexual abuse. This Code must set out clearly, with worked examples and guidance, (a) how the Act allows separate services for men and women, or provision of services to only men or only women in certain circumstances, and (b) how and under what circumstances it allows those providing such services to choose how and if to provide them to a person who has the protected characteristic of gender reassignment. (Paragraph 190)

Individual action in Courts and Tribunals

31. The Ministry of Justice has committed to monitor take up of legal aid for discrimination cases and to assess the level of face to face provision once the planned round of procurement of specialist telephone advice and face to face contracts has been completed. This is to be welcomed but must also explicitly evaluate their effectiveness in securing legal aid for those facing discrimination in a way that genuinely improves access to justice. (Paragraph 200)
32. *We recommend that the Ministry of Justice monitor and evaluate the effectiveness of the removal of the mandatory requirement to access legal advice for discrimination cases through the telephone gateway, the planned legal aid awareness campaign and the procurement of specialist advice services in increasing the number of individuals being granted legal aid, including legal representation, for discrimination claims. (Paragraph 201)*
33. If the necessary critical mass of cases is to be achieved, the starting point for the cost benefit test for civil legal aid should be a presumption that enabling discrimination cases to be brought is in the wider public interest. (Paragraph 206)
34. *We recommend that the Government amend the rules on application of the cost benefit test for civil legal aid to reflect the non-financial value, to the individual and to society, of enabling a discrimination claim to be brought. The rules should require the cost benefit assessment to start from an assumption that discrimination claims are not primarily claims for damages and are likely to be in the wider public interest. (Paragraph 207)*
35. *We recommend that the Government amend the Civil Procedure Rules to introduce qualified one-way costs shifting for discrimination claims in the county court. (Paragraph 212)*
36. *We recommend that the Government work with the Courts and Tribunals Service to issue guidance to judges and the legal profession on when refusing to enter a settlement agreement or agree to a non-disclosure agreement will and will not constitute grounds for awarding costs in discrimination claims, with a strong presumption that such a refusal, on its own, will not lead to an award of costs against an individual. (Paragraph 216)*
37. It cannot be beyond the ability of our courts system to be able to publish something as important to those involved as the judgment of their case. The Equality and Human

Rights Commission is correct to argue that this would increase transparency and provide comprehensive, accessible information about discrimination cases in the county court. (Paragraph 218)

38. *We recommend that the Courts and Tribunals Service publish the judgments in county court discrimination cases online, with suitable use of anonymity to protect individuals where appropriate.* (Paragraph 219)
39. There are two key areas where the most urgent improvement to the remedies available for breaches of the Equality Act is needed: the financial consequences of discrimination need to be such that they act as a significant deterrent and the courts and tribunals need the power to ensure that their judgments can achieve change beyond the individual case. (Paragraph 223)
40. *We recommend that the Government bring forward legislation to make exemplary damages for discrimination claims more widely available in both employment tribunals and in county courts.* (Paragraph 224)
41. *We recommend that the Government bring forward legislation to empower both employment tribunals and county courts to make remedial orders that require organisational change and to make wider recommendations where this can support change within the wider sector.* (Paragraph 225)

Formal minutes

Wednesday 17 July 2019

Members present:

Mrs Maria Miller, in the Chair

Tonia Antoniazzi

Stephanie Peacock

Sarah Champion

Jess Phillips

Philip Davies

Draft Report (*Enforcing the Equality Act 2010: the law and the role of the Equality and Human Rights Commission*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 225 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Tenth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available (Standing Order No. 134).

[Adjourned till Wednesday 4 September 2019 at 9.30 a.m.]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 31 October 2018

Karon Monaghan QC, Barrister, Catherine Rayner, Chair, Discrimination Law Association, **Sam Smethers**, Chief Executive, Fawcett Society [Q1–62](#)

Wednesday 28 November 2018

Alex Hayes, Managing Director, Equality Advisory and Support Service, **Christina McAnea**, Assistant General Secretary, UNISON, **Richard Miller**, Head of Justice, The Law Society, **Nick Whittingham**, Chief Executive, Kirklees Citizens Advice and Law Centre [Q63–137](#)

Wednesday 16 January 2019

Barbara Cohen, Niall Crowley, **Mike Smith**, Chief Executive, Real, **Nick Webster**, Senior Solicitor, Leigh Day [Q138–176](#)

Wednesday 30 January 2019

Nick O'Brien, Luke Tryl, Director of Corporate Strategy, Ofsted, **Annette Lovell**, Director of Engagement, Financial Ombudsman Service [Q177–234](#)

Esther Leighton and **Doug Paulley** [Q235–272](#)

Wednesday 27 March 2019

Professor Sir David Metcalfe CBE, Director of Labour Market Enforcement, Department for Business, Energy and Industrial Strategy, and **Emily Eisenstein**, Head of Policy and Stakeholder Engagement, Office of the Director of Labour Market Enforcement [Q273–323](#)

Wednesday 8 May 2019

Melanie Field, Executive Director, Equality and Human Rights Commission, **Stephen Lodge**, Senior Principal Lawyer, Equality and Human Rights Commission [Q377–463](#)

Wednesday 22 May 2019

Janet McDermott, Head of Membership, Women's Aid, **Karen Ingala Smith**, Chief Executive, Nia, **Diana James**, Volunteer, Cornwall Refugee Trust Women's Refuge & Norda House Men's Refuge [Q464–571](#)

Wednesday 5 June 2019

David Isaac, Chair, Equality and Human Rights Commission, **Rebecca Hilsenrath**, Chief Executive, Equality and Human Rights Commission, **Clare Collier**, Legal Director, Equality and Human Rights Commission

[Q572–623](#)

Baroness Williams of Trafford, Minister of State for Equalities, **Charles Ramsden**, Deputy Director, Government Equalities Office

[Q624–653](#)

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

EEA numbers are generated by the evidence processing system and so may not be complete.

- 1 A member of public ([EEA0024](#))
- 2 A member of the public ([EEA0007](#))
- 3 A member of the public ([EEA0020](#))
- 4 A member of the public ([EEA0022](#))
- 5 A member of the public ([EEA0026](#))
- 6 A member of the public ([EEA0033](#))
- 7 A member of the public ([EEA0034](#))
- 8 A member of the public ([EEA0050](#))
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- 10 A member of the public ([EEA0072](#))
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- 53 BBC Women ([EEA0025](#))
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- 55 Black South West Network ([EEA0267](#))
- 56 Brighton & Hove City Council ([EEA0058](#))
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- 59 Carl Rindell ([EEA0115](#))
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- 67 Disability Law Service ([EEA0040](#))
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- 90 Educational Institute of Scotland ([EEA0133](#))
- 91 Eleanor Hill ([EEA0221](#))
- 92 Eleanor Roberts ([EEA0028](#))
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- 94 Elizabeth Barnes ([EEA0263](#))
- 95 Emily Dyer ([EEA0125](#))
- 96 Equality and Diversity Forum ([EEA0177](#))
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- 130 Leigh Day & Co ([EEA0069](#))
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- 224 Stonewall ([EEA0266](#))
- 225 The Access Association ([EEA0044](#))
- 226 The Runnymede Trust and Race on the Agenda ([EEA0213](#))
- 227 The Traveller Movement ([EEA0183](#))
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- 237 Women's Resource Centre ([EEA0136](#))
- 238 Working Out ([EEA0134](#))
- 239 Young Women's Trust ([EEA0159](#))
- 240 Yvonne Hall ([EEA0203](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	Fathers and the workplace	HC 358 (HC 1076)
Second Report	The role of Minister for Women and Equalities and the place of GEO in government	HC 365 (HC 1546)
Third Report	Race Disparity Audit	HC 562 (HC 1537)
Fourth Report	Older people and employment	HC 359 (HC 1585)
Fifth Report	Sexual harassment in the workplace	HC 725 (HC 1801)
Sixth Report	Sexual harassment of women and girls in public places	HC 701 (HC 2148)
Seventh Report	Tackling inequalities faced by Gypsy, Roma and Traveller communities	HC 360
Eighth Report	Abortion law in Northern Ireland	HC 1584
Ninth Report	The use of non-disclosure agreements in discrimination cases	HC 1720
First Special Report	Ensuring strong equalities legislation after the EU exit: Government Response to the Committee's Seventh Report of Session 2016–17	HC 385
Second Special Report	Implementation of Sustainable Development Goal 5 in the UK: Government and Office for National Statistics Responses to the Committee's Eighth Report of Session 2016–17	HC 426
Third Special Report	Fathers and the workplace: Government Response to the Committee's First Report of Session 2017–19	HC 1076
Fourth Special Report	Race Disparity Audit: Government, Equality and Human Rights Commission and Office for National Statistics responses to the Committee's Third Report of Session 2017–19	HC 1537
Fifth Special Report	The role of the Minister for Women and Equalities and the place of GEO in government: Government Response to the Committee's Second Report of Session 2017–19	HC 1546
Sixth Special Report	Older people and employment: Government and Equality and Human Rights Commission Responses to the Committee's Fourth Report of Session 2017–19	HC 1585

Seventh Special Report	Sexual harassment in the workplace: Government Response to the Committee's Fifth Report of Session 2017–19	HC 1801
Eighth Special Report	Sexual harassment of women and girls in public places: Government response to the Committee's Sixth Report of Session 2017–19	HC 2148
Ninth Special Report	Tackling inequalities faced by Gypsy, Roma and Traveller communities: Government and Ofsted response to the Committee's Seventh Report of Session 2017–19	HC 2411