Executive Summary

1. The Equality and Human Rights Commission (the Commission or EHRC) is a statutory body established under the Equality Act 2006 (EA 2006). It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited at UN level as an ‘A status’ National Human Rights Institution, in recognition of its independence, powers and performance.

2. We welcome the opportunity to respond to this inquiry into the enforcement of the Equality Act 2010 (EA 2010). Our submission is divided into two parts, which are summarised below. Part 1 responds to questions one to four and six of the inquiry terms of reference, which concern the degree to which enforcing rights under the EA 2010 is accessible to individuals, provides appropriate redress, and helps to achieve widescale change. Part 2 addresses the remaining questions in the terms of reference, which focus on the Commission’s role in enforcing the EA 2010.

Part 1: Enforcement of the Equality Act 2010

3. In the first part of our submission we raise a number of concerns about how difficult it is for individuals to understand their rights under the EA 2010 and to access tribunals and courts to seek redress. Enforcement of equality rights in Great Britain is principally based on legal action brought by individuals. It is therefore vital that the UK Government takes urgent action to address the serious and ongoing failings in access to justice. We summarise our key concerns below.

4. As long as enforcement of equality rights is based on civil litigation, the accessibility of the justice system is undermined by:
   - Lack of awareness of equality rights, compounded by limits on access to early legal advice introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO);
   - The complexity and expense of litigation and inadequate remedies, which can be prohibitive for individuals enforcing their EA 2010 rights, or create strong disincentives to bringing a claim;
   - Cuts to legal aid, particularly in England and Wales, including barriers posed by the operation of the mandatory telephone gateway;
   - Failure to make reasonable adjustments in the court system;
   - Lack of data and information sharing, including about the protected characteristics of court users, which results in an unclear picture of court users and how many EA 2010 claims are brought in the county and sheriff courts.
5. The difficulties in accessing justice undermine the ability of the EA 2010 to achieve widescale change. While individual cases do not always have a broader impact, change can be achieved by challenging an interpretation of the law or overturning discriminatory policies or practices. We include examples in Part 2 of this submission. The removal of the power of Employment Tribunals to make wider recommendations has undermined another way in which widespread change could be achieved. In addition, the Public Sector Equality Duty (PSED) could be strengthened in order to reach its potential for achieving transformative change.

6. Finally, the remedies for discrimination need to provide an incentive for an organisation to change. There are many barriers to individuals obtaining a remedy, but even when legal action is successful, there are obstacles to enforcing awards of compensation, including: the lack of enforcement powers by employment tribunals; the need for a simplified enforcement process; and the ease with which companies can shift assets to avoid paying awards.

7. In light of the challenges identified, we make a number of recommendations which address:
   - Urgent action to mitigate the corrosive impact of LASPO on access to justice in England and Wales;
   - Collecting better information about the protected characteristics of court users, and robust impact assessments of the efficiency and accessibility of the courts in dealing with EA 2010 claims;
   - More accurate information about the number and outcomes of EA 2010 claims brought to the county and sheriff courts;
   - Considering full range of options for improving access to redress;
   - Reinstating the power of employment tribunals to make wider recommendations;
   - Strengthening the Public Sector Equality Duty;
   - Considering ways to strengthen enforcement of compensation awards.

Part 2: The Role of the Equality and Human Rights Commission

8. The second part of our submission sets out the Commission’s role in enforcing the EA 2010. The Commission was established by Parliament with a broad remit and the expectation that it would act as a strategic enforcer of equality law. As a strategic enforcer, the Commission focuses on how it can achieve improvements to law, policy and practice by using all the powers at its disposal in a coordinated way. We believe that the breadth of the Commission’s statutory powers makes it uniquely placed to achieve impact by deploying its various powers in a complementary way. Our compliance and enforcement activity consists of a spectrum of activities aimed at ensuring compliance with the law, from providing information and advice to individuals and organisations on equality law to undertaking litigation and enforcement action using formal enforcement powers. It is important to understand that the Commission was not established, and has never been resourced, to support large numbers of individual discrimination cases or high-volume enforcement activity.
9. The Commission’s strategic enforcement work has achieved significant success: our litigation has strengthened equality law for everyone in Great Britain and our compliance activity has improved equality protections for thousands of people across the country. We are committed to greater focus on our enforcement activity in our next Strategic Plan and we will put compliance and enforcement at the heart of our strategies for achieving change.

10. **In order to maximise our effectiveness as a strategic enforcer, the Commission calls for improvements to its powers to gather intelligence to inform its enforcement. In particular, we seek the return of the telephone helpline offering advice to the public on discrimination and human rights. The helpline is a vital tool to support the Commission to connect with people in Great Britain at a grassroots level, understand their experience of discrimination and take action where appropriate. Using the intelligence and data provided by the service, we would be able to take targeted action to support more people to resolve complaints, as well as to challenge systemic discrimination. While the Commission strives to increase and deepen its stakeholder engagement, we would achieve greater impact supported by this source of intelligence.**
Part 1 – Enforcement of the Equality Act 2010

Introduction

11. Effective enforcement of equality law starts by enabling individuals to access justice and obtain remedies for violation of their rights. Over the last decade, individuals’ access to justice and effective redress has declined dramatically across all areas of the law that support fairness and social mobility, including equality law. As a result, there is a crisis in access to justice which threatens to undermine the most basic guarantees of fairness and equality in our society.

12. The Equality Act 2010 (EA 2010) gives individuals rights to remedies for discrimination that they can only enforce through litigation in the courts. It does not create a system of administrative enforcement, such as an ombudsman scheme as exists in other jurisdictions. The Equality Act 2006 (EA 2006), which created the Equality and Human Rights Commission, gave a set of strategic powers to the Commission to take action to promote equality and enforce the EA 2010, but Parliament chose not to give the Commission a complaints-handling role in relation to discrimination complaints.

13. Ensuring individuals are able to access justice in the courts is therefore a critical mechanism for ensuring an effective system of redress, as well as maintaining a disincentive to discriminate. If duty holders believe that it is impossible to seek a remedy for discrimination, there is a risk that a culture of impunity will emerge and discrimination will proliferate.

14. There are, however, inherent challenges in a model of protection for equality rights which relies predominantly on individuals bringing claims through courts. The imbalance of power between the parties in a discrimination case makes litigation unattractive for many people, and the stress and complexity of bringing a claim is heightened by the cost and the low level of compensation available in some cases. Greater consideration should be given to placing the onus on duty-bearers to root out discrimination and ensure respect for equality rights by taking steps such as introducing a mandatory duty on employers to protect employees from discrimination and harassment, enforceable by the Commission, and by strengthening the Public Sector Equality Duty (PSED). The imbalance in power could also be addressed by reinstating the statutory questionnaire procedure, for example.

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1 In this response we have used “courts” to refer collectively to all the courts and tribunals which have jurisdiction to hear cases under the Equality Act 2010, e.g. employment tribunals, First Tier Tribunal (Health, Education and Social Care Chamber) and the sheriff court in Scotland.

2 Administrative enforcement consists of independent determination of discrimination complaints by a non-judicial body, such as an ombudsman. Such a system exists in the United States, where any individual alleging discrimination by their employer must make a complaint to the Equal Employment Opportunities Commission which will either determine the complaint itself, give the individual permission to litigate, or bring litigation in its own name. See: https://www.eeoc.gov/eeoc/enforcement_litigation.cfm.

3 The Commission’s power to arrange conciliation services in non-employment discrimination cases was repealed by the Enterprise and Regulatory Reform Act 2013 on the grounds that other sources of mediation existed.

4 See para 25, below.
15. As the system for enforcement currently stands, the decline in access to justice imperils basic equality protections in the UK. The reasons behind the decline in access to justice are complex, but we believe the most influential are the reforms introduced by successive UK governments limiting access to justice, including reductions in legal aid and shortening limitation periods.\(^5\)

16. All organisations working in the justice sector have a role to play in improving access to justice, but no single organisation can solve the crisis and plug the gap in advice and funding alone. In terms of the Commission’s strategic role, we have been subject to cuts to our budget of 70% since 2010, restricting the extent to which the Commission can use its legal powers to address the barriers to securing access to justice.

17. The Commission calls again on the UK government to take urgent action to address the crisis in the justice system and ensure that effective access is available to all and not only those who can afford it.

**Understanding and enforcement of rights under the Equality Act; effectiveness and accessibility of redress under the Act**

18. The issues raised by questions 1 and 3 in the terms of reference are closely related. This section therefore addresses the questions together.

**Understanding equality rights**

19. Evidence indicates that many people lack awareness of their rights under the EA 2010. For example, the Commission has raised concerns that people are not necessarily aware that problems they are experiencing at work amount to a breach of the EA 2010.\(^6\) Evidence has shown that around 62 per cent of people faced with a discrimination problem did not know their rights, and a similar proportion were not familiar with the procedures involved in seeking redress.\(^7\) Similarly, there is evidence that employers are unaware of their obligations and continue to ask women in job interviews whether they are pregnant or intend to start a family despite clear legal prohibition on these questions.\(^8\)

20. The complexity of the law, and the need for interpretation by the courts, can also create a barrier to individuals understanding their rights under the EA 2010. For example, there is evidence of poor understanding of the duty to make

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\(^7\) Balmer et al, (March 2010), ‘Knowledge, capability and the experience of rights problems’. Legal Services Research Centre.

reasonable adjustments, including among disabled people, as the House of Lords Committee on the Equality Act 2010 and Disability concluded in 2016.9

21. As a consequence of the complexity of discrimination law, there is a need for both general information and guidance about the law and good legal advice at an early stage in a dispute. In England and Wales, changes to legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) have meant that many people can no longer access early legal advice for a range of legal problems.10 Cuts to legal aid under LASPO, combined with local authority funding reductions, have diminished capacity in the advice sector,11 with Citizens Advice, for example, estimated to have lost a total of £33 million between 2011/12 and 2013/14 after LASPO was introduced.12 Overall the number of civil legal aid providers has fallen by a third since 2011/12,13 and the number of law centres is dwindling.14 The Commission’s Legal Support Project, which provided funding and legal assistance to help people to pursue their claims and access justice, identified a lack of solicitors specialising in education law and discrimination law (other than in relation to employment).15

**Enforcing equality rights**

22. As enforcement of equality rights is based on civil litigation, its efficacy depends largely on the accessibility of the justice system. Accessibility is undermined by:

- The complexity and expense of litigation and inadequate remedies;
- Cuts and changes to legal aid in LASPO;
- Lack of reasonable adjustments in the court system;
- Lack of information-sharing and data collection.

**Complexity and expense of litigation and inadequate remedies**

23. Numerous legal practitioners and experts have noted the complex nature of enforcing EA 2010 rights through the courts. This makes it an unattractive

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14 A number of law centres in England have closed due to a reduction in funding from local authorities, while there has always been a very small number of law centres in Scotland. There are no law centres in Wales, following the closure of Cardiff Law Centre in 2014.

process for both claimants and those facing discrimination claims. There are legitimate questions about whether a person who alleges discrimination should, in principle, be expected to shoulder the burden of pursuing redress in this way. In relation to sexual harassment the Select Committee, following recommendations by the Commission, has suggested that creating a mandatory duty on employers to protect workers from harassment and victimisation in the workplace would help shift the burden from the individual to employers.\textsuperscript{16}

24. Employment tribunals were intended to be an accessible and inexpensive forum in which to resolve employment disputes. However, proceedings have become increasingly complex. Claimants often face the prospect of pursuing a claim without representation, against a legally represented respondent, which can put them off pursuing their claim at all. The procedural complexity can also lead to some respondent representatives seeking to use procedural applications to strike out or limit claims. In addition, the repeal of the statutory questionnaire procedure\textsuperscript{17} has removed a mechanism which evidence indicates promoted early and cost-effective resolution of issues preventing the need to proceed to a tribunal, or enabled the claimant to have greater clarity when entering into legal proceedings which may be quicker and loss costly as a result.\textsuperscript{18} Furthermore, where a claim is unfounded or poorly articulated, the potentially lengthy process that ensues places an unnecessary burden on employers and employees alike.

25. The complexity of the system makes it very difficult to bring a case without representation. For those who do not have the means to pay legal fees or who cannot access legal representation through union membership or legal expenses insurance, options are limited. Some solicitors in England and Wales operate damages based agreements which results in the claimant spending a significant portion of their compensation on legal fees if successful, but given the low level of damages this is not an attractive option for many potential litigants.

26. The effects of tribunal fees continue to be felt in the tribunals. While fees have been removed in Employment Tribunals following \textit{R (Unison) v Lord Chancellor},\textsuperscript{19} in which the Commission intervened to underscore the discriminatory effects of fees, the volume of cases in Employment Tribunals (including discrimination claims) has still not risen to pre-fees levels.\textsuperscript{20} In the county and sheriff courts, claims continue to attract a fee which varies depending upon the value of the


\textsuperscript{17} Previously provided for by s138 of the Equality Act 2010. This enabled a potential claimant to put a list of questions to a potential defendant in order to obtain useful information as well as a pre-claim explanation concerning their treatment, and to understand whether they had a viable discrimination claim. A court or tribunal could take into account a failure to respond or an unsatisfactory response in deciding whether discrimination had taken place.


\textsuperscript{19} [2017] UKSC 51.

claim. Such fees are likely to be prohibitive, especially in higher value claims, and litigants in person may find it difficult to provide a realistic estimate of the value of their claim.

27. Non-financial remedies in discrimination cases are important for enforcing rights, but are not currently effective. Financial compensation may provide effective redress in some contexts, for example when an employment relationship has broken down and there is a significant financial loss. However, where the individual’s priority is to stop or undo the impact of a discriminatory act quickly, financial compensation is not in itself adequate redress.

28. The ability of the county courts to issue an injunction or the sheriff court to issue an interdict\(^\text{21}\) is a powerful tool, as the Commission’s recent action against Fergus Wilson, a landlord discriminating against his tenants, showed. However, it is not well understood, including among legal representatives, as noted by the House of Lords Select Committee on the EA 2010 and Disability in 2016.\(^\text{22}\)

**Recommendation:** Statutory questionnaires should be reintroduced after consultation to ensure that they are used proportionately.

**Cuts to legal aid in LASPO**

29. In England and Wales, while discrimination claims have remained in scope for legal aid following cuts under LASPO, there is evidence that the provision of legal aid for discrimination is not operating effectively to ensure access to justice. Regulations made under LASPO significantly changed the provision of initial legal advice for discrimination, which can now only be accessed through a telephone gateway (with a small number of exceptions). Initial legal advice for discrimination cases fell by almost 60 per cent after LASPO was introduced.\(^\text{23}\)

30. The Commission is concerned that the very low number of cases funded by legal aid suggests the gateway presents almost insurmountable barriers to people obtaining legal advice about discrimination. We have therefore launched an inquiry into the accessibility and effectiveness of legal aid for discrimination cases.\(^\text{24}\) In Scotland, the Commission is conducting research into the availability of legal aid in discrimination cases.

31. In its submission to the consultation prior to the introduction of the LASPO Bill, the Commission expressed its concern about “the chilling effect” on access to justice for workplace-based discrimination cases if employment law were removed from the scope of legal aid.\(^\text{25}\) Recent research we commissioned has

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\(^\text{21}\) Restraining a person from doing, or compelling them to do, a particular act.


reinforced that individuals experiencing problems at work may not be aware that their issue engages discrimination law.\textsuperscript{26} The research identified cases where individuals with seemingly strong discrimination claims did not know that legal aid may be available to support them to bring a claim.\textsuperscript{27}

**Recommendation: The UK Government should act upon the Commission’s recommendations for the LASPO post-implementation review.**\textsuperscript{28}

**Lack of reasonable adjustments in the court system**

32. We are concerned that HM Courts and Tribunals Service (HMCTS) and the Scottish Courts and Tribunals Service (SCTS)\textsuperscript{29} do not have sufficient information about the protected characteristics of court users to enable them to ensure they are meeting their different needs and removing barriers to access to justice. We have raised this issue in the context of the UK Government’s consultations about the modernisation of the court and tribunal system\textsuperscript{30} but we are concerned that the lack of data reflects a broader lack of understanding of the different needs of court users with different protected characteristics.

33. Courts and tribunals have increasingly recognised they have a duty to make reasonable adjustments to meet the needs of disabled court users.\textsuperscript{31} However, we are aware of examples that suggest recognition of that duty does not always translate into practical action.\textsuperscript{32}

**Recommendation: HMCTS and SCTS should collect comprehensive data about the protected characteristics of court users, and conduct a robust assessment of the efficiency and accessibility of courts in dealing with claims under the EA 2010, and of the modernisation programme as a whole.**

**Lack of information-sharing and data collection**


\textsuperscript{27}Ibid.


\textsuperscript{29}SCTS provides administrative support to Scottish courts and tribunals and to the judiciary of the courts.

\textsuperscript{30}See, for example, EHRC’s Parliamentary Briefing on the Courts and Tribunals (Judiciary and Functions of Staff) Bill House of Lords Second Reading (18 June 2018). Available at: https://www.equalityhumanrights.com/sites/default/files/parliamentary_briefing_courts_and_tribunals_judiciary_and_functions_of_staff_bill_house_of_lords_second_reading_18_june_2018.pdf.


\textsuperscript{32}For example, we are aware of a case where no steps were taken by the tribunal to identify the impact of a claimant’s disability on the conduct of proceedings until well into an employment discrimination claim, despite the claimant ticking the box on the claim form indicating the claimant was disabled and a preliminary hearing having taken place.
34. The lack of accurate information about the number and outcomes of EA 2010 claims brought in the county courts in England and sheriff court in Scotland presents a barrier to a proper assessment of the accessibility of the courts. Although claimants are required to notify the EHRC when issuing EA 2010 claims, our experience is that claimants frequently do not know about or adhere to the requirement, which is likely to be exacerbated by lack of legal advice.

35. County and sheriff court judgments are not systematically published, in contrast to ET judgments. Similarly, whereas employment tribunal statistics enable a reasonable level of analysis of the number of different types of employment discrimination claims brought, statistics for the county court do not even provide statistics for the number of discrimination claims brought overall. As a result:

- neither the Commission nor HMCTS or SCTS has a clear picture of how many Equality Act claims are brought in the county and sheriff courts;
- the Commission may be missing out on cases where it would use its powers to intervene or assist cases because it does not know the cases exist;
- because the outcomes of cases are not reported there is no opportunity for organisations to learn from them;
- it is more difficult to identify organisations who are “repeat offenders” and in relation to whom which enforcement action by the Commission might be appropriate;

We are also aware of cases where respondent representatives have attempted to use the claimant’s failure to notify the EHRC as the basis for applications to strike out claims, adding another procedural hurdle for claimants.

**Recommendation:** HMCTS and the Scottish Government should be required to publish data on discrimination claims in the county court and sheriff court, highlight the requirement for claimants to notify the EHRC when issuing a claim, and send copies of judgments in proceedings brought under the EA 2010 to the EHRC.

36. All the issues highlighted above raise concerns that the court system is not currently providing an efficient and accessible means for enforcing discrimination claims. The UK Government is currently undertaking significant reforms to the courts and tribunal system in general, and has closed over 230 courts in England and Wales. It intends to introduce a package of reforms which include, for

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33 By the Civil Procedure Rules, paragraph 2 of the Practice Direction ‘Proceedings under Enactments Relating to Equality’. Available at: [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/proceedings_under_enactments_equality#IDAGENS](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/proceedings_under_enactments_equality#IDAGENS) and the Sheriff Court ordinary cause rules (Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956 (S.223) Schedule 1 Chapter 44.2).

34 These are now online at: [https://www.gov.uk/employment-tribunal-decisions](https://www.gov.uk/employment-tribunal-decisions). They are also available at: [http://www.bailii.org/form/search_cases.html](http://www.bailii.org/form/search_cases.html).

35 Despite the failure having no practical impact on the respondent’s conduct of the case.

example, digitisation of the tribunal system and the delegation of judicial functions to tribunal staff.\textsuperscript{37}

37. The Commission agrees that reforms are necessary to improve the efficiency and accessibility of the tribunal system and the courts more widely. However, we are also concerned to ensure that proper consideration is given to equality and human rights issues in designing and implementing these reforms. The absence of robust data about the protected characteristics of court users and their particular needs raises concerns about the Government’s ability to comply with its obligations under the PSED.

\textit{Recommendation: The UK Government should commission a full examination of the options for improving access to redress for discrimination, and any such examination should take full account of the PSED.}

Enforcement as a mechanism for achieving widescale change

38. Until October 2015, employment tribunals had the power to make recommendations for changes to employers’ policy or practice. The Commission advised against repealing this power during the passage of the Deregulation Bill,\textsuperscript{38} and we continue to believe that it provided an opportunity for to drive improvements in employers’ to improve their practices and policies and tackle systemic discrimination.\textsuperscript{39} In our briefing, we highlighted that one reason why wider recommendations were not made more often was that they were dealt with as part of remedies rather than considered separately. Many cases were settled after a liability hearing but before a remedies hearing took place. This could be addressed if the power were reintroduced.

\textit{Recommendation: The government should:}

\begin{itemize}
  \item \textit{Reintroduce the power for employment tribunals to make wider recommendations in order to leverage wider change from tribunal judgments.}
  \item \textit{Stipulate that wider recommendations should be made at the end of the liability hearing, before remedy is considered.}
  \item \textit{Stipulate that recommendations should be made unless certain circumstances apply. For example, that the employer shows it has already taken steps to address the matters which recommendations would cover.}
\end{itemize}

\textsuperscript{37} See: \url{https://www.gov.uk/government/consultations/reforming-the-employment-tribunal-system}.
\textsuperscript{38} Based on a review of over 400 employment tribunal judgments and experience of our work at the time, we concluded that “the power to make wider recommendations provides an effective way of preventing unlawful discrimination from recurring and helping employers to comply with their legal obligations. See: \url{https://www.equalityhumanrights.com/en/file/14556/download?token=DEFbFp3D}.
\textsuperscript{39} \url{https://publications.parliament.uk/pa/ld201516/ldselect/ldeqact/117/11712.htm#_idTextAnchor154}. The repeal of the power has subsequently been criticised by a range of stakeholders and the House of Lords Select Committee on Disability and the Equality Act 2010 recommended that the power should be restored.
• **Include the power to improve an “aggravated behaviour” penalty for failure to comply with a wider recommendation.**\(^{40}\)
• **Make non-compliance with a recommendation an unlawful act enforceable by the Commission.**

39. The real test of the success of the EA 2010 is the extent to which those with duties not to discriminate are complying with their obligations. While enforcement by individuals in the courts, and by the Commission and other regulators, is an essential part of ensuring the law is effective in practice, it is preferable to prevent discrimination from occurring by ensuring equality is embedded in policy and decision-making.

40. Gender pay gap reporting is an example of a preventative approach to systemic discrimination. The requirement for employers with 250 or more employees to report on their gender pay gaps\(^{41}\) has focused attention on the existence of, and reasons for, the gender pay gap to enable employers to take steps to prevent discrimination. Understanding the drivers of, and solutions for, differences in pay and employment can help employers to address pay gaps and the reasons for them.

41. The Commission is building on the success of gender pay gap reporting by making employers aware of the drivers of inequality for some ethnic minority groups and disabled people. We believe monitoring and measuring this inequality would be made more effective by supporting employers to collect data on ethnicity and disability, including on employment and pay gaps. The aim of measuring employment and pay gaps is not just to assess the size of the gaps, but also to understand their causes and identify potential solutions to addressing both the causes and the resulting pay gaps, which will be different across gender, ethnicity and disability.

**Recommendation: By April 2019 the Office for National Statistics should:**

• **Provide clear and country-appropriate guidance on the classification system to be used for ethnic minority and disability monitoring by all types of organisations, in partnership with the Equality and Human Rights Commission, and practical guidance for different types and sizes of employers on how to collect and report on the data.**\(^{42}\)

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\(^{40}\) As s124 was originally worded, there was no sanction for failure to comply with a wider recommendation, only the power to increase an award to a claimant insofar as a recommendation was aimed at obviating the adverse impact on them personally (a power which still exists). Since 6 April 2014, employment tribunals have had the power to order a losing employer to pay a financial penalty (currently up to £5000) where any breach of a worker's rights has 'one or more aggravating features'. This is in addition to any award for compensation which the employer is ordered to pay to a claimant. This power could be extended to breach of a wider recommendation.


Once consistent classification, collection and reporting systems are in place to support employers to use employment data effectively, the UK Government should:

- Require private, voluntary and listed public sector employers with 250+ employees to monitor and report on ethnicity and disability in recruitment, retention and progression within the workplace by April 2020.

- Require private, voluntary and listed public employers to publish a narrative informed by analysis of their ethnicity and disability data, and an action plan with time-bound targets. This narrative should help explain the factors underlying the data and focus on how to make substantive improvements to the workplace.

42. We consider that the inherent challenges within the model of protection for equality rights that relies predominantly on individuals to bring claims through courts, combined with the barriers outlined above, means that a greater onus should be placed on duty-bearers to prevent and address discrimination. The PSED is a vital tool with the potential to leverage the resource of the public sector to tackle significant and persistent inequalities. However, the PSED has not reached its potential for achieving widescale, transformative change and for tackling the most pressing equality issues including those set out in the Commission’s Is Britain Fairer? reports.43

Recommendation: Strengthening the PSED would enhance the ability of the Equality Act to function as a mechanism for achieving widescale change. The Commission therefore recommends that:

- In order to use the leverage of public services and resources to address the findings of inequality in the Commission’s Is Britain Fairer? reports, governments across Britain and all public bodies should, in performing their PSED, set equality objectives or outcomes and publish evidence of action and progress in relation to our key findings that relate to their functions.

- Governments across Britain should 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.

Effectiveness of current remedies under the Act

43. The remedies for discrimination need to provide an incentive for an organisation to change. If claims are not brought because the benefits are outweighed by the costs or because the routes to remedy are not accessible, there is no incentive...
for the organisation concerned to change its practices. Indeed, if claims are not brought, the organisation concerned may not even be aware that there is an issue it needs to address. Access to justice is therefore critical to driving change.

44. Even when an individual manages to obtain a remedy, they can face obstacles to enforcing awards of compensation:

- Employment tribunals do not have the power to enforce awards and therefore the enforcement process requires the individual to take further court action and to pay a court fee.
- An individual can make an application to BEIS to fine the employer up to £5,000 if they do not pay an award within 28 days. This may prompt payment in some cases, but not in all, especially where the value of the claim exceeds the potential fine. This may result in BEIS collecting a fine but the individual will still have to resort to further court action to enforce the award. As recommended in the Taylor review, the enforcement process could be simplified to increase the number of awards which are successfully enforced.\(^4\)
- As highlighted by the case of AA v Secretary of State for Business, Energy and Industrial Strategy,\(^5\) it is relatively easy for organisations to shift assets in order to avoid having to pay employment tribunal awards.

**Recommendations: The Government should consider:**

- *Introducing interim measures such as freezing orders or deposits aimed at preventing companies shifting assets to avoid paying employment tribunal awards.*

- *The merits of the proposal that in some circumstances, the directors of limited companies should be made personally liable for paying compensation where the company has failed to do so.*

**Other models of enforcement as a means of achieving widespread compliance**

45. There are a variety of enforcement models in other countries that focus on administrative mechanisms for resolving disputes. Some other European National Human Rights Institutions (NHRIs) and National Equality Bodies (NEBs) have different dispute-resolution powers to from the Commission. Among the dispute-resolution powers held by NHRIs and NEBs across Europe (as identified in McGregor et al 2017)\(^6\) are agreement-based dispute resolution, investigations with non-binding recommendations, quasi-judicial tribunals or a combination of these powers.

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\(^5\) [2018] CSOH 54.

46. Similarly, the United States Equal Employment Opportunity Commission is empowered and resourced to address individual cases of discrimination through an administrative enforcement process. The remit of the US Commission is limited to employment discrimination. Any person with an employment discrimination complaint in the US must first make a complaint to the Commission before they can sue in court. They receive an average of around 90,000 complaints a year, and take around 150-200 cases a year themselves, where they have identified systemic issues. The EEOC has a budget of $365m per annum and employs some 250 lawyers, reflecting the intensive resource demands of this approach to enforcement.

47. These approaches are distinct from the Commission’s statutory framework, which does not give the Commission a complaints handling role, and was intended by Parliament to enable the Commission to pursue systemic issues through strategic use of litigation and enforcement in coordination with its general powers.

Part 2 – The Role of the Equality and Human Rights Commission

The Commission’s establishment

48. The Committee will be familiar with the history of the Commission’s establishment but it may be helpful to briefly set out the relevant background.

49. In 2007, Parliament established the Commission with a broad remit, as expressed in the general duty in section 3 of the EA 2006 to encourage and support the development of a society which respects equality and human rights. In 2011, Parliament chose to reject the government’s proposals for reform to the Commission’s duties, retaining the Commission’s general duty and its far-reaching responsibility for securing respect for equality and human rights. The government’s recent Tailored Review, while making various recommendations for improvement, supported the continuation of the Commission’s current functions.

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See: https://www.eeoc.gov/.

48 The general duty in section 3, Equality Act 2006 provides: The Commission shall exercise its functions under this Part with a view to encouraging and supporting the development of a society in which—

(a) people’s ability to achieve their potential is not limited by prejudice or discrimination,
(b) there is respect for and protection of each individual’s human rights,
(c) there is respect for the dignity and worth of each individual,
(d) each individual has an equal opportunity to participate in society, and
(e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

This duty is broader than the duties of the predecessor commissions which the Commission replaced.

49 Enterprise and Regulatory Reform Bill, clause 51.

50. Enforcement of the EA 2010 is one of the Commission’s duties alongside duties to promote awareness and understanding of equality and diversity, encourage good practice, promote equality of opportunity and work towards the elimination of discrimination and harassment.\(^5\) It has similar duties in relation to human rights.\(^5\) In addition, the Commission must monitor the effectiveness of the equality and human rights enactments and monitor progress towards the realisation of a more equal and rights-respecting society.\(^5\) None of these duties is given pre-eminence in the EA 2006 and the Commission must fulfil all of them.

51. As the government’s White Paper setting out the vision for a new equality and human rights body stated, the intention was that the Commission would act as a strategic enforcer of equality law:

"1.36 Demand for the CEHR’s service is likely to be high and its resources will be necessarily limited. It will, therefore, need to ensure that it can maximize the impact of its expertise and experience. This will mean operating strategically, developing its work including enforcement in a way that delivers the most benefit, and adds value to the activities and work of others…

4.15 The CEHR will take a strategic approach to the use of its enforcement tools relating to unlawful discrimination and harassment. It will use these tools as a lever for broader change.” \(^5\)

52. In line with this approach, Parliament gave the Commission a set of limited and strategic enforcement powers designed to bring about broader change. The Commission has powers to: conduct inquiries, similar in form to public inquiries; investigate when it suspects an unlawful act under the EA2010; assess compliance with the PSED; judicially review public authorities on equality and human rights grounds; fund litigation; and subsequently, Parliament gave the Commission specific enforcement powers in relation to disability discrimination in recruitment.\(^5\)

53. Parliament did not intend the Commission to litigate extensively on behalf of individuals except in cases which “test important areas of the law or are likely to have a significant wider impact.”\(^5\)

54. The Commission was not established, and has never been resourced, to support large numbers of individual discrimination cases or high-volume enforcement activity. Litigation by individuals remains the primary enforcement system for

\(^5\) Section 8, EA 2006.
\(^5\) Section 9, EA 2006.
\(^5\) Sections 11 and 12, EA 2006.
\(^5\) The Commission’s enforcement powers are set out in Part 1 of the Equality Act 2006, section 20-32. The power to conduct inquiries is characterised as a ‘general power’ in section 16, though the subjects of an inquiry must have regard to its recommendations and can be judicially reviewed for failing to implement them. Discrimination in recruitment processes is outlawed by section 60 of the Equality Act 2010, which prohibits potential employers from asking questions about an applicant’s health. Section 60(2) made breach of this provision an unlawful act for the purposes of the Commission’s enforcement powers.
equality rights. The Commission can support and supplement this system, but it cannot replace it.

A strategic enforcer

55. The strategic enforcement model for the Commission, legislated for by Parliament, accords with the general regime for enforcing equality rights under the EA 2010, which is based on individuals’ ability to access remedies through civil litigation and does not create a system of administrative enforcement. As we set out in Part 1, the deterioration in individuals’ ability to access justice has undermined the effectiveness of our justice system in securing redress and achieving widespread change, and led to increased calls for the Commission to take greater action to help individuals obtain remedies for discrimination. We understand why these calls have arisen and as an important component in the effectiveness of the EA 2010, the Commission welcomes the opportunity to engage in discussions about its role and how to address access to justice.

56. We believe that equality law needs to be understood by employers, service providers and the public sector as a regulated space – individuals must be able to access remedies for discrimination to create disincentives to discrimination, and regulators, including the Commission and other sector specific regulators, must be willing and able to take strong, strategic action to stop discrimination and promote compliance.

57. As a strategic enforcer, the Commission focuses on how it can achieve improvements to law, policy and practice by using all the levers at its disposal. It is the breadth of the Commission’s statutory powers that makes it uniquely placed to achieve impact by deploying its various powers in a complementary way. Our compliance and enforcement activity therefore consists of a spectrum of activities aimed at ensuring compliance with the law, from providing information and advice to undertaking litigation and enforcement action using formal enforcement powers.

58. The Tailored Review accepted that our enforcement powers “span effective influence and ‘nudge’ through to legal action. ‘Enforcement’ does not refer exclusively to legal action in the courts.” The Review recognised that coordinated action along this spectrum was the best way for the Commission to achieve impact.

59. The Commission achieves impact along the spectrum of our powers and through the interaction between them. It is therefore critical to understand the full range of our powers and activities, and not to focus solely on litigation and our harder-edged enforcement powers. The full list of our compliance and enforcement activities is set out in Annex 3.

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57 All regulators, inspectorates and ombudsman have a role to play in enforcing equality law. As the Select Committee has recognised in recent reports, more can be done by regulators to take action against discrimination using their specific regulatory principles.

58 Tailored Review.
60. Our enforcement priority is to secure compliance with the law and when assessing a piece of work we carefully select the right lever, or levers, for the job. Crucially, our experience has shown that the integration of our powers achieves the maximum impact. For example, following the case that we funded for Doug Paulley against FirstGroup,\(^{59}\) in which the Supreme Court ruled that bus companies must do more to accommodate wheelchair users, we worked with other experts in the field to advise Government on the steps that must be taken to implement the judgment and meet the needs of wheelchair users on bus services, and we briefed parliamentarians on amendments to the Bus Services Bill and relevant regulations. Our follow-up compliance work shows the impact a judgment such as this can have: we learnt about a complaint from a wheelchair user about a similar incident that occurred just days after the Supreme Court’s decision, and our letter to the bus company met with a swift and detailed reply setting out the steps they were taking to ensure it did not happen again.

61. Our approach to enforcement is common among regulators in the UK, which deploy targeted regulation aimed at achieving maximum impact. For example, the Charity Commission focuses on the outcomes it can achieve through the use of a wide range of interventions ranging from advice and guidance through to investigatory powers, and “targets its resources at the highest risks... and where it thinks its intervention will have the most impact.”\(^{60}\)

62. The Chair of the Charity Commission recently announced their new 5 year strategy focusing on working with charities to achieve culture change and emphasising that she would not measure the Charity Commission’s success by its volume of enforcement action.\(^{61}\) The Financial Conduct Authority (FCA) similarly “prioritises its resources in the areas which pose the biggest threat to its statutory objectives” and makes use of the full range of regulatory tools at its disposal, making “judgement about whether these tools can remedy or mitigate the harm cost-effectively.”\(^{62}\) Like the Commission, the FCA is clear that “choosing the best remedy will often mean carefully combining tools to secure substantive compliance.”

**Progress so far**

63. The Commission is determined to take robust action to tackle discrimination within the boundaries of our powers and resources. We are on an improvement journey and while there is still some way to go, we have already made significant progress.

64. Our new Target Operating Model, implemented in April 2016, introduced more agile and flexible ways of working and re-organised our work around six

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\(^{59}\) FirstGroup Plc v Paulley [2017] UKSC 4


‘domains’ of life.\textsuperscript{63} This approach allows us to bring the full range of our powers to bear on key issues.

\textit{Measuring impact}

65. We are putting impact at the heart of our planning process, so that we can measure our performance against the outcomes of our work, rather than just the resource we devote to it. We have developed an impact model which is used in our strategic planning process and when planning significant pieces of enforcement work. The model requires us to identify what change we are trying to achieve, what we will do to get there, and how we will know if we have been successful. We provide an example impact model in Annex 3.

66. Having adopted our impact model in our day-to-day work, we are currently commissioning a research project on the impact of our enforcement powers, which will inform decision-making about the use of these powers in the future. In addition, we are acquiring a case management system to better record and measure outcomes across the breadth of our compliance and enforcement work.

\textit{Increased strategic cases and enforcement work}

67. We are already responding to calls for us to increase the number of strategic cases that we take on, nearly doubling the number of strategic cases from 27 in 2016/17 to 45 in 2017/18.

68. Our recent strategic cases have seen considerable success, including:

- Securing employment rights\textsuperscript{64} for the 2.8 million people who work in gig economy in Great Britain;\textsuperscript{65}

- Securing the withdrawal of potentially discriminatory Continuing Healthcare policies\textsuperscript{66}, protecting some of the 55,000 people in England who are eligible for this type of support;\textsuperscript{67}

- Putting an end to bus companies’ ‘first come, first served’ policies and ensuring they do more to accommodate wheelchair users.\textsuperscript{68}

69. We have also stepped up our enforcement activities by:


\textsuperscript{68} FirstGroup Plc v Paulley [2017] UKSC 4.
• Successfully achieving 100% compliance with the gender pay gap reporting requirement, with more than 10,000 employers publishing their information;
• Funding 160 further frontline cases in our Legal Support Projects since 2017;
• Completing 180 compliance matters in 2017/18.

70. We have adopted a detailed set of key performance indicators for 2018/19 committing us, among other things, to:
• Funding 10% more strategic cases;
• Completing 10% more compliance matters;
• Instigating at least 3 investigations;
• Taking pre-action steps in at least 3 own-name judicial reviews.

Combining the Commission’s powers

71. We are increasingly taking an integrated approach to our powers when tackling an issue. Access to justice is a key priority in the Commission’s current Strategic Plan, and our work around this exemplifies both the broad scope of our duties and the way we use our powers to achieve change. We are seeking to effect change at a systemic level through a range of work along our spectrum of powers:

• Our formal inquiry into legal aid in discrimination cases, launched in September 2018, will scrutinise the current system in England and Wales for obtaining public funding and make recommendations to ensure that people are able to access the courts in discrimination cases.

• We commissioned research on the effects of LASPO and we are engaging with the government in its post-implementation review.69

• We have consistently raised concerns about barriers to justice with the UN bodies which examine the UK’s record on human rights, and they have made recommendations to the UK government in line with our advice.

• Between January 2017 and April 2018, our Legal Support Project funded 160 individual discrimination cases in areas where there is a particular access to justice gap: disability, education, housing and social security. As well as assisting individuals to obtain a remedy for discrimination, we gathered intelligence on systemic issues in those sectors to inform our future work.

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In 2017, we provided grants to 11 organisations in the legal advice sector to support provision of advice and creation of resources to support people to understand their rights. These grants led to provision of advice and representation in hundreds of discrimination cases.

Our Adviser Support helpline gives free advice to advisers and case workers in the advice sector (for example CABs, law centres and trade unions), building their capacity while providing us with an evidence base about equality issues that are arising. In Scotland and Wales, our transfer of expertise work similarly builds the capacity of the advice sector.

72. It is through this coordinated and strategic use of all of its powers that the Commission seeks to fulfil its statutory duties and bring about change.

Resources

73. The Commission devotes a considerable proportion of its available resources to compliance and enforcement activities. External spending on our legal activities (i.e. funding for legal cases, interventions, investigations and injunctions) has more than trebled to £1.3 million comparing the last full year (2017/18) with 2015/16. See Annex 5 for an indication of the external expenditure on using our formal enforcement powers.

74. The figures above exclude Adviser Support and our transfer of expertise activities, and our recent grant-making programme, both of which are targeted at improving the quality and quantity of advice and representation on equality and human rights issues. We invested another £641,000 on these activities in the last financial year.

75. In terms of staff time spent on compliance and enforcement activity, litigation and compliance correspondence are conducted by the Legal Directorate, which consists of 27.3 FTE lawyers, case workers and support staff. Inquiries and investigations are carried out by a team of 5.6 FTE staff. The cost to the Commission of these groups of staff is circa £1.9 million per annum.

76. In addition to work carried out by the legal and inquiries/investigations team, the Commission’s Programmes team manages compliance projects such as Working Forward; and all our staff, including Communications, Policy, Treaty Monitoring and Research, work collaboratively to support compliance and enforcement activity.

Next steps

77. The Tailored Review provides reassurance about the Commission’s direction of travel. It recognise our successes, our strong international reputation and that the Commission has a critical role to play in advancing equality and human rights in Great Britain in the future. The Review also makes a number of recommendations, many of which we recognise as important contributions to our improvement journey. The Review is being published while we are finalising IBF and developing our Strategic Plan, so we are taking the opportunity the Review
provides to clearly set out in our Strategic Plan how we will continue to develop and improve.

78. The Strategic Plan will be published in March 2019 and will set out the organisation’s overarching theory of change and our key priorities for the plan period, while ensuring we remain agile enough to respond to the major equality and human rights issues of the day. The issues we prioritise will require us to use the full range of our tools as part of an integrated strategy to achieve impact. In line with our commitment to put compliance and enforcement at the heart of our strategies for achieving change, we are committed to dedicating additional resource in the next financial year to these activities.

**Compliance and enforcement policy**

79. As part of our strategic planning, we are producing a new enforcement strategy which will emphasise proactive enforcement and we will consult on an amended compliance and enforcement policy. In particular, we plan to adopt a firmer approach to non-compliance in the policy, while remaining committed to following the Regulators’ Code, which emphasises that regulators should support those they regulate and take a proportionate approach to enforcement.\(^70\)

**Intelligence gathering**

80. Effective intelligence gathering is central to our ability to identify and tackle the most pressing inequalities. Many ombudsmen and regulators have a complaints handling function or public advice service which provides an evidence base to shape their work. As set out below, we are seeking the return of the public helpline, but we do also recognise the need identified by the Tailored Review to develop a user-focused, multi-channel approach to our advice provision and evidence gathering.\(^71\)

81. We have a very broad range of stakeholder networks, cultivated by Commissioners and staff across the organisation, which provide a valuable pipeline of information. Our relationships with legal stakeholders are particularly important for our enforcement work and we collaborate closely with lawyers, advice organisations and NGOs to ensure they continue to bring individual cases to our attention. Our key performance indicators for this year demand an improvement in legal outreach and referrals. We are building on our networks with a more structured approach to outreach and we are developing training for staff in this area to increase confidence and capability in stakeholder engagement.

82. Our Scotland and Wales Committees were recognised by the Tailored Review as being particularly successful in cultivating stakeholder relationships. We aim to achieve similar success in England and are developing an England and the regions strategy, including structured stakeholder engagement plans with representatives across the regions and domains. As part of this strategy, we are developing a proposal to hold regional ‘clinics’ alongside local advice agencies on the issues identified in our strategic plan. We will establish a Commissioner

\(^{70}\) Regulators’ Code, section 1.  
\(^{71}\) Tailored Review, p.24.
Working Group, led by our Deputy Chair, to oversee the implementation of this strategy and evaluate its impact.

83. We will also refresh our website at the start of the new strategic plan period in 2019, ensuring our approach to prioritisation and impact is clear to stakeholders.

Additional powers

84. As the Commission strives to make the best use of our enforcement powers, the lack of an effective method for large-scale intelligence gathering has become more problematic and pressing.

85. In order to maximise our effectiveness, we seek the return of responsibility to the Commission for the telephone helpline (the Equality Advisory and Support Service) offering discrimination and human rights advice. In 2016, the House of Lords Equality Act 2010 and Disability report recommended the return of the helpline to the Commission, stating:

“We have examined how the Equality and Human Rights Commission could do more to support disabled people. In 2012 the Government removed its helpline and gave the work to an external company. This has been much criticised. The responsibility for providing advice should be restored to the EHRC.”

We agree. With our expertise and strategic relationships, we can ensure a high quality service, take targeted action to support more people to resolve complaints, as well as to challenge systemic discrimination. The helpline would enable us join up people’s experience of discrimination with the exercise of our enforcement powers, making sure we are targeting our resources on the most prevalent and egregious breaches of the law.

Recommendation: The Government should return responsibility for the telephone helpline to the Commission.

October 2018
Annex 1 – Recommendations

1. Statutory questionnaires should be reintroduced after consultation to ensure that they are used proportionately.

2. The UK Government should upon the Commission’s recommendations for the LASPO post-implementation review.

3. HMCTS and SCTS should collect comprehensive data about the protected characteristics of court users, and conduct a robust assessment of the efficiency and accessibility of courts in dealing with claims under the EA 2010, and of the modernisation programme as a whole.

4. HMCTS and the Scottish Government should be required to publish data on discrimination claims in the county court and sheriff court, highlight the requirement for claimants to notify the EHRC when issuing a claim, and send copies of judgments in proceedings brought under the EA 2010 to the EHRC.

5. The UK Government should commission a full examination of the options for improving access to redress for discrimination, ensuring any such examination should take full account of the PSED.

6. The power for employment tribunals to make wider recommendations should:
   - Be reintroduced in order to leverage wider change from tribunal judgments;
   - Stipulate that wider recommendations should be made at the end of the liability hearing, before remedy is considered;
   - Stipulate that recommendations should be made unless certain circumstances apply. For example, that the employer shows it has already taken steps to address the matters which recommendations would cover;
   - Include the power to impose an “aggravated behaviour” penalty for failure to comply with a wider recommendation;
   - Make non-compliance with a recommendation an unlawful act enforceable by the Commission.

7. By April 2019 the Office for National Statistics should:
   - Provide clear and country-appropriate guidance on the classification system to be used for ethnic minority and disability monitoring by all types of organisations, in partnership with the Equality and Human Rights Commission, and practical guidance for different types and sizes of employers on how to collect and report on the data.
Once consistent classification, collection and reporting systems are in place to support employers to use employment data effectively, the UK Government should:

- Require private, voluntary and listed public sector employers with 250+ employees to monitor and report on ethnicity and disability in recruitment, retention and progression within the workplace by April 2020.

- Require private, voluntary and listed public sector employers to publish a narrative informed by analysis of their ethnicity and disability data, and an action plan with time-bound targets. This narrative should help explain the factors underlying the data and focus on how to make substantive improvements to the workplace.

8. Strengthening the PSED would enhance the ability of the Equality Act to function as a mechanism for achieving widespread change. The Commission therefore recommends that:

- In order to use the leverage of public services and resources to address the findings of inequality in the Commission’s *Is Britain Fairer?* reports, governments across Britain and all public bodies should, in performing their PSED, set equality objectives or outcomes and publish evidence of action and progress in relation to our key findings that relate to their functions.

- Governments across Britain should 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.

9. The Government should consider:

- Introducing interim measures such as freezing orders or deposits aimed at preventing companies shifting assets to avoid paying employment tribunal awards.

- The merits of the proposal that in some circumstances, the directors of limited companies should be made personally liable for paying compensation where the company has failed to do so.

10. The Government should return responsibility for the telephone helpline to the Commission.
Annex 2 – The Commission’s compliance and enforcement activities

Publication of information and advice\textsuperscript{72}

We provide advice and guidance to ensure that individuals and organisations can comply with their duties under the EA 2010, and that people understand their right not to be subjected to discrimination and how to enforce those rights.

Example: The most popular guidance on our website is that on sex discrimination (92,158 page views last year)\textsuperscript{73}, followed by disability discrimination\textsuperscript{74} (91,528 views), then our guidance on the Equality Act 2010 (59,728 views).

Publication of Codes of Practice\textsuperscript{75}

We have a power to publish statutory Codes of Practice which give guidance to organisations on how to comply with their legal obligations, and set out best practice. Codes of Practice can be taken into account by the courts when determining claims.

Example: Following our recent research on sexual harassment in the workplace, we identified a need for further specific guidance for employers. In line with our recommendations and those of the Women and Equalities Select Committee, we are planning to publish a Code of Practice on sexual harassment and harassment at work.

Research\textsuperscript{76}

Our research allows us to identify and understand systemic issues, which in turn inform our strategic priorities and decisions on how to target our resources to achieve maximum impact. When additional research is needed, we may undertake it ourselves (for example, if it is urgent or if we have a unique perspective that means we are best placed to do it), partner with other organisations, or influence third parties to undertake it.

Example: We partnered with the Department for Business, Innovation and Skills (as it then was) to conduct extensive research into pregnancy and maternity discrimination at work. Our findings shone a light on a pervasive problem and informed our compliance activity in Working Forward, our campaign to improve employers’ practice on maternity issues in the workplace.

\textsuperscript{72} Equality Act 2006, s13
\textsuperscript{75} Ibid, s14
\textsuperscript{76} Ibid, s13
Grants\textsuperscript{77}

We can provide grants to organisations to support them to, for example, provide information and advice resources, operate advice services and support legal cases.

Example: In 2017/18 the Commission funded 11 advice sector organisations to provide direct advice and resources to the public on discrimination and human rights and how to enforce their rights. Hundreds of individuals received advice and representation as a result and the Commission deepened collaboration with the advice sector.

Compliance campaigns\textsuperscript{78}

We have used our powers to provide information and advice to bring about change in a particular problem area.

Example: Our Working Forward campaign supports employers to make their workplaces the best they can be for pregnant women and new mothers. So far, 347 employers have signed up, covering 1.67 million employees.

Direct compliance work with organisations\textsuperscript{79}

We undertake a large quantity of work with organisations to secure their compliance with the EA 2010 at an early stage. This can range from a single letter setting out their legal duties, to multiple conversations, meetings and follow-ups depending on the complexity of the issue and the level of cooperation we receive.

Example: Our work with the Premier League helped secure an additional 700 spaces for wheelchair users. On top of that, 17 clubs now meet the recommended number of ‘amenity’ and ‘easy access’ seats for disabled people; 20 provide accessible toilets to the required standard; 22 provide specially-equipped ‘changing places’ toilets; and 20 provide support and sensory aids.

Inquiries\textsuperscript{80}

We can conduct an inquiry into any matter which relates to equality, diversity or human rights, and compel organisations to provide us with information for the inquiry. Following an inquiry, we can issue recommendations to which organisations must have regard.

Example: As part of our inquiry into accessible housing for disabled people, we followed up on WESC’s finding that the Planning Inspectorate was not complying with the PSED when assessing local authorities’ planning policies. We took this

\textsuperscript{77} Ibid, s17  
\textsuperscript{78} Ibid, s13  
\textsuperscript{79} Ibid  
\textsuperscript{80} Ibid, s16
up with the Planning Inspectorate which amended its guidance for inspectors, ensuring that local authorities are now assessed for their compliance with the PSED.

Public sector duty assessments\textsuperscript{81}

We can conduct an assessment to evaluate whether a public authority is complying with the PSED and issue a compliance notice if we find that it is not. We can take the public authority to court if they fail to comply with the compliance notice.

Example: The Commission regularly relies on its assessment power in compliance work with public authorities. For example, we have satisfactorily concluded compliance correspondence with universities about potential anti-Semitic activity on campus relying on the PSED and our assessment power.

Example: The Commission conducted an assessment of the extent to which HM Treasury met its legal obligations to consider the impact of the 2010 Spending Review decisions on protected groups. The assessment helped to inform better collection and use of equality data, and a toolkit to help policymakers consider the potential impact of decisions during policy development.

Agreements\textsuperscript{82}

The Commission can enter into a formal agreement with any person or organisation that we think has committed an unlawful act. An agreement is binding and we can take an individual or organisation to court if they fail to comply with it.

Example: After following up media reports alleging harassment of female event staff at the Presidents Club Dinner, we entered into an agreement with the recruitment agency that provided the staff, committing it to undertake additional training and update its policies and procedures support staff to raise concerns and deal with incidents effectively if complaints are made.

Injunctions and interdicts\textsuperscript{83}

The Commission can apply to court for an injunction or interdict to prevent a person from committing an unlawful act. This power is used only in cases where a serious breach justifies immediate court action.

Example: We obtained an injunction against Fergus Wilson, a landlord who refused to let his properties to Indian or Pakistani tenants.\textsuperscript{84}

\textsuperscript{81} EA 2006, s31
\textsuperscript{82} EA 2006, s23
\textsuperscript{83} Ibid, s24
\textsuperscript{84} https://www.equalityhumanrights.com/en/our-work/news/landlords-policy-banning-indian-and-
Investigations

If we suspect that a person or organisation has committed an unlawful act, we can carry out an investigation. At the conclusion of an investigation, we can issue an unlawful act notice to the organisation requiring them to prepare an action plan to address the discrimination. If the organisation does not comply, we can seek a court order requiring compliance.

Example: Our investigation into Metropolitan Police Service (MPS) found that ethnic minority, gay and female police officers and staff who raise complaints of discrimination expect to be victimised and fear reprisals. Although the available evidence did not establish a breach of the EA 2010, our report identified areas of poor practice which the MPS committed to addressing.

Legal assistance to individuals

We can provide assistance, including funding or legal advice, for people pursuing litigation under the EA 2010.

Example: We used our funding power to provide assistance in strategic cases such as DB v Secretary of State for Work and Pensions which challenged the cap on the access to work fund and led to an increase in funding for disabled employees.

Judicial review

We can seek a judicial review of a public authority that we believe has breached the EA 2010. The court can make a declaration as to whether the public authority has acted lawfully, and may quash a decision or issue an injunction or, in Scotland, an interdict.

Example: We recently issued a claim against NHS England’s policy on storage of gametes for trans people and we await a hearing.

Interventions

pakistani-tenants-unlawful-says-county-court

Ibid, s20

Ibid, s21

Ibid, s22


Ibid, s28

[2010] UKUT 144 (AAC)

Ibid, s30

Ibid, s.30
We can intervene in legal cases brought by individuals and organisations. In our role as an intervener, we can help to clarify the law and present our own evidence on disputed matters. Our interventions are often proactively sought by claimants and the courts and have had a significant impact in shaping the outcomes of legal cases over the last decade.

Example: we intervened in the *Unison* case on tribunal fees to explain the discriminatory effect of fees.
Annex 3 – Diagram of the Commission’s compliance and enforcement activities

How we work

Compliance with equality law

Inform & Advise

Provide support for individuals pursuing strategic cases in the courts.
Publish Codes of Practice to give guidance on compliance with equality law.
Provide information and advice to the public, employers, service providers and the public sector.

Research

Challenge a public authority’s decision with a judicial review.
Carry out research to identify and understand systemic issues and build evidence for enforcement or litigation.

Scrutinise

Seek an injunction from the courts to prevent discrimination by an individual or organisation.
Hold an inquiry into any equality, diversity or human rights issue. Compel organisations to provide information. Make recommendations, to which organisations must have regard.

Compel

Assess a public authority’s compliance with the Public Sector Equality Duty. Compel them to provide information. Issue a compliance notice. Seek a court order.

Challenge

Investigate whether an individual/organisation has breached equality law. Compel them to provide information. Issue an unlawful act notice requiring an action plan. Seek a court order.

Enter into an agreement with an individual or organisation to prevent a breach of equality law.

Carry out compliance work with specific organisations to address discriminatory policies and practice.
### Annex 4 – Example impact model

**Aim:** Ensure Equality Act effectively protects employees from being harassed at work by third parties

**Impact measures:** Reduction in harassment by third parties in the workplace

<table>
<thead>
<tr>
<th>Intermediate changes</th>
<th>Success measures</th>
<th>Activities and outputs</th>
<th>Output measures</th>
</tr>
</thead>
<tbody>
<tr>
<td>The short and medium term changes that need to happen to achieve the aim.</td>
<td>How will we know that the intermediate changes have been progressed or achieved?</td>
<td>The things the Commission will do and/or produce in order to effect achievements of the intermediate changes.</td>
<td>The measures for the delivery of activities and outputs. [eg Research report published by August 2017]</td>
</tr>
<tr>
<td>[eg Increased understanding of the gender pay gap]</td>
<td></td>
<td>[eg Evidence of EHRC research used by academic bodies]</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>[eg Manage delivery of research report]</td>
<td></td>
</tr>
<tr>
<td>1. Supreme Court finds that employers can be vicariously liable for harassment by third parties</td>
<td>Supreme Court judgment overturning CA decision</td>
<td>Provide section 28 funding to the appellant in a case challenging Court of Appeal’s interpretation of Equality Act 2010</td>
<td>Appeal proceeds; appellant’s case makes persuasive case for our interpretation of the law</td>
</tr>
<tr>
<td>2. Increase in third-party harassment claims because people are able to rely on the EA 2010</td>
<td>Evidence that advisers understand and apply the judgment when advising clients</td>
<td>Disseminate the judgment and educate advisers</td>
<td>EHRC guidance updated to reflect judgment Seminar held on the implications of the judgment for practitioners Article written on the judgment for ELA Briefing</td>
</tr>
<tr>
<td></td>
<td>Evidence that there are greater numbers of settlements and ET claims concerning third party harassment</td>
<td>Influence MoJ to collect disaggregated data on ET claims</td>
<td>Raise data collection/disaggregation in policy discussion with MOJ and other relevant stakeholders</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Monitor ET judgments for harassment cases Discuss quantity of complaints/cases with relevant stakeholders, e.g. ACAS, unions</td>
<td>Report on effectiveness of the judgment to relevant stakeholders, e.g. Select Committees</td>
</tr>
<tr>
<td>3. Employers are aware of their responsibilities in relation to harassment by third parties</td>
<td>Evidence that employers are taking steps to amend policy and practice</td>
<td>Inform employers about the implications of the judgment Identify potential cases for enforcement action</td>
<td>Disseminate judgment and updated guidance to stakeholders, e.g. Working Forward members</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Enforcement action concerning third party harassment considered by Prioritisation Group</td>
</tr>
</tbody>
</table>
Annex 5 – Indicative external costs of the use of the Commission’s compliance and enforcement powers

These figures provide an approximate indication of the external costs (e.g. the costs of external legal advice and representation) to the Commission of using our formal enforcement powers under the Equality Act 2006.

N.B. These figures do not include the Commission's potential liability for the other parties' costs should the case not succeed in court. The Commission must make allowance for these costs in its budget.

1. Inquiry (section 16): between £100,000 and £300,000; average £200,000
2. Investigation (section 20): between £100,000 and £300,000; average £200,000
3. PSED assessment (section 31): between £30,000 and £200,000; average £80,000
4. Legal funding for individual cases (section 28): between £4,000 and £80,000; average £28,000
5. Intervention (section 30): between £2,000 and £70,000; average £17,000
6. Own-name judicial review (section 30): between £7,000 and £45,000; average £26,000
7. Injunction (section 24): between £2,000 and £20,000; average £10,000.