

Women and Equalities Committee

Oral evidence: [Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission](#), HC 1470

Wednesday 31 October 2018

Ordered by the House of Commons to be published on 31 October 2018.

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Members present: Mrs Maria Miller (Chair); Tonia Antoniazzi; Angela Crawley; Vicky Ford; Jess Phillips; Tulip Siddiq; Gavin Shuker.

Questions 1–62

Witnesses

I: Sam Smethers, Chief Executive, Fawcett Society, Catherine Rayner, Chair, Discrimination Law Association, and Karon Monaghan QC, Barrister.

Written evidence from witnesses:

- [Discrimination Law Association](#)
- [Fawcett Society](#)
- [Equality and Human Rights Commission](#)
- [Government Equalities Office](#)

Examination of witnesses

Witnesses: Sam Smethers, Catherine Rayner and Karon Monaghan QC.

Q1 Chair: Good morning. Thank you for joining us today. I welcome not only our witnesses but the people watching online. This is the first evidence session of our new inquiry on enforcing the Equality Act 2010. We launched the inquiry because of evidence, received throughout our previous inquiries, that individuals can have difficulties with enforcing their rights under the Equality Act, and because we, as a Committee, are responsible for scrutinising the Equality and Human Rights Commission and its enforcement role.

We have received a very large amount of written evidence for this inquiry, and we are really grateful to all of those who have taken the time to set out their views. We are still processing and analysing that evidence, and it will all be published in due course. Today we will be taking a general overview of the subject of enforcement before looking at very specific aspects in forthcoming sessions over the coming months.

Before we start our questioning, perhaps I could ask the witnesses to say their name and the organisation they represent.

Sam Smethers: I am Sam Smethers, the chief executive of the Fawcett Society.

Catherine Rayner: I am Catherine Rayner. I am here in my capacity as chair of an organisation called the Discrimination Law Association.

Karon Monaghan: I am Karon Monaghan, a barrister practising principally in the field of equality law.

Chair: Thank you. Our first line of questioning is from Tulip.

Q2 Tulip Siddiq: This Committee has in the past made a number of recommendations about improving enforcement of the Equality Act, most often as a result of inquiries into problems faced by those of a particular protected characteristic. For example, we have recommended that the time limits be extended for claims of maternity and pregnancy discrimination, and that exemplary damages be available in sexual harassment cases. My question to the panel is this: are there problems with enforcement that are particular to specific protected characteristics, or do issues apply across the board?

Karon Monaghan: Probably the key difficulties in enforcement apply across the board. There will be specific ones, as you say, for example with pregnancy and time limits, and the same may apply in relation to disability, as there may be reasons why a person cannot issue proceedings quickly, but the key difficulties apply across the board.

Catherine Rayner: I agree. I think that time limits are quite an interesting example, because they pose specific difficulties across the characteristics, but for different reasons. For example, in the one that you



HOUSE OF COMMONS

are familiar with—pregnancy and maternity—there are very particular reasons why a woman with a new baby may have difficulties putting in a legal claim and having that well worked out. They are fundamentally different from the reasons why a person with a mental health disability who has been on long-term sickness leave is unable to do it. One of the things that the DLA has been concerned about is the lack of consideration across the board of how disabilities are affected by time limits in particular. I gave two examples, but I think that is also across the board.

Sam Smethers: We have not looked across all the characteristics in the same way that Karon and Catherine have, so I cannot answer that question specifically in that way, but for us the issue with bringing claims, as well as time limits, is about whether multiple discrimination is being addressed. That was one of the issues we raised in our law review. You might be time-limited out, but you also might not be able to bring a claim because your particular identity characteristics are not being covered in the way our law is applied at the moment, because we do not have multiple discrimination provisions enacted in our Equality Act. That is another way in which individuals are constrained by the claim that they can bring. I am talking about section 14, which refers to dual discrimination rather than multiple.

Q3 **Tulip Siddiq:** What do you see as the most significant barrier to individuals enforcing their rights under the Equality Act?

Sam Smethers: The biggest problem we have is that the balance of power is wrong. The law is trying to redress that balance of power by giving the individual rights, but fundamentally it is very difficult to exercise those rights, so the balance of power is still heavily in favour of the employer in an employment case, for example.

From an individual's point of view, what is the biggest barrier? First, if they bring any kind of complaint or claim through their organisation, just raising it in the first instance is a massive barrier for women. When you are raising sexual harassment or challenging on equal pay, and you have not got the data and you do not know who a comparator is, you cannot even get to first base. That is almost before you get to the legal system.

When you get into actually trying to pursue and construct that claim, the financial and emotional costs are huge. Equal pay claims can go on for years. Some of the cases that are still going through tribunal—Reading Council began in 2003 and the Glasgow women have spent over 10 years fighting their equal pay claim. It is just unacceptable to have a legal system that expects an individual to bring a claim and to go through that in order to see justice. Again, we addressed that in our law review and we talked about time limits on equal pay cases. I just think it is such a big mountain.

So many women never get to that first point of bringing a claim, and if they do start the process, it is often with a view to settling before it gets to a tribunal, because they are looking for some remedy to move on with their lives. They do not really want to get all the way through to the end of



HOUSE OF COMMONS

the process in terms of a legal challenge, because of all those other considerations such as cost, emotional pressure and the toll it takes on them. And they still have a day job; they still want to get on and have a career and a life, and look after their families and everything else. Sometimes we underestimate the challenge for the individual to even begin the process of litigation. I would like us to think about the legal process in that balance of power framework, and try to understand it from a woman's perspective.

Catherine Rayner: From the perspective of the Discrimination Law Association, as practitioners, there are two significant issues. One is about identification, which really ties in with much of what has been said about the work of the equalities body, as well as wider issues with education and knowledge. For example, many people with a disability will not consider that they have been discriminated against because they will not necessarily identify as a disabled person.

Similarly—I think Sam touched on this—there are often issues about knowing why. One issue of discrimination is that people who discriminate in the choices they make do not necessarily say that. We are aware that much research has been done into race discrimination in promotion cases, for example, where it is clear that the issue in many organisations is not about want of talent—there is lots of talent—but about people not being promoted. There are issues about the way that procedures are dealt with and the way the law is implemented in the workplace. People who are not promoted may not realise that it is about race, unless they start looking at how other people are treated. Certainly, Karon was very involved in one recent case—the Essop case—where that was looked at in the context of Government Departments. There are issues of identification, knowledge and understanding, and that is about education.

The second issue is really about access to justice, which is absolutely fundamental. Over the past five to 10 years there has been a massive reduction in the amount of funding available to individuals to access justice and support, in terms of both the reduction in legal aid and legal help, and a reduction in funding for the very organisations that are set up to assist those people. It is galling to see the Government responding to this consultation by referencing citizens advice bureaux, as they have suffered massive reductions in the amount of money going in to allow them to do the very work that might prevent people from having to bring claims in the first place.

If you live in the south-west, as I do, you are in a legal help desert—I think I know personally the two lawyers in my region who do discrimination work, which is shocking. We know that 50,000 women a year—certainly this was true 18 months ago when I last gave evidence to the Committee—suffer from what may well be pregnancy discrimination, and we know from the Lammy report the extent of race discrimination in criminal practice, but we do not have those people coming forward and bringing cases. There is an obvious, real shortfall between what is happening on the ground and people's access to justice.



HOUSE OF COMMONS

Karon Monaghan: I agree with everything that has been said. Looking now not at what improvements should be made—I will come to those in a moment—but at the inadequacies in our present system for enforcement, one of the major difficulties is that it depends principally on individual enforcement. No doubt we will come to the EHRC in due course, but it depends principally on individual enforcement. There are very low levels of awareness about the rights that exist under the Equality Act, and the existing guidance could be better—I will put it like that. As has been said, there is very little access to legal advice, and legal aid has pretty much gone. Access to a county court where non-employment cases are enforced requires a person to pay fees and put themselves at risk of a cost order.

There is little opportunity to gather evidence without first issuing proceedings. You will know that a questionnaire procedure existed that permitted a potential claimant to serve a questionnaire against the proposed defendant—their employer or the public authority, as the case may be—for the purposes of gathering evidence to determine whether they might have a claim. The provisions addressing questionnaires, including for third-party harassment, were repealed as part of a package of repeals under the Equality Act, meaning that a person must issue proceedings first if they are to gather the necessary evidence to determine whether they have a claim.

There are fees for issuing proceedings in the county court that extend to hundreds of thousands of pounds for low-value claims, meaning that, even if somebody becomes aware of their rights and is able to gather the evidence to issue proceedings, they will find themselves required to pay significant fees if they are to continue. There are a range of problems extending across all those things and the matters already alluded to by Sam and Catherine.

Q4 **Angela Crawley:** My section is on the scope and clarity of the law. We have received a large number of inquiry submissions expressing specific concerns about the definitions of the protected characteristics in the Equality Act. The vast majority are concerned about how sex is defined and commonly understood. You will understand the specific sensitivities around this area. Do these issues present problems for people seeking to enforce their rights?

Karon Monaghan: I think without any doubt whatsoever that sex needs to stay as a protected characteristic. I have experience of the concerns about sex and gender, and particularly gender reassignment. I represent trans women and women who aspire to protect women-only spaces; I work on both issues from both sides, to the extent that it is binary. I do not think that the problem is with enforcement. I do not think that the definitions of trans women and trans men who have had their gender reassigned lack clarity at the moment.

The much bigger problem is that women running women-only spaces, such as rape crisis centres and refuges, are very unclear about their entitlement to exclude trans women in certain circumstances; there is a lack of clarity, so far as defending women-only spaces is concerned. In my



HOUSE OF COMMONS

experience of representing trans people, I have not come across any lack of clarity as to the meaning of gender reassignment under the present law, or to the meaning of trans status. It is the other problem, if you like—the maintaining of sex as a specific status and also protecting women-only spaces.

- Q5 **Angela Crawley:** Do you envisage any specific changes to people's ability to enforce their rights under the Equality Act if the Government change the way in which they grant gender recognition certificates under the Gender Recognition Act 2004?

Karon Monaghan: No. It might make it easier for trans people to bring claims where they have been discriminated against as trans people. The protections for single-sex spaces will still exist, but they need to be clarified and strengthened, because there is such low-level awareness about their scope.

I have heard from various organisations and single-sex spaces that the lack of clarity can have a chilling effect. In other words, they do not feel confident about where the boundaries are. There needs to be either clarity in the law or very clear guidance. At the moment, there is no clear guidance.

- Q6 **Angela Crawley:** Catherine, do you agree that there is a concern about litigation specifically?

Catherine Rayner: What I would say, in my capacity as chair of the DLA, which has members from a range of different organisations, is that we are still considering the issue. We have not yet come to a conclusion. I think that Karon has very eloquently outlined the legal issues, and I do not really want to add anything to that; I think that what she says is right.

I think there are other issues about definitions within the Equality Act that are not set. They are about disability and the definition of disability. I would like to say something about that, if this is an appropriate moment—I don't know whether you want to focus only on issues around sex at this point. I think that one of the real difficulties within the Act is around definition of disability. I think it is sometimes quite difficult for people to bring themselves within it, because of the way it is structured. I think sometimes that can present an absolute barrier. This is something that the DLA has said in evidence to other committees and we are not alone in saying that. It is a complicated definition and perhaps it ought to be looked at.

One of the reasons it is complicated, of course, is because disability is an enormous range of different impairments and conditions, including mental health issues, physical issues and indeed issues with the learning disabled. There is a huge range there, just to flag that up.

- Q7 **Angela Crawley:** Sam, the Fawcett Society has done work around this area. Specifically, do you think there are any issues around the definition of sex in the Equality Act and do you foresee any issues around the definition changing under the Gender Recognition Act 2004?



Sam Smethers: We don't think the definition is set to change. As a protected characteristic it should remain as it is. I have agreed with much of what Karon said. We have published a Q&A on our website—for those who have not seen it, I urge you to have a look at it. The challenge is with the reform of the GRA, which we have said we support in principle, subject to the detail of how it would be reformed. You have to think about the interaction between the exemptions and the Equality Act, and how those policing those exemptions and applying those exemptions can have confidence in what they are doing and that they are not breaking the law.

I think there is a question of guidance and a question of clarity around the interaction. Given that the Government are bringing forward proposals to change the Gender Recognition Act, I think the onus is on Government to address that need for clarity, and then we will engage with the next stage of the process, once we see exactly what the precise detail of that is. I think Karon is right to say that there is genuine confusion on the part of those organising and running single-sex services. Some of them would say that they are not confused and they are clear, but others would say that they are confused and that they are concerned.

I think there is also a question about whether the users of those single-sex spaces have had their voices sufficiently heard in this entire process. I am not clear that they have really been heard. I genuinely do not know if there is anxiety or not. I genuinely do not know if women using those services are really comfortable and they are not bothered at all about this, or they are worried and actually, given the opportunity to talk about it, they would like to air those views. Some of the voices we are hearing on all sides of this issue are not actually those voices. Let's try to surface the users' experience in this as well—that includes trans women's voices too. Let's genuinely get to a place where we provide services that meet the needs of everyone and respect their needs, their safety and dignity, whatever they might be and wherever you are on this issue. That is the service provider's obligation.

Q8 **Chair:** We will have a separate section on single-sex services. Jess is going to cover that a bit later on. Can I ask a particular question of Karon? Do trans women have the same rights as non-trans women?

Karon Monaghan: Yes they do. If they have a GRC they are entitled to be treated as a woman for all purposes, save that there are exemptions under the Equality Act, even in the case of trans women with a GRC. So even trans women with a GRC can be excluded from single-sex services—rape crisis centres and refuges being the paradigm example—because there are exemptions in relation to single-sex services. In addition, even in the case of trans women without a GRC, they have the right not to be discriminated against because of their gender reassignment status.

Q9 **Chair:** That is the current law?

Karon Monaghan: Yes. If there is a change so that self-identification becomes the route to a GRC and you do not need a diagnosis of dysphoria—whatever gender dysphoria is; it is highly contested, but you



HOUSE OF COMMONS

would not need two doctors to say and all that sort of stuff—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—this is why, to my mind, self-identification is not particularly relevant to this issue—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.

Chair: Thank you very much. That is helpful.

- Q10 **Tonia Antoniazzi:** Legal action by individuals is a primary means by which the rights of the Equality Act are enforced, so is the burden placed on individuals to enforce their rights under the Equality Act proportionate to the benefit that they and society could gain from doing so?

Karon Monaghan: No. *[Laughter.]*

Tonia Antoniazzi: Don’t mince your words!

Karon Monaghan: You probably have unanimity here.

- Q11 **Tonia Antoniazzi:** In that case, what level of burden is acceptable?

Catherine Rayner: The first point is that the right not to be discriminated against and equality rights are issues for society. They are human rights, they are fundamental, and they are society’s concerns. At the moment, the balance between the individual bringing action and society taking steps to ensure that inequality is reduced and discrimination does not happen are out of kilter. The emphasis on individuals places an enormous stress factor on the individual, as well as all the other issues that I and others have touched on about cost, personal investment of time and all the rest of it. There are issues about that.

The reality is that there are many other mechanisms available to Government, local government and organisations that could be utilised. We have seen the gender pay gap reporting come in, but of course the public sector equality duty could be much better used. There was also section 1 of the Equality Act, which is the socio-economic duty—the duty to take into account socio-economic factors when considering public services and so on. There is lots of research that demonstrates that inequality affects those who are poorer and low income far more than it does other groups. It has a more significant impact.

There are issues around enforcement through, for example, ombudsmen. There are issues potentially around the Equality and Human Rights Commission using its powers of investigation, enforcement and so on far more effectively and more stringently. The powers are there, and the ideas have been put forward on many occasions. It is possible for Government to legislate to increase the responsibility of individual



organisations and inspectorates—whether it is tax inspectorates, school inspectors or whatever—to give them responsibilities and powers for ensuring that these matters are looked at. A lot of that is about asking people to do monitoring, recording and reporting. It is not difficult. We know it can be done; we just don't do it sufficiently.

- Q12 **Tonia Antoniazzi:** So it is possible to design a system of enforcement that does not place the burden on the individual.

Catherine Rayner: Yes, absolutely—both by looking at the ways that organisations can enforce individually and by having an oversight. For example, the public sector equality duty has been used as a route into litigation through judicial review, which has an early stage to flag up difficulties. It has also been used, in its most effective areas, when there was proper funding and all the rest of it, 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. It can be used to flag up a responsibility or a concern at an early stage of decision making to place an obligation on a council committee, for example, 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. So it can work.

The powers of the ombudsman could be increased significantly in particular areas, so that they had a responsibility for looking into the equality aspects of an organisation. In government and the public sector there is a huge amount of contracting—perhaps less than there was, but still a huge amount—and it is entirely possible to put terms and conditions into public sector contracts, or with those who are contracted with privately. There are numerous mechanisms, and I suggest they are fairly well known and can be worked through. I would say there will always also be a place for the individual litigant, but as well as perhaps looking at how group litigation could be facilitated more easily, I would like to see the Equality and Human Rights Commission or other organisations have the facility to take representative actions or to take action on behalf of groups where there is a known concern.

Sam Smethers: Can I come in on that one? This is really important. It goes back to the point about balance of power and it goes to the heart of how you want to drive change. Section 78 gender pay gap reporting requirements were about trying to get employers to take responsibility for the gender pay gap, to look at what is going on in their own organisations and to try to do something about it. It is not really about giving the individual information that she can then use to bring a claim, because you do not publish that level of detail of data. It is about the responsibility of the organisation to drive change, but we do not complete the line of what you need to do to make that strong and powerful. It is about accountability: what are you actually going to do to follow through on that data? What is your plan? At the moment, we do not require an action plan to go with the regulations that require you to publish your gender pay gap data. The follow-through is a bit lacking.



HOUSE OF COMMONS

A good comparison that I think is quite interesting is that we have just had the GDPR, and as a small charity, I can promise you we have done a lot of work on really detailed data protection and privacy policies. My awareness of what we have to do has shot through the roof. Why? Because I know there is a meaningful sanction at the end of it. As an employer and an organisation—I am the chief executive of a small charity—I am worried about our getting it wrong and what the consequences might be for me and my organisation. How worried are all those other organisations out there about GDPR versus the gender pay gap and equal pay? Do you see what I mean? It is not comparable. Why aren't they as worried? If they are not as worried, we are getting it wrong. We are not getting the sanction right. It has to hurt and their fear of it has to be meaningful. We are completely getting it wrong at the moment.

Q13 Tonia Antoniazzi: You are saying the burden should not sit so heavily on the individual facing the discrimination, so where should it sit?

Sam Smethers: It is the responsibility to prevent discrimination and harassment. We have called for a new duty, and this Committee has called for a duty, to prevent harassment. Karon has done a huge amount of work on that for the commission. We are all singing from the same hymn sheet on that, because we recognise that the only way you can try to change and solve a problem so endemic is to put the onus back on the organisation and say, "What culture do you want to promote? Whose responsibility is it? It comes back to your ownership of that culture. It is not her job to sort that culture out; it is her right to challenge that treatment."

Q14 Tonia Antoniazzi: As we have just talked about the GDPR legislation, would you support a change in the law to allow charities representing people with particular protected characteristics to bring discrimination cases?

Sam Smethers: I would support anything that gives me more power to challenge these things, so I would say yes to that—and I need more money as well. Let's be clear: there is not much point having the right if you cannot use it. Let's do it in a meaningful way. It is about how you want to drive change and what is realistic for the individual to be able to do in a system that is so gamed against them.

Karon Monaghan: I will just pick up on that before I forget it, and I have a couple of other observations. Charities can bring proceedings already; the Fawcett Society brought a case some years ago about auditing the budget on gender grounds.

Sam Smethers: A judicial review.

Karon Monaghan: Yes, a judicial review. So charities can already bring claims. I don't think it would be helpful to have charities be responsible for bringing representative claims—for example, bringing claims on behalf of groups of individuals. You are just shifting responsibility on to another sector which has no money and may not have the lawyers and so on. If we are going to have organisations with responsibility for representing



HOUSE OF COMMONS

individuals rather than the broad sorts of challenge that the Fawcett Society brought, there need to be statutory bodies, such as the commission, for example, which does not bring representative actions, and they should be properly funded.

I will move to some other observations, if I may. I agree that there needs to be a shift from individual enforcement, but there is still a lot to be gained from an individual enforcement if the sanctions are right. As Sam was talking about, if an employer thinks they might be hit with £1 million bill—I'm plucking a figure from the air—because they did not pay their cleaner equivalent to their road sweeper, then they might take a bit more care about 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.

Even with an individual model, it could be improved, so that there is greater compliance, by better sanctions, and also, where a claim is brought, providing the court or tribunal with the power to require the defendant—the employer, the service provider, as the case may be—to prepare an action plan identifying what they are going to do to ensure that it doesn't happen again.

There should be positive obligations, even through individual enforcements, and in addition, the introduction of more compelling, positive obligations. Those would be positive obligations to have plans to deal with sexual harassment and pay in relation to other characteristics—not just gender, but ethnicity and so on. So positive obligations but, even with an individual enforcement model, even if we can't get more positive obligations, there are still things that can be tweaked that will make them better.

Q15 Tonia Antoniazzi: Is it possible for the EHRC to undertake the level of enforcement activity that would shift this burden from individuals to the EHRC?

Karon Monaghan: If you give them lots of cash, probably. Lots of cash, and move away from a culture of deregulation and light-touch regulation, which I think has hampered enforcement efforts over the past decade or so. The idea that there is red tape, the Hampton principles, light touch under the guise of proportionality, has created a culture, not just in the commission but elsewhere, where there is less inclination to use the law robustly, and more inclination to negotiate, issue guidance and so on. I hope the commission don't sack me because I do work for them—

Q16 Chair: They appreciate your honesty.

Karon Monaghan: My perception—others might have a different one—is that the EHRC has not been as robust as it could be. In part, that has been affected by that culture of light-touch regulation. Really, 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."

Catherine Rayner: Can I come back on that? It is right to say from the DLA perspective, we would agree with that. The EHRC has suffered massive cuts in budget but there has also been a change in strategic focus. There is some argument that, even with the funding that they have, they could certainly do more with it on the enforcement side. Like Karon, I would like to see more funding into it and I do think that depends on the context within which they are working.

I also wanted to mention again the issue of recommendations. That is one of the perennial matters that comes up before this Committee, I think. There used to be a power for employment tribunals to make recommendations of the type that Karon has just outlined, once there had been a finding of discrimination, to recommend that things should be done by an organisation. That was specifically removed, I think by the Enterprise Act, some years ago. It would be relatively easy to reinstate that power to employment tribunals, which would be a very sensible step towards redressing some of that balance.

Sam Smethers: I used to work for the Equal Opportunities Commission, so I was part of the preceding structure of enforcement before the EHRC was established. One of the things we had at the EOC was a very useful helpline that we ran for individual women to phone up and get advice. It was basically a line through from the helpline to legal cases and legal consumer enforcement. Obviously, most cases did not go through to enforcement but some did.

It was a great source of connecting up lived experience of women on the ground, in terms of discrimination, and the policy work, campaigning work and legal enforcement work we did. The EHRC does not have a helpline. That is run by the ASS; it was hived off from the commission. That is a weakness in its overall architecture. It needs to have that back.

They could definitely do a lot more in terms of enforcement. I completely agree. They could be more effective at it and could do more to promote the work that they do. 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, so there are weaknesses at different levels.

I also think there has been a positive shift in the last 18 months to two years or so. They are getting their act together a bit more. I would say yes, give us more resource; yes, get the helpline back; and let's try and get that strategy really right. They are consulting on that at the moment.

- Q17 **Tonia Antoniazzi:** Compliance with the public sector equality duty has been described in evidence that we received as patchy and not a priority. The EHRC argues for the duty to be strengthened as part of reducing the burden on individuals. Is there a problem with the public sector equality duty? If so, is it a problem of enforcement or a weakness in the duty

itself?

Karon Monaghan: Both. I would say that one of the problems in the crafting of the duty is that it is very procedural in nature. It requires public authorities to have regard to the need to eliminate discrimination or advance equality, as the case may be. Actually, rather than its being a procedural obligation to have regard to the need, it should be “achieve”. It should be an outcome-focused duty. They should be required to do—not just to have regard to the need to do—and those outcomes should be measurable, forming part of an action plan, and reviewable by the commission. So it should not just be a procedural duty, but a substantive duty requiring measurable outcomes.

Secondly, enforcement is difficult. Again, many of the cases in so far as enforcement is concerned have been brought by individuals: cuts to libraries, cuts to social care, housing prioritising and so on. That really ought not to happen. These are positive public authority duties. They should be enforced by regulators. Some of the regulators have the power to do it, but they probably don’t even know the duties exist. As for regulators and the commission, we have twofold enforcement, but also the duty is much too bureaucratic. We want outcomes, not procedures.

Catherine Rayner: I don’t have a great deal to add.

Sam Smethers: Can I mention our law review? We had a written evidence submission from Louise Whitfield, who was also a lawyer on the panel and is an expert on the public sector equality duty enforcement. You might want to do more on this and hear directly from her. She referred to the way in which the rules around JRs have been tightened up and how it was much more difficult now for, say, a charity like mine to judicially review a public body, because, effectively, we carry the risk of costs and you have to go through a lot of the process before you can actually get any prospect of those costs being covered until you get to the application process. Either the solicitor you are working with has got to do a lot of the legwork pro bono or we have to carry that cost and that risk.

There is also a restraint. If it appears to the court that the outcome for the applicant would not have been substantially different, that therefore means they can refuse leave to bring the case. They make a judgment, a hurdle judgment, before the case has been properly heard. Again, we feel that that is unduly restraining and constrictive. It was quite important for the application of the public sector equality duty for cases to be brought to evidence that. So how it works in practice is important. Those JR cases helped to form through case law what that means, but we would not be able to do that with the constraints that are in operation at the moment.

Catherine Rayner: Can I refer back to the DLA work that was done at the point that this was going through? We made a recommendation for an amendment that was compliant with the duty, putting a responsibility on the local authority to take all proportionate steps towards the achievement of matters, which we certainly at the time felt would have had a significant impact on the way that the duty was operated. I think that that is still a

relevant amendment that could be made, so if at any stage in the future there was a consideration we would certainly come back with recommendations to look at that again.

I also want to mention that in the context of the Equality and Human Rights Commission we would very much like to see guidance—a statutory code and much stronger, better, clearer guidance across the board—for organisations about how the duty operates, when it operates and what can be achieved. Again, that is something that can be done.

Sam Smethers: Can I add a follow-up, that in the law review, we looked at a comparison between the duties in Wales and Scotland and the duty in England? There were very good specific duties, particularly in Wales, that seemed to be quite effective. That was the evidence that we saw, anyway. We recommended that we should have similar specific duties in England, as compared with what the other nations have got. It seems odd that we don't.

Tonia Antoniazzi: It does.

- Q18 **Angela Crawley:** You spoke about how, if the EHRC was adequately funded, it would be in a position to bring forward more test cases. Do you think that increasing the volume of test cases would bring about that societal change and instrumental change that you are trying to achieve?

Catherine Rayner: Not in itself, but it is part of the package. I think all three of us have been saying that you have to look at this issue across the board. There is a place for litigation in the enforcement of equality, not only because it leads to the enforcement of individual rights, but because of the message it sends to organisations.

The Equality and Human Rights Commission, in its previous manifestations as the Equal Opportunities Commission and so on, used to do a lot more funding of initial cases. That was to tease out points of law not only at the Supreme Court level, but at the level of employment tribunals. Those cases were then used to publicise factual situations for other people as an exercise in education and to demonstrate what they could do. They were able to do that because, as Sam has identified, they had the helpline. With the helpline advising women on an everyday, individual basis, they were able to take the temperature of the problems that existed, focus their policy work, identify issues and pick out test cases at an early stage. That is absolutely fundamentally important, and it is not happening.

It is not happening because there is a lack of funding and a lack of a helpline at the Equality and Human Rights Commission level. It is also not happening because the funding that they used to be able to put in place regionally to ensure that there was work being done by specialist advisers—for example, specialist disability advisers used to be funded in various places—and the funding for particular projects no longer exists. Yes, there is an issue about litigation, and yes, it has an impact.

- Q19 **Angela Crawley:** My main question is: if money were no object, is it about the quantity or quality of litigation?



HOUSE OF COMMONS

Catherine Rayner: I think it is both, but I will let someone else speak.

Karon Monaghan: There are two issues, as you have said. People have to have the opportunity individually to enforce their rights. That is a simple access to justice issue. Things such as legal aid, the availability of advice and so on are absolutely relevant to that. Whether it should be the commission that should be funding all these cases or representing all these people, who knows? Certainly they should have the facility to support test cases, because they can effect societal change. We know from the very outset that even things like equal value claims were won by litigation. All these Glasgow and Birmingham cases were won because in the 1980s people said, "The law is not good enough. This is what the law means." Individual litigation is critical.

It seems to me that it is not necessary for the EHRC to have endless funds to run every single case. There need to be mechanisms allowing people to access justice, and there needs to be funds and facilities, as has already been identified, to allow the EHRC to run test cases. They really are critical. It is part of a broader strategy. Positive obligations will not be enough without individual litigation. That is first because people are entitled, just as a matter of access to justice, to enforce their own rights. Secondly, positive obligations, such as duties on public authorities and so on, will generally probably not provide—there are exceptions—the opportunity for litigating on test issues, such as, "What does the law mean?"

Q20 **Chair:** We are going to come on to quite a lot of these issues about enforcement and the EHRC in a moment. I know there are a lot of questions in my mind. If we can press pause there, Vicky, do you want to come in?

Q21 **Vicky Ford:** You have spoken a bit about the financial barriers to litigation. I wanted to see whether we could identify ways to improve that situation. We know there is a problem, so how can we improve that? Would the cost still be such a problem if the burden of enforcement was shifted from the individual to another organisation such as the EHRC or another organisation that was taking representative actions, and is there any way in which we could reduce the costs and make them more affordable?

Sam Smethers: I don't think we explicitly addressed that question in our law review. I was just thinking about what we said that is particularly relevant to that. I think there is a related point, as well, about cost, which is how the system itself is funded—how the tribunal system is funded. At the moment, if you want to bring a tribunal claim you go into a system, which, at the moment, is just creaking. It cannot cope with what it has got. We had a dip in cases, because of fees. They are rising back up again. They haven't got back to previous levels; but I think there is a basic problem of the infrastructure funding for the tribunal system, which is effectively a blockage on individual women accessing justice anyway; so even if she has got the money, even if she can bring a claim, she then gets into a queue behind a load of other cases. I think there is a genuine



problem about the way in which justice is dispensed, in terms of the way the whole system is resourced. So that is the first thing.

Secondly, I am just trying to think how it works in practice. You are talking more about class actions—because, I think, we have supported class actions, but you can't say therefore the individual loses their right to bring a claim. You have to still—for a human rights reason, it is set out as a fundamental right, so it is quite possible that someone will represent you in a class action and not quite secure for you what you would have secured if you had pursued your own claim. That is precisely what has happened in a number of equal pay cases, which is why the individual woman can still pursue a claim—because there is a residual right that hasn't been realised. So we would support class actions, but it can't be at the expense of the individual right.

I think you would think there would be efficiency in terms of cost, in terms of running these things together, but I am not an expert, really, on the mechanics of how the legal process works. These class actions can take a very long time, still.

Catherine Rayner: I think the first thing that I want to say, really, is that it is important to recognise that some investment in early advice has a cost saving benefit. So one of the pieces of research that was done when there were some significant changes proposed to legal aid and legal help, over the withdrawal of what we used to call the old green form scheme, was an analysis of how the use of that scheme was cost-effective. What was demonstrated over and over again was that the availability of a free-at-point-of-use early advice scheme, which was dealt with by local high street solicitors on any subject, if people were on a low income, would often mean that matters would be settled and sorted out at an early stage, because a letter would be written or a telephone call made. There would be a correction and the individual would not have to litigate in order to enforce their rights, particularly over issues around pay and some issues around inequalities. So I think there is a real need to look again at those sorts of issues.

Certainly there is a merit—

Q22 **Vicky Ford:** Can I just ask if it has to be personal advice—it has to be one on one?

Catherine Rayner: Yes. So it is looking at the individual's issue. Following on from that, of course, the question about moving the cost, perhaps, to things like class actions, is that you have to go through a stage in order to get to the class action. So in order for individuals to know that they have an equal pay claim or that there are a group of them who are all suffering from the same harassment issue, or that there is an issue around structural inequality in the way that promotions are happening within the Home Office, for example, as in *Essop*, there has to be some work done in advance. That requires there to be a level of understanding, of education and often advice.



HOUSE OF COMMONS

So I go back to what I said earlier about the advice lines that were operated by, for example, the Equal Opportunities Commission, but certainly law centres that I have worked in, as well. The benefit of that early individual advice is that somebody who has the expertise in discrimination law, or any other area, is able to look at that as a whole and say “There is a problem,”—which you might not get from one individual. By looking at a whole pack of things you can see that there is an issue, and then there may be identification. So yes, once that is identified, the cost of bringing, say, 50 cases would be changed to the cost of bringing one case. That can happen, but you still have to have a mechanism by which you identify it.

Karon Monaghan: I agree with all of that, but I would add that the procedural rules of employment tribunal could be improved to allow what might be described as class actions. At the moment you have 30,000 women bringing an equal pay claim against Birmingham City Council, for example, and the procedures for managing that really aren’t good enough. However, that is tweaking. It could be done fairly easily, and should be. As to cost—

Q23 **Vicky Ford:** But it is an important tweak.

Karon Monaghan: Absolutely. Sorry. I do not mean to in any sense undermine the significance of that. At the moment, for example—

Q24 **Vicky Ford:** Let us try to clarify that. Are you saying that small changes could make a significant difference?

Karon Monaghan: Yes. To give one example, which I hope will change, there was a case that said that, if there are marginal differences between each equal value claim, the claims cannot be brought on a single form. People used to bring a claim to the employment tribunal on one form, saying that, for example, all these women, who are cleaners, were not paid the same as dustmen, which is inequality in pay. They would schedule the 30,000 names on a spreadsheet and they would all go on one claim.

The courts have now said that, if there are what I would regard as marginal differences between the claims, such as people comparing a dustman or road sweeper or park cleaner with a cleaner somewhere else, they have to bring separate claims. That means—I promise that this is literally so—that they now have to deliver boxes, boxes, boxes full of forms that say almost the same thing. That is utterly ludicrous. The procedures should be tighter, but they can be tweaked, which would be easy.

Q25 **Chair:** Who is responsible for those changes?

Karon Monaghan: A court. It is now going to the Court of Appeal, which I hope will see sense, but who knows,

Q26 **Chair:** So the courts made that decision?



HOUSE OF COMMONS

Karon Monaghan: The courts made that decision. It is not for me to say that they are legally wrong. That is for the courts. I look at the impact of the decision, not the legality. However, they have been able to come to that conclusion because the rules are not sufficiently clear about the circumstances in which a group action might be managed. As I say, such a tweak would be really good and not difficult to make.

- Q27 **Vicky Ford:** It would be really helpful for us, when making specific recommendations on how to improve things, if you could be very clear—maybe by following up later—as to what clarity the Government need to give on the change of the rules and how we should make that tweak happen. Hold that thought.

Karon Monaghan: Yes. Absolutely.

- Q28 **Vicky Ford:** Anything else?

Catherine Rayner: I was just going to add to that—I am sorry; you may have been about to say this—the rules of procedure are part of the statutory instrument attached to the Employment Tribunals Act 1996. That sets out the rules, and it is that that is being interpreted. I think I am right in saying that Parliament could change them, and I think that they are in a statutory instrument rather than primary legislation.

Karon Monaghan: One brief point, to follow up on one part of your question, is on cost. This is not just about the cost of litigating but the cost of court fees. We got rid of employment tribunal fees, thankfully, because they had a devastating effect, as you know. We should not have them back, because that would again have a devastating effect.

However, there are ever-increasing fees in the civil courts. Someone bringing a claim in a county court against an authority or, for example, a nightclub that won't let them in because they are black—or, in one case I had, too black—has to pay huge fees.

- Q29 **Chair:** Give us an example.

Karon Monaghan: £500. Compensation for discrimination claims is fairly modest, and I think it should increase. You could have a claim for, let us say, £3,000 because somebody didn't let you into some space in a club because you are a woman, even though you were lawfully entitled to enter, but you weren't terribly distressed. If as a matter of principle you bring a claim, which might be worth £3,000, you could pay hundreds of pounds in fees, with the risk that you will not win.

Vicky Ford: My next question is: are financial remedies set at the right level?

Karon Monaghan: No.

Sam Smethers: There is also no remedy for injury to feelings in equal pay cases, so that is another big gap. In other discrimination cases, you

can get an injury to feelings payment, given how traumatic the process of bringing a discrimination claim can be, but in pay, you cannot. That is an obvious gap that needs to change.

Some of these equal pay cases are really traumatic to bring. Certainly, Carrie Gracie's evidence about that to the Select Committee on Digital, Culture, Media and Sport was really compelling, and that came through very strongly. Not only are you discovering that someone has valued you less than your male counterparts, which is incredibly painful and humiliating, but you then have a process that—as we see in all of these other cases—goes on for literally years. If there is not stress and injury to feelings in a situation like that, I do not know what is. There is also a question about pension entitlements in pay cases. You can negotiate them in, but it is not an automatic entitlement. Your pension contributions should be made good as part of your settlement, and you should have an entitlement to that, but at the moment, that is not automatic.

Catherine Rayner: Also, in the context of costs, there is wide disparity between the protected characteristics in some cases. In some areas, there is perhaps greater recognition of the injury to feelings and the harm done, and in others, there is not. The levels of compensation for discrimination tend to be on the low side.

Q30 **Vicky Ford:** Is compensation the best way to put things right?

Catherine Rayner: Often, it is absolutely crucial. For a person who has the misfortune to have a disability that causes them to need time off work, they lose their livelihood. It is also very stressful, so they lose further time out of work. They may then be unable to get references because they have sued their employer. It is very difficult to get back into the workplace. It can have a lifelong effect. Even if somebody manages to go back into the workplace, the reality is that it often continues to have a career-long impact; that is particularly obvious in instances of sexual harassment and pregnancy and maternity discrimination. Financial compensation is often absolutely crucial in order to demonstrate, both to the organisation that discriminated and the person involved—

Q31 **Vicky Ford:** But that needs to include the injury to feelings.

Karon Monaghan: And punitive damages—exemplary damages—which I think this Committee has already recommended.

Catherine Rayner: Can I echo what Sam says about pension loss? Loss of pensions and pension payments is significant, but often it is overlooked and very complicated. It seems very difficult.

Q32 **Vicky Ford:** We are very aware of the wider discussions on women's pensions. You have mentioned punitive damages, but are there any other remedies that could be brought in that could have a bigger impact on general compliance? Are there any other countries that use punitive damages that we should be looking at?

Karon Monaghan: Lots of countries use punitive damages; the States is just one example. The other thing that your Committee might want to



consider—I think it has already been addressed—is more robust recommendations. Whether a case is won or lost, if a tribunal or a court becomes aware from the evidence that there are patterns or processes in place that make discrimination more likely to occur, it should be able to issue binding recommendations or direct action plans, to prevent a wasted opportunity.

You might have a five-week case. Somebody wins or loses at the end of it, but during the course of the evidence, it becomes apparent that there is a pattern or a discriminatory policy in place, and the court or tribunal can do nothing about it. Employment tribunals have a narrow scope for making recommendations directed at the individual concerned, but no broad powers to direct institutional change, and that is a real wasted opportunity. It is an absolutely wasted opportunity.

Q33 **Vicky Ford:** Any other points on that?

Sam Smethers: I agree—I think that is absolutely right.

Q34 **Jess Phillips:** Thinking about the strategic priorities and the strategic work done by the EHRC, do you think that any changes are currently needed to the commission's approach to using enforcement powers to set these strategic aims in their policies?

Catherine Rayner: I would like to see them use them a lot more often. I suspect that is about a strategic focus, but also about leadership. It is inevitably about the political climate within which they are operating.

Certainly from our perspective—I think Sam touched on this earlier—as practitioners of discrimination law, many of the people I work with are simply not aware of instances when the commission had to use its powers. Certainly, in preparing to come along today, I did some cursory searches online, and it is very difficult to find what it does. That is not included, as far as I could see, in annual reporting, and if you are trying to look at how to go about using those powers as an individual, or if you are advising someone to do it, it is difficult to see how you would do that. There is a twofold issue. One point is that there needs to be a much more robust approach and a willingness to do it, but evidence also needs to be available to the public of the willingness to take action and use the powers that exist. The powers are there—they have always been there, and they have been used more effectively in the past.

Q35 **Jess Phillips:** When you say the political environment that they operate in—

Catherine Rayner: I think there is a lack of support from central Government for that sort of direction. There is a sense that there should be a light touch—Karon has already referred to the regulatory approach, and the light touch and reduction in regulation—and I think there has been a general lack of support for the work done by the EHRC.

Sam Smethers: The commission could take a more proactive approach to finding some of these strategic cases, and really go out there and knock on the doors of organisations such as mine, little law firms and so on. We



HOUSE OF COMMONS

are looking for cases like this; this is the part of the law we want to change, and this is the thing we are trying strategically to pursue—whatever it is. That sort of thing has been missing, which has been a bit of a frustration for me personally.

I feel that we could work quite well together and, for example, be a resource for the commission to feed in sex discrimination cases that we might find, but it doesn't feel like that. There is no mechanism there. When I say that, it is like, "Oh yeah, what a great idea"—but come on, let's do it! It is partly a mindset problem, and that point about the environment it is in, and the light touch versus the aggressive regulator, the troublemaker. How will it be received if it does that? I think there might be a genuine conflict or tension between what its role is and what some people expect it to do. Some people are saying, "You're falling short; you are not doing enough of that." Other people are saying that we actually want to encourage organisations to do this and give them incentives, but we do not want to over-regulate.

- Q36 **Chair:** Let's be very clear: it has statutory independence. Are you implying that it is being influenced in a way that the law would protect it against? To say that it is being influenced by Government policy is absolutely contrary—

Catherine Rayner: We live in the real world of cuts and austerity. The Equality and Human Rights Commission has seen its budget reduced massively. That happens in a political context—

Jess Phillips: To be fair, so has every other Department.

Catherine Rayner: Well, okay, let's be fair about it, but this is the context within which it operates. Central Government have put through a series of legislative changes that have chipped away at equality rights over the years, certainly around enforcement. Some of the things that we have all referred to have been about taking away and removing some of the more—I want to say peripheral, but they are not peripheral; this is about some of the powers and responsibilities that existed, for example in the courts, such as the section 149 power to make recommendations. It is not a climate in which there has been general support, and organisations such as the EHRC must be aware of that because it works in that context. That is what I am saying.

- Q37 **Chair:** Would you be surprised to hear that the number of litigation cases that it is handling has doubled? Are you aware of that?

Catherine Rayner: Doubled from when?

Chair: Doubled in the past 12 months.

Catherine Rayner: From what to what?

Chair: I am just interested to hear whether you are aware of that—I am not here to be an apologist for the EHRC and I hope my record speaks for itself. In having a lot of conversations with the EHRC, you may be as aware as I would expect you to be—



HOUSE OF COMMONS

Karon Monaghan: I am more aware of that. Actually, I think Catherine said earlier—perhaps it was Sam; I can't remember—that there has been a discernible shift in the last 18 months; I think that. We can all say why that might be, but in any case we don't need to speculate. I think there has been a discernible shift. They are doing more cases.

Just because we've agreed on everything, I feel I must disagree about something, otherwise you'll think this is a plot. I disagree somewhat with Catherine's perception about Government. Certainly recently, I think they are demonstrating real willingness to address some of the real, tricky, political—what might be described as centrally political—issues, and they are taking on the Government on them, on legal cases.

I absolutely accept what you are saying. I think there has been a shift; I think they are doing more casework; and I don't sense that they are kowtowing to anyone.

- Q38 **Chair:** The other thing that is clear is that more of the casework is coming from solicitors and organisations. So you would prefer to go back to getting the cases from a telephone line rather than getting them from the professionals?

Karon Monaghan: That was not my—

Sam Smethers: I raised that.

Karon Monaghan: I think both. Certainly they write to all of us. Sam's point is a good one. Certainly they write to the people on their lawyers list, asking, "Have you got cases? Let us know." And I do all the time. Sometimes, they will say, "We'll take them up"—not to instruct me. Usually, I do not have anything to do with them after that. However, I think Sam's point is a good one. Really, if they are doing that with their wider legal community, then a very positive thing to do would be to do it with the wider NGO sector.

Catherine Rayner: On some of the concerns that I have, I am not saying that they are kowtowing to Government; I don't think that's right. What I do think is that there has been a significant reduction in their funding, which has limited their ability to do certain things. And I think that the commission don't always make the best of what they have. They don't always tell people what they are doing. For example, there is an advisers' helpline. I have talked to a number of people and they simply do not know it is there. So there are things that have been done that simply are not known about. One of the real issues is about publication. One of the ways that that used to happen was that there was a much more regional structure. I think that's an issue.

In terms of the access to work of a strategic nature, one of the things that I have observed, and I think this is still true, is that while there is a willingness to take on more strategic work, it tends to be coming from a much smaller pool of individuals and people, and that is also because of the cuts that have occurred in legal aid elsewhere. So there are fewer

places where that is being dealt with and I think that has had a significant effect.

Q39 Jess Phillips: I feel like my inbox is full of strategic cases they could take on.

Karon Monaghan: Exactly.

Jess Phillips: I don't think there is a shortage.

Catherine Rayner: I am a member of the Bar and I am aware of the call on my time regularly for pro bono assistance. The increase in requests for pro bono assistance on all of us over the last 10 years has skyrocketed. There are numerous cases. We've got the pro bono unit, from the free representation unit, as well as from one's contacts and a whole range of other places, to do significant amounts of work. There isn't anywhere to send them and that is a problem.

Karon Monaghan: Can I just make one observation, so that it does not slip out of my mind? I think one of the observations made—perhaps it was in a question; I cannot recall—concerned the existing powers of the commission. It seems to me that the powers of the commission could also be improved. I agree that there is the opportunity for greater enforcement even within the powers that exist, but there are some difficulties with their powers.

I will give just one example. Their power to undertake an investigation—that is, into the question whether an organisation has committed an act of discrimination—and the consequential power to require that organisation to prepare action plans is only triggered if they are satisfied that a discriminatory act has in fact occurred. So they may do a huge investigation, realise the policies are in place that are likely to be discriminatory, but unless they can satisfy themselves that a discriminatory act has already occurred, they cannot thereafter use their powers.

That can be tightened. You just need to remove the word "satisfied" that an unlawful act has occurred and replace it with "suspect" it might do, or "suspect" it has. It would be very easy drafting. Again, that would ensure that the resources they are using achieve the best outcomes. Tweaks to the powers as well as cultural change.

Q40 Jess Phillips: The Government have told us that they think that the EHRC's past approach to strategic litigation has not been adequate, because it has been difficult to identify cases in a timely way to define them as strategic. The GEO, in evidence to us, specifically felt that the EHRC needed to look at systemic issues, rather than strategic ones. Do you agree? That is the Government actually pushing them to do more, in a complete about-turn from what we just said.

Catherine Rayner: I would come back to something that I said earlier. I am not entirely sure what they mean by "systemic". If they mean structural inequality issues, yes, of course, it would be great to see more work done on that. The reality is that some thought has to go into how



HOUSE OF COMMONS

they are going to identify those cases. One of the things, of course, is the equality advisory line. If the Equality and Human Rights Commission were doing the advice themselves and running that line, it may be that they would be able to identify those issues more easily. It seems to me that that just puts an extra barrier in the way. It does not seem to work. It seems relatively straightforward.

- Q41 **Jess Phillips:** I do not disagree with you about the advice line issue and the fracturing—that is always something that the EHRC raise. However, if I wanted to look into something that I believe to be a systemic issue, such as maternity advice, which I do all the time, actually—at the moment I am doing a thing about third-party harassment—I do not wait until somebody calls my advice line. I put out a call and I ask for evidence.

Catherine Rayner: That is what the commission does quite a lot. They do a lot of valuable and useful research, policy work and consultation work. On the issue about taking strategic cases, if the Government response is about strategic cases—doing a case study or doing an investigation—that is one thing. If it is about what I as a lawyer talk about as a case, it is about taking litigation. Strategic litigation is about identifying a range of factors and a particular issue within an organisation, a public sector body or a method of making decisions. That requires you to look at people, because it is about people. People are discriminated against. Organisations can be responsible and there can be strategic issues or structural issues, but it is the individuals who raise the concerns, flag them up and act as the canary, or whatever.

Jess Phillips: The canary in the mine.

Catherine Rayner: Indeed.

Jess Phillips: Anyone else have anything to add?

Sam Smethers: I agree with the point about proactive action. They could do more on that and be more on the front foot, and not wait for someone to say, “Are you going to enforce this?” It would be really good if they said, “Right. We are out there.” I do think that there is an organisational confidence issue, which they are beginning to overcome. It is changing, but that goes back to the relationship that they have had previously with the Government. Perhaps it is very different now.

- Q42 **Jess Phillips:** A very quick answer to this. In your experience, do organisations and businesses worry that they could be subject to enforcement action by the commission if they fail to comply with the public sector equality duty?

Catherine Rayner: I have never come across one that did.

Karon Monaghan: Not that I am aware of. I am sure there must be someone out there. If they had been stung once, then maybe, or if they had been subject to particular scrutiny for one reason or another and they have a reputation to maintain, but I cannot say that I am aware of public authorities out there—

Q43 Chair: But if that is the case, why is the EHRC not looking to have cases that would make people more sensitised to this?

Karon Monaghan: They do—actually, they have brought quite a lot of public sector equality duty cases relative to other things. Mainly, they brought the early ones. You could say that, yes, they will have to be more robust. I also think, as was touched on, that however much money you give them, the reality is that they are not going to be able to scrutinise compliance by every single public authority in the country. That is inconceivable. But there are other regulatory bodies. What is the FCA doing about the financial institutions? They are a public sector body. They could be doing work. The CQC regulate other public authorities—

Q44 Jess Phillips: Ofsted?

Karon Monaghan: Yes, Ofsted. There are other bodies that could say, “We are regulatory bodies for these areas. We will take responsibility for ensuring compliance.” Chucking money at the EHRC is never going to permit it to monitor compliance by every public authority.

Sam Smethers: It comes back to sanction again, I am afraid. Does it hurt, or not?

Q45 Chair: Do you think businesses ever worry about the EHRC intervening on them?

Catherine Rayner: Not that I am aware of. I do quite a lot of work with employers these days—small organisations and public sector organisations, but also private businesses—and I do not think it is on the radar. They worry about all sorts of other things to do with equalities, and they often want advice about how to deal with them, but they are certainly not going to the EHRC or worrying about it.

Q46 Chair: If there are considerable existing powers of enforcement and intervention but businesses are not worried about them, how do you change that? That is the frustration: even now, organisations receive letters from the EHRC about sexual harassment or bullying cases and ignore them without any fear of consequences.

Sam Smethers: It goes back to sanction again. The Information Commissioner’s Office’s GDPR sanction powers have made it more powerful as a regulator.

Jess Phillips: I wish people would stop sending me loads of emails, then.

Sam Smethers: It strengthens their hand. At the end of the day, what is the sanction that the employer faces?

Q47 Chair: So it is about sanctions.

Karon Monaghan: That is a very big part of it.

Sam Smethers: It is. If it looms large, and you know it is going to hurt, it really makes a difference.

Q48 **Chair:** So if you ignore a letter from the Information Commissioner—

Karon Monaghan: You recognise that you could be in trouble. If you get it wrong, you could be subject to a very big fine.

Sam Smethers: The scale of the fines in the GDPR is really significant. It could knock us over.

Q49 **Jess Phillips:** Because it is new, though, until people start getting these big fines—

Karon Monaghan: I think even the threat of it is working.

Catherine Rayner: One aspect of it is that the GDPR has been fantastically well advertised. It has had a lot of publicity and coverage—the Information Commissioner is very good at publicity. The EHRC is doing some really fantastic work in lots of places, although there are places where I would like to see it do more, but one criticism I have is that it is not getting out into the public domain as much as possible. I suspect that a lot of organisations are simply not aware of what they might face. They do not necessarily know that the EHRC might come knocking on their door.

Q50 **Vicky Ford:** Are you approaching that as a recommendation, as opposed to a criticism? Are you saying that the EHRC should be doing more to publicise its work?

Catherine Rayner: I would like to see it shouting a lot more about what it does, yes.

Q51 **Vicky Ford:** Cool. I am just quite keen that we come out with recommendations.

Karon Monaghan: How about the power to apply sanctions, as the Information Commissioner does? How about saying, “We have the power to monitor compliance with the public sector equality duty—if you don’t comply, not only can we issue you with a compliance notice, but we can fine you 500,000 quid”? The fine could depend on the size of the organisation or be proportionate to the failure to comply. If a business does not meet the terms of an action plan on sexual harassment, the EHRC could say, “We are going to fine you and impose a penal sanction. If your business has a turnover of 5 million quid, we will charge you 5%; if it is 100 million quid, it will be 10%.” There are ways of doing things, but they require a fundamental shift, with the commission being given substantially more power.

Sam Smethers: National minimum wage enforcement is more like that. If employers are not paying the national minimum wage, an officer can issue an underpayment notice. They have the power to go in on behalf of HMRC and say that the rules have not been properly applied.

Karon Monaghan: Do they have fining powers?

Sam Smethers: Well, they can issue the notice.



Vicky Ford: So it is about punitive fines for non-compliance.

Q52 **Jess Phillips:** I would like to be the person who gave out those tickets. I would apply for that job.

Finally, can we go back to what we were saying earlier about single-sex services? A number of submissions to us stated that some service providers are afraid to use the Equality Act exemption that allows them to exclude someone with a protected characteristic of gender reassignment from single-sex services. Do you think that this is a widespread concern?

Karon Monaghan: I already alluded to this. Yes, I think there is a widespread concern. The legal framework is not as bad as I think some people think it is, but because it lacks clarity and there is an absence of nuanced guidance, people are anxious about it.

When I say nuanced guidance, 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.

Q53 **Jess Phillips:** So there just needs to be really clear guidance that says if you turn someone away on the basis of risk, on the basis of the needs of the other people in the building or whatever—

Karon Monaghan: Not just risk. There are widely publicised exceptions, but generally trans women don't pose a risk. The problem is that people feel unsafe. If you have been subject to sexual violence, you may feel unsafe with somebody who you perceive presents as a man.

Q54 **Jess Phillips:** You are not allowed to live in a refuge if you are a boy and you are over 14, for example, because 14-year-old boys present as men.

Karon Monaghan: Precisely. Whether 14 is the right age, I am not sure, but anyway.

It may be that the legislation itself should carve out exemptions for refuges or for rape crisis centres; it would have to be defined more broadly. But for certain safe spaces, so that people know and we don't have to go through this exercise of proportionality and we don't have to identify precisely what the issues are in every individual case, we can say, "We have a blanket policy and that is because there is an exemption."

Even if Parliament hasn't got the time at the moment to change the exemptions, at the very least there should be very clear guidance, so that people feel confident saying, "I'm sorry, but with this service—".

I think the anxiety is increasing with the proposals for potential self-ID. I think that is a slightly different issue, but I can understand why those are becoming difficult to distinguish.

Catherine Rayner: All I would say is to absolutely underline the necessity of really good information and education in order to allay fears. On the fears that exist around this, groups have different views about the validity or reasonableness of the concerns being raised. One way of addressing

that is absolutely about ensuring that there is clarity, education and guidance.

Sam Smethers: I agree with all of that. The guidance can also obviously give examples of where you can find trans-inclusive services, wherever it is possible. Part of it is about demonstrating, if we are starting from inclusivity, how we are going to meet the needs of everyone. Let's address the question of how we do that.

Karon Monaghan: And how do we provide sexual violence services for trans women? It's not about exclusion; it is about where the lines are drawn and ensuring that there are adequate services across the board.

Sam Smethers: Absolutely.

- Q55 **Jess Phillips:** There aren't adequate services for many of the other protected characteristics, like women-only spaces. Disability is the main one, I would say. And learning disability.

Sam Smethers: If you end up in a situation where women feel less safe—women who need that sanctuary are feeling less safe because of something you have done—that is a fail. We have got to make sure that we hold that clear—

- Q56 **Jess Phillips:** To be very clear, Karon, will there be any less or any more of a concern if the Government change the way in which gender recognition certificates are given out?

Karon Monaghan: In the Twittersphere, yes. In my view, in terms of legal analysis, no, so long as the exemptions are in place and they remain firm and they apply to those with a GRC as well as those without a GRC, as is the case now, it is fine. People need to know that you can apply these exemptions.

If somebody has self-identified as a trans woman, and gets a gender recognition certificate, you can still have your single-sex services excluding trans women. I am not advocating that, by the way—I just recognise that in certain circumstances it is the right thing to do. GRC or no GRC, you can still exclude. Whether they get a GRC through self-identification or a diagnosis of gender dysphoria does not make the slightest bit of difference. That message has not got out. That reflects a real problem that small services—tiny rape crisis centres, small refuges—do not feel confident about addressing. *[Interruption.]*

- Q57 **Jess Phillips:** That's not the Twittersphere coming to get you; that is just the bell.

Karon Monaghan: Listen, I hope nobody is watching or I will have to close my Twitter account immediately.

Sam Smethers: I think it's too late for that, Karon.

- Q58 **Jess Phillips:** We are so far down that hole. Finally, are there any other aspects of equality where a lack of understanding or awareness is



HOUSE OF COMMONS

significantly affecting compliance? You have already raised the issues about disability.

Catherine Rayner: I have to say also, although it is a slightly off-kilter way of looking at it, that there are serious problems around race and BAME issues. There are serious levels of discrimination being reported on a daily basis on our streets, in our schools and in workplaces, and they are simply not being dealt with. It seems to me that there is a particular question about race discrimination, particularly when you look at it in the context of mental health and access to some of those services, where there are fundamental issues that are simply not being dealt with. I don't have answers, but it is something that, as a group, the DLA have recognised and identified over a number of months, along with a lot of other organisations looking at research being done. It is one of the areas that would benefit from greater focus, perhaps looking at it as a special area or talking to those organisations, such as the Runnymede Trust, that are doing huge amounts of research on it.

Sam Smethers: On the issue of equal pay, I will just flag up that we are publishing new data next week. I cannot give it to you now, but it reveals a great deal of confusion and lack of awareness about basic fundamental rights to equal pay and the obligation to maintain any kind of secrecy provisions in the workplace. People think they are not allowed to talk about pay at work, for example. There will be more to say from us on that, but genuinely, on some of the things where you think, "The penny should have dropped a long time ago, given it has been nearly 50 years since our first equal pay legislation,"—don't believe it.

Karon Monaghan: One last thing to finish on; it does not fit very closely with the question, but I want to flag it for your thoughts going forward. From the Twittersphere—that is where I get all my information these days—I understand there may be submissions suggesting that all discrimination claims be brought within the employment tribunal context. I do not know if you have received submissions like that yet, but I would urge a great deal of caution about that, because the employment tribunals do not have the skillset necessary, for example, to decide on a case where somebody is alleging they were beaten up by the police because they are black, or the family of someone who was restrained and killed by the police. If that is suggested to you, and I am told it is going to be, I would exercise great caution about that, if I may say so.

- Q59 **Chair:** Could I have a final question? There is a lot of talk in the press about the use of non-disclosure agreements—something that has been a concern to this Committee on a number of occasions. To what extent do you think the use of non-disclosure agreements or gagging clauses—whatever people who dance on the head of a pin want to call them nowadays—are being used to both disguise the level of discrimination happening to people with protected characteristics and promote a culture within companies where it is seen as something that you can pay people off to keep quiet about? Do you have any views on that and how it affects the work in this particular area?



Sam Smethers: We were talking about this outside. I have said all the way through that this is about the balance of power, so if we are going to narrow down the individual's ability to use non-disclosure agreements, you have to consider what leverage she has in that situation. One side of it is that it is about silencing women, but the flip side is that it is her access to some sort of remedy so that she can move on with the rest of her life. If she does not have the ability to negotiate that, you have to think about what else you are putting in place to strengthen her hand in a situation where she is bringing a claim of sexual harassment, for example. If the employer just says, "Well, we don't believe you," or, "He's more valuable to us than you are," what can she do next?

Q60 **Chair:** But then we don't allow other women to know that that has happened.

Sam Smethers: Of course, but then it is about the individual's right and whether she wants to make that public. Is it her right to privacy, or is it about her obligation on behalf of womankind to tell her colleagues? Genuinely, there is a real tension there. Not every woman can be a hero, if I'm honest.

Catherine Rayner: I have dealt with numerous settlements of discrimination claims, and settlement is often desirable and the best way forward in many situations. Confidentiality of the fact of settlement is not always desirable. It is often resisted very strongly by claimants, and it is often an absolute deal breaker in my experience.

Q61 **Chair:** But 80% of settlement cases have NDAs in them?

Catherine Rayner: That's exactly right. What has happened within the context of some public sector organisations and health service providers is that the process of settlement has been subject to a more senior review. It seems to me that there is a possibility, certainly within public sector organisations, that non-disclosure or confidentiality could be looked at in the context of a responsibility within an organisation to deal with, so there is already a mechanism there. If you are in the process of mitigating and you want to settle, you have to get authority for the settlement itself and other things, and it has to be looked at a fairly senior person within the organisation.

The difficulty with confidentiality is that sometimes—it's not my experience that this is very often across the characteristics—it is the best thing for the individual. Sexual harassment is a difficult area. Sometimes individuals do not want what has happened to be known, and sometimes there is a risk of organisations perhaps bad mouthing them, as well as a risk of information coming out. It is far more complex and nuanced than saying, "Yes, it's right," or, "No, it's not."

Chair: But it is disguising the scale of the problem, particularly in terms of discrimination.

Catherine Rayner: It is, without doubt. There are numerous examples from my practice—I'm sure any discrimination lawyer would say the



HOUSE OF COMMONS

same—where the confidentiality agreement has been entered into with enormous reluctance and a great degree of disappointment by the claimant involved and their lawyer.

Q62 **Chair:** So Karon, do you think we should adopt the Californian model and ban them from sexual harassment cases?

Karon Monaghan: I am picking up on the observation that Sam made: not every woman wants to be a hero. However much we despise NDAs, the reality is that the alternative might be that she doesn't have a remedy at all. While we impose the obligation on women—you fight the case as a means of revealing the extent of sexual harassment—it's yet another burden on an individual. I don't like NDAs, and many public authorities now won't use them as a matter of principle. I don't use them. Very powerful men use them to silence vulnerable women, and they're despicable, but it is a difficult issue, because I know that women on the ground will say, "I don't want to fight this case. In fact, I don't even want anybody to know it was me. I certainly don't want to be going out into the job market with anybody knowing that I've brought a case against my previous employer for sexual harassment. If you can get me two grand more, of course I'll sign an NDA." I despise them, and I despise the men who require them even more, but I recognise the pragmatism.

Chair: Thank you. I could not resist ending on that particular note, given the commentary about it. I thank all three of you for your time today. It is incredibly generous of you to spend time with us, and it will really help our discussions as we go forward with our inquiry and report.