



House of Commons
Women and Equalities
Committee

**Enforcing the Equality Act:
the law and the role of
the Equality and Human
Rights Commission:
Government and Equality
and Human Rights
Commission Responses
to the Committee's Tenth
Report of Session 2017–19**

First Special Report of Session 2019

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Women and Equalities Committee

The Women and Equalities Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Government Equalities Office (GEO).

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First Special Report

The Women and Equalities Committee published its Tenth Report of Session 2017–19, [Enforcing the Equality Act: the law and the role of Equality and Human Rights Commission](#) (HC 1470) on 17 July 2019. The Equality and Human Rights Commission’s response was received on 2 October and the Government’s response was received on 15 October. The responses are appended to this report.

Appendix 1: Government Response

Introduction

The Equality Act 2010 (‘the Equality Act’) is the cornerstone of equalities legislation, providing protection from discrimination. It embodies the principle of fair treatment, providing an important safeguard for the rights of individuals, and recourse to redress. The Government is committed to ensuring that the processes for enforcing the Act are working effectively to provide the necessary protections.

As our evidence noted, and the Committee’s report acknowledged, since the first Race Relations Act of 1965, anti-discrimination law has always been civil law, primarily enforced by individuals. The structure of the law reflects this: the test for proving discrimination in many circumstances is to show that an employer or service provider has treated one individual less favourably than another individual for reasons related to a protected characteristic – the comparator test – not simply that someone has been treated unfairly against an absolute standard. Under the Equality Act 2010, as under previous anti-discrimination legislation, many individuals have taken cases to courts and tribunals, and as a result of specific judgments, the interpretation of the law has developed around almost every protected characteristic. In 2017/18 alone, 58,661 employment tribunal claims were made on the grounds of discrimination involving a protected characteristic.

That said, the introduction first of the reasonable adjustment duties to avoid disadvantaging disabled people, then public sector duties (consolidated and expanded into the Public Sector Equality Duty in the 2010 Act) and more recently the Gender Pay Gap Reporting regulations, have started a process of moving towards a “mixed economy” of compliance and enforcement. Increasingly, compliance is no longer simply a matter of avoiding behaviour which is perceived as being discriminatory, harassing or victimising, but also of complying actively with specific legal requirements with enforcement through judicial review (of public authorities) or the Equality and Human Rights Commission (EHRC).

But we do not think it is possible that a system of proactive compliance would make individual challenge obsolete. Equality is about the perception of fair treatment, and individuals’ perception of whether they have been treated fairly will inevitably differ; similarly, the general perception of what is fair and reasonable changes over time. Under a proactive system, individual challenge may still be used where individuals felt employers and providers were not doing enough, in order to draw attention to circumstances they believed were underserved.

Given this, it is likely that enforcement will continue to develop through a combination of pro-active compliance requirements, and complaints and legal actions being brought by

individuals. Our responses to individual recommendations in the Committee’s report set out a number of ways in which we will be seeking to ensure that the Equality Act 2010 can best result in fair treatment for everyone in employment, or in receipt of goods, services and public functions.

The other key element of the Select Committee’s inquiry is the role of the EHRC in enforcing the Act. The EHRC is an independent body, and is responding separately and substantively to the report. However, we welcome the Committee’s recommendations relating to the EHRC, and particularly its endorsement of the 2018 Tailored Review, to which both Government and the EHRC are committed. We are keen to see EHRC make further progress on the review’s recommendations to prioritise and deliver against its unique powers. We are clear that further enhancement of the EHRC’s enforcement role cannot merely be a question of it supporting more individuals to bring claims in courts and tribunals. Evidence to the inquiry from both Government and EHRC itself has emphasised that the EHRC was never resourced to support more than a tiny proportion of claims made under the Equality Act. The Committee’s report speaks of the high cost of legal action to individuals; but clearly claimants are not the only parties involved and costs fall on all parties – for the EHRC, the average cost of providing formal legal assistance to a claimant or potential claimant under Section 28 of the Equality Act 2006 is around £7,000. Were it therefore to support on this basis just 10% of the 58,000+ discrimination tribunal claims mentioned above, its costs for this aspect of enforcement alone would exceed £35m – nearly double its entire budget.

We therefore strongly support EHRC taking “smart” action, through more systemic approaches and considerably greater use of investigations, which have in the past tended to be seen by EHRC as separate exercises not closely related to its other enforcement work. We note that in the past year the Commission has initiated more enforcement action, leading to two major investigations and three inquiries.

Responses to specific recommendations

Recommendation 1

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

The EHRC is an independent public body and is responding separately to this recommendation. For the reasons set out in the introduction, Government welcomes this recommendation.

The Minister for Women and Equalities and the Government Equalities Office will continue liaising closely with the EHRC to monitor its action plans, developed in response to the Tailored Review recommendations, and to ensure these are delivered at a pace and to a high standard.

Recommendation 2

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

The EHRC is an independent public body and is responding separately to this recommendation. In general we welcome this recommendation, and note that the Tailored Review found that the strongest public perception of EHRC (74% of its stakeholders) thought of it as a provider of information, with only 47% seeing it an enforcement body. We are aware that the EHRC is taking steps to enhance publicity for its enforcement activities and will no doubt cover this in its response.

Recommendation 3

We recommend that the EHRC assesses its enforcement policies and practices to ensure that the threshold for suspecting an unlawful act may have taken place is no higher than required by the law. It should publicly set out the type and level of evidence that will allow it to meet that threshold. If, after changing its policies, the Commission still struggles to meet that evidence threshold then the law must be changed accordingly. (Paragraph 73)

The EHRC is an independent public body and is responding separately to this recommendation. As already noted, we welcome the EHRC increasing the number of investigations it carries out, notice it has started to make progress in this respect and welcome suggestions for it to review and further streamline its processes. However, merely “suspecting” an unlawful act appears a modest legal test for triggering further action and we would not expect the law to require changing.

Recommendation 4

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

In the Government’s view this recommendation – which would be unique across public sector regulators and enforcement bodies – could create moral hazard, where risks are not realistically assessed because of the assumption that losses resulting from bad decisions will be underwritten. It could also result in issues around the propriety of public expenditure, particularly in cases brought against other public sector authorities and/or where Government was supporting the respondent. Since the Government has not in the past agreed with the EHRC’s definition of a “strategically important case”, it also cannot be assumed that there would be an agreed basis for providing an obligation to indemnify.

Recommendation 5

The EHRC must take further action to address the problems identified in the tailored review conducted in 2018. We see little evidence of the kind of clarity and focus that the

tailored review recommended. Despite some progress in setting priorities and numerous restructures, the Commission still fails to have the kind of focus on impact and influence that good management should be delivering. (Paragraph 97)

The EHRC is an independent public body and is responding separately to this recommendation.

As noted in the introduction to this response, we welcome the Committee's endorsement of the Tailored Review. The Minister for Women and Equalities and the Government Equalities Office are working with the EHRC to use the Tailored Review as a basis for the EHRC's development.

Recommendation 6

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

The Government agrees that enforcement bodies are an important part of the answer to securing compliance with rights under the Equality Act 2010. We are committed to doing more to ensure that enforcement bodies are using their powers to secure compliance in the sectors they are responsible for. However, we do not believe that a further legal duty in this area is the best way to promote compliance.

There are over 70 national regulators – some sector specific, and others covering all sectors but concerned only with a particular policy area. Many organisations will be regulated by more than one regulator, raising the risk of duplication of activity. We would also need to guard against the risks that may come with enforcement bodies taking on a special responsibility for compliance with the Equality Act 2010, as some organisations will have only limited contact with regulators, potentially leaving them under little scrutiny. Furthermore we would note that regulators are operationally independent of their sponsor departments and a further legal duty raises the prospect of departments having to intervene in their regulators' operational matters.

Instead, the Government is taking a number of steps to drive effective action by enforcement bodies. As promised in oral evidence to the Committee, the Government Equalities Office has refreshed its Public Sector Equality Duty (PSED) Network to include enforcement bodies and refocus its terms of reference towards promoting compliance throughout policy development and service delivery. The Network will support enforcement bodies to both comply with PSED themselves, and to use their powers to secure compliance by the public bodies in their sectors as appropriate. Through their inclusion in the Network, enforcement bodies will also be directly included in GEO's efforts to ensure Equality Objectives are high quality and genuinely reflective of organisations' work.

Some bodies are also working directly with the EHRC. For example, the Health and Safety Executive (HSE) is in the process of setting up more formal working arrangements with the EHRC. Good progress has been made on these arrangements and HSE continues to offer support to EHRC as appropriate.

Recommendation 7

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

On 16 July Government launched a consultation on proposals for a new single labour market enforcement body. The consultation sought stakeholder views on what role a new enforcement body could play in relation to tackling harassment and discrimination in the workplace. It also considered the role a new body could play in supporting compliance and the provision of information and guidance more generally. The consultation closed on 6 October 2019 and we will use the responses and views gathered through stakeholder roundtables to inform the Government response.

Recommendation 8

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

The EHRC is an independent public body and is responding separately to this recommendation. Similarly, other enforcement bodies work independently of their sponsor departments in Government.

However, the Government is supportive of this recommendation and agrees that joint working with other enforcement bodies can increase the efficiency and effectiveness of the Commission. We are aware of the EHRC's ongoing commitment to improving the relationship with sector-specific enforcers and embed equality and human rights into their enforcement activities, which is also prioritised in the Commission's recent strategic and business plans. The Government welcomes the Commission's 2018/19 Business Plan, where it commits to conducting a review of its current RIO Forum – a group of regulators, inspectorates and ombudsmen with an interest in human rights and equality – to ensure it is an effective way of working together and sharing best practice in driving progress on equality and human rights.

Recommendation 9

We recommend that the Equality and Human Rights Commission establish memoranda of understanding with all relevant enforcement bodies within the next 12 months. These memoranda should explicitly set out which enforcement matters under the Equality Act 2010 the enforcement body will undertake and which will remain within the strategic role of the EHRC, as well as a mechanism for dialogue and joint working in less clear-cut

cases. For example, we expect that any new labour market enforcement body would have to take on enforcement of routine employment discrimination matters, such as reasonable adjustments by employers, leaving the EHRC free to fulfil its strategic enforcement role and act where its expertise is most needed. (Paragraph 127)

The EHRC is an independent public body and is responding separately to this recommendation

Recommendation 10

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

The Government agrees that it is essential that equality is considered at every stage of the policy development process and that enforcement of rights can be improved by concerted sectoral action. We intend to ensure that greater attention is paid to the enforcement of rights across Government through the coordinating power of both the newly established Equalities Hub and the Economic and Domestic Secretariat in the Cabinet Office.

However, we do not agree that a requirement should be placed on every strategy, plan or policy to contain explicit plans to improve enforcement rights. Not all policy papers will be the appropriate vehicle for setting out plans regarding enforcement of rights under the Equality Act 2010 and a blanket requirement could lead to a tick-box approach.

Instead, the Government Equalities Office is continuing to take advantage of its new position at the heart of Government to further embed equalities across departmental policy making and service delivery.

Recommendation 11

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

The specific duties under the Equality Act 2010 are set out in regulations which vary across England, Scotland and Wales and were brought into effect from September 2011 onwards. The specific duties play an important role in underpinning the main Public Sector Equality Duty, focussing organisations' efforts around equality objectives, and providing transparency through the publication of data. The system is intentionally designed to require organisations to set their own equality objectives, focussing on the issues of most relevance within their sectors.

The Government Equalities Office has been building on the foundations of the specific duties in its recent efforts to embed equalities in the government's public policy planning process. In 2018, it ensured government departments now publish their Equality Objectives every year (instead of every four years as required by the regulations) by adding them to annual departmental plans. It worked closely with departments to achieve an increase in the quality and quantity of their Equality Objectives in their 2019 plans. In the 2019/20 process, the Government Equalities Office will be engaging Departments at an earlier stage and highlighting priorities identified by EHRC's *Is Britain Fairer?* report, as well as work following on from the LGBT Action Plan and Gender Equality Roadmap. We think that this approach strikes the right balance between co-ordinating efforts across Government to focus on key issues, while maintaining Departments' ownership of and therefore engagement with objectives. We will continue to assess how this process can be improved.

Recommendation 12

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

- *The Government should place a mandatory duty on employers to protect workers from harassment and victimisation in the workplace. Breach of the duty should be an unlawful act enforceable by the Commission and carrying substantial financial penalties. The duty should be supported by a statutory code of practice on sexual harassment and harassment at work which sets out what employers need to do to meet the duty; and*
- *The Government should introduce a specific duty under the Public Sector Equality Duty requiring relevant public employers to conduct risk assessments for sexual harassment in the workplace and to put in place an action plan to mitigate those risks. Action plans should set out how cases will be investigated and include guidance on penalties for perpetrators. (Paragraph 154)*

Following the Committee's 2018 report on sexual harassment in the workplace, the Government committed to consult on the effectiveness of current legislation in this area. This consultation process is closed on 2 October and the Government is analysing the responses received.

As detailed in our response to the 2018 report, public sector organisations (with limited exceptions) are already required to have 'due regard' to the need to eliminate harassment under the Public Sector Equality Duty. They are also required to set themselves equality objectives at least every four years.

The Government has already agreed to introduce a new statutory Code of Practice which will advise employers on what they should be doing to prevent sexual harassment, and how to address it when it does occur; this will apply to employers within the public sector as well as outside it. As this work progresses we will assess whether additional public sector guidance is required, and incorporate it if so. If we were to introduce a duty to prevent harassment, following our current consultation, this would apply to the public sector as well as all other employers.

Recommendation 13

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

As detailed in our response to recommendation 12, the Government is already consulting on whether it should introduce a new duty. We propose that this duty, if introduced, would apply to all forms of harassment.

We are aware of concerns that a broader duty on harassment may be less effective, and are therefore interested in respondents views on this question, as shared in our consultation exercise. As such, we will withhold judgment on this recommendation until the consultation process has concluded.

With regard to a further duty to prevent discrimination, although our recent consultation focussed on sexual harassment, we think it will raise many points of relevance to other areas and therefore believe it is sensible to wait until we have studied the question of a duty on harassment further before we consider an additional duty.

Recommendation 14

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

We agree that clarity is needed on the question of single-sex services and plan to publish guidance to provide this. Earlier this year, the Government committed to develop and publish best practice guidance for commissioners and service providers on their legal obligations under the Equality Act 2010¹, including how and when to commission specialist and single sex services to meet particular needs. This guidance will fulfil the same role as a statement of law, clarifying how the law works and organisations' responsibilities under it, including for compliance with the Public Sector Equality Duty.

Recommendation 15

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

As set out in response to recommendation 14, the Government is planning to develop and publish non-statutory guidance on how the Equality Act 2010's single and separate sex service exemptions apply. There are limitations to what could be achieved through

1 <https://www.gov.uk/government/publications/strategy-to-end-violence-against-women-and-girls-2016-to-2020>

statutory guidance as there is no case law in this space that moves beyond interpretation of the original legislation, so it would not be possible to set out ‘rules’ for the application of exemptions: statutory guidance must reflect existing law, it is not a means of establishing new law.

Recommendation 16

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

The Ministry of Justice will monitor the impact of the removal of the mandatory gateway and the procurement of specialist advice services on the number of people accessing legal aid.

The Legal Aid Agency regularly monitors capacity and the available access to services and takes action where it identifies gaps in services or where demand is greater than the available supply.

Recommendation 17

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

We are aware of the EHRC’s recommendation and we will give this due consideration.

Recommendation 18

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

The Government reviewed costs protection in the [Post-Implementation Review \(PIR\) of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(LASPO\)](#) which was published on 7 February 2019. The PIR concluded that, on the evidence available, the Part 2 reforms had, on balance, successfully met their objectives.

The position on any potential extension of costs protection was covered in paragraph 160 of the PIR of Part 2 which stated:

‘In terms of any potential extension of costs protection there are clear attractions for claimants and their lawyers in being able to litigate at no or reduced costs risk. However, there is also a clear risk that by extending costs protection some of the benefits of the Part 2 reforms would be undermined: the shifting of costs back to defendants, an overall increase

in costs and the potential for prolonging rather than settling litigation. The Government would wish to be satisfied that these risks have been addressed before considering the case for extending costs protection further’.

The Government maintains that position and is considering the case for extending costs protection for certain types of discrimination claims.

Recommendation 19

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

It would not be appropriate (given the principle of judicial independence) for the Government to issue guidance to the judiciary on the grounds on which costs orders should be made in particular types of cases. This would be a matter for the senior judiciary to consider, and we will draw the Committee’s report to the attention of the Lord Chief Justice and Senior President of Tribunals.

Detailed general guidance from the President of the Employment Tribunal on the award of costs in employment tribunals was published in January 2018 and can be accessed at: <https://www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-general-casemanagement-20180122.pdf> (note 7).

It would be extremely rare for a tribunal or court to award costs (expenses in Scotland) on the basis that someone has failed to enter into a NDA. The test to be met to award costs is high and the person must have acted ‘vexatiously, abusively, disruptively or otherwise unreasonably’ or brought a claim which has ‘no reasonable prospect of success’. (The latter is not relevant to this issue.) It is therefore likely to be extremely rare for a tribunal or court to award costs (expenses in Scotland) on the basis that someone has failed to enter into a NDA.

Recommendation 20

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

Some county court judgments are already published online on legal websites such as British and Irish Legal Information Institute (BAILII) and in weekly law reports. The EHRC publishes judgments from cases they have been involved with on their website.

The judiciary publish judgments at their discretion on their own website. The judiciary are proactive and supportive of efforts to increase the transparency and openness of the courts. The Government is working closely with the judiciary to consider how best to make the work of the county courts available to the public, whilst remaining mindful of the obligations outlined in the General Data Protection Regulation.

The Government notes the recommendation that HM Courts & Tribunals Service publish judgments in county court discrimination cases. As part of the HM Courts & Tribunals Reform programme, the Government is reviewing aspects of our online services. This includes exploring what it is appropriate for the Ministry of Justice and HM Courts & Tribunals Service to publish online; judgments made in county court are being considered as part of this work.

The judiciary have discretion over all decisions to protect the identities of parties in civil proceedings, including in written judgments. It is a general rule that county court hearings should be held in public and that the identity of parties and witnesses should be disclosed. The court may direct that the identity of a party or witness shall not be disclosed if it considers it necessary to secure the proper administration of justice and/or to protect the interests of that party or witness.

Recommendation 21

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

In relation to the County Courts the principle that successive Governments have adhered to is that the core purpose of a civil law award of damages is to provide compensation for loss and not to punish.

In England and Wales the common law already provides for exemplary damages to be awarded in some circumstances, but the senior judiciary have taken the view that these should be exceptional and have to fulfil certain criteria (established in case law) to be awarded (the concept of exemplary damages is not used in Scottish law).

In England and Wales, exemplary damages are limited to cases in which at least one of the circumstances set out by Lord Devlin in the leading case of *Rookes v Barnard* has been met:

- (1) Oppressive, arbitrary or unconstitutional actions by the servants of government.
- (2) Where the defendant's conduct was 'calculated' to make a profit for himself.
- (3) Where a statute expressly authorises the same.

In addition, in civil proceedings generally the judiciary are able to award aggravated damages in circumstances where the claimant has been caused mental distress as a result of the manner in which the defendant committed the wrong or by his or her subsequent conduct.

The Government considers that the range of damages available is adequate and concurs with the judiciary's view that exemplary damages should be exceptional. It therefore has no plans to extend the current limited statutory provision for the award in England and Wales.

As referenced in our response to Recommendations 12–14, Employment Tribunals can apply aggravated damages in discrimination claims, and where there has been an

aggravated breach of employment law they can apply financial penalties of up to £20,000. The criteria set out in case law for exemplary damages does not seem to be appropriate for discrimination claims where aggravated damages are better suited.

Recommendation 22

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

It is not clear from the Committee's report what form the suggested court orders would take. However, it would appear that such orders would go significantly beyond the core purpose of proceedings in both the county courts and employment tribunals of awarding compensation and remedying detriment in individual cases, and could have broader implications for the role of the judiciary in this area. The Government has no plans for legislation in this area.

Appendix 2: Equality and Human Rights Commission Response

Introduction

1. The Equality and Human Rights Commission ('the Commission') is Great Britain's National Equality Body and National Human Rights Institution, recognised and accredited by the UN. We stand up for freedom, compassion and justice, using our statutory powers to protect the rights of everyone in Britain. Our Strategic Plan published in June 2019 articulates how we will do this over the next three years. It concentrates our work on a focused set of issues: at the core of this is an unflinching determination to uphold equality and human rights laws and ensure that these protections remain strong. We enforce equality law robustly: challenging flagrant breaches of the law, tackling systemic discrimination and defending those in the most vulnerable situations when their rights are breached. We bring all our tools to bear on equality and human rights problems through integrated strategies to achieve measurable impact. We carry out research, monitor the extent to which human rights obligations are being met and influence law and policy; we promote better compliance with the law and seek to improve practice through guidance and inquiries; and we conduct investigations and litigation when the law is breached.

2. We are proud of the significant progress we are making. Our formal enforcement powers include undertaking litigation in the courts, conducting investigations, and entering into binding agreements with organisations. Last year we used these powers 98 times, doubling the volume of our formal enforcement work compared with 2014/15. Our current high profile investigations into equal pay at the BBC and anti-Semitism in the Labour Party demonstrate our commitment to drive change, without fear or favour. We have used our powers to ensure that 13 NHS local bodies have changed their policies so that disabled people can live independently; gig economy workers have been accorded greater protection at work; and thousands of children with special educational needs who are at risk of school exclusion are now better protected. In the first two years since the gender pay gap regulations came into force, we were successful in securing 100% compliance: every single organisation within scope published its gender pay gap data.

3. We intend to do even more: a key component of our strategy is to use enforcement action to secure real change for people facing discrimination, and we act on the most serious, systemic and flagrant breaches of the law. Later sections of this response set out our approach to enforcement.

4. The context in which the Commission is working, however, is becoming more complex. Population changes will put further pressure on services for elderly and disabled people. Growing divisions in society are leading to a rise in racial and religious hate crime. Political changes and Brexit raises questions about how the current equality and human rights infrastructure will be protected and the possibility of 'no deal' increases the threat of civil unrest and further polarisation of communities. In this context, the Commission has a more important role to play than ever as guardian of equality and human rights in Britain. This is why the core aim of our Strategic Plan is to uphold the system of equality and human rights protections and laws. We know that our stakeholders see this as a crucial

part of our work in difficult times. Whatever the political or economic environment, we will continue to champion the rights of the most disadvantaged and be driven by a simple vision: that everyone should get a fair chance in life.

5. So we welcome the work that the Women and Equalities Select Committee (the ‘Committee’) has done to shine a light on inequality and injustice and we support many of the recommendations in their report. However we do not accept some of the Committee’s recommendations on the Commission’s current work, or recognise its characterisation of the progress we are making – while we acknowledge that we have further to go. Paragraphs 6 - 24 below set out the Commission’s response to the key points raised by the Committee’s report. Our detailed response to each of the recommendations is at Annex A.

A strategic approach to enforcement

6. Our Strategic Plan sets out how we will use the full range of our powers in an integrated way to drive change, with enforcement playing an increasingly prominent role in our work. As well as our core aim of upholding and strengthening equality and human rights laws we will concentrate on the following areas in the next three years to ensure:

- people have equal access to the **labour market** and are treated fairly at work;
- accessible **public transport** supports disabled and older people to participate in the economy and society;
- people have **access to justice** and a fair trial;
- our **education** system promotes good relations and equality and human rights;
- people’s treatment in **institutions and detention settings** respect their rights.

7. This focus on a smaller number of issues is allowing us to devote more resources to each particular problem: we are better able to assemble the evidence base, influence the debate, and take enforcement action where we see flagrant breaches of the law or systemic discrimination.

8. We know that some of these issues are about tackling entrenched inequalities, or long-standing attitudes. Fixing these problems will not be quick. So we will continue to review and refine our approach, prioritising further where necessary to ensure we have maximum impact.

Robust enforcement

9. Listening to the views of the Committee, the Government and our other stakeholders, we have significantly increased our enforcement activity in recent years and have done so in the context of a reduced budget. This year has seen us undertaking three inquiries and two major investigations – a record for the Commission. Our enforcement work has wider societal impact: it helps us gather the intelligence to influence Government, public authorities and the private sector to act to advance equality and rights in order to build a more equal and rights-respecting society.

10. We agree with the Committee that the burden for Equality Act compliance needs to be shifted away from individuals having to challenge discrimination in the courts. Greater consideration should be given to placing the onus on duty-bearers to root out discrimination and ensure respect for equality. As evidence to the inquiry showed, there are significant barriers for individuals pursuing legal action. We agree that litigation places a significant burden on individuals, and as we said in our evidence, there are inherent challenges in the model of individual enforcement, such as an imbalance of power, cost, stress, complexity and the low level of compensation in some cases. As well as the role for Government in securing better compliance with the Equality Act, the Commission has an important role in this shift of emphasis.

11. The Committee is right to note the importance of organisations believing that the Commission will take action on serious breaches of the law and support individuals. We have created a step change in this area, and will continue to raise our profile as a robust enforcer of the law. Last year we considered over 250 pre-statutory enforcement matters – which did not result in formal investigations largely because contact from the Commission was sufficient to ensure compliance. When employers did not comply with the requirement to report their gender pay gap we took action, invoking our investigation powers to secure compliance. As a result we achieved 100% compliance from businesses, a remarkable result which demonstrates how reluctant employers are to be publicly investigated by the Commission. It shows how significant an impact the Commission has when it uses all its levers to achieve an outcome.

12. The more vocal we can be about our successful enforcement activity, the better. We were cited in the mainstream media more than 1,200 times in 2018/19, 40% more than the previous year. We have established a new Compliance team whose role includes ensuring that important court judgments are followed up with communication to relevant organisations to help ensure they meet the requirements of the law. For example, when a court decided that a landlord was required to give consent for reasonable alterations to benefit a disabled tenant, we promoted the case and its implications through landlords' forums and disabled people's organisations to inform people of their rights and promote wider compliance across the sector.

Prioritising enforcement activity

13. Being more vocal about what we do does not mean we can tackle every breach of the Equality Act. The Commission is, among other things, a strategic enforcer of equality law; it cannot, and was never intended or resourced to enforce against all breaches of the Act. No other comparable regulatory body has an equivalent breadth of remit within a field of law of equivalent complexity. So we do not accept the Committee's view that we have failed to act to address inequalities. We are unapologetic about focusing our limited resources on those areas where we know we will have the most impact. Many of our stakeholders acknowledge that this is the right approach and agree that our new strategic focus is allowing us to influence the debate and target those areas where we can most make a difference.

14. A typical example of this approach is our recent launch of a legal support project to help individuals with discrimination cases concerning public transport. While we cannot support every transport case arising across Britain this project will highlight the

issue, make transport operators more aware of their legal obligations and the risk of non-compliance, and stimulate action to secure wider improvements to the system. Transport operators who discriminate will know that enforcement action is a tangible risk.

More than enforcement

15. The Equality Act 2006 requires the Commission to encourage and support the development of a society in which people's potential is not limited by prejudice or discrimination, where human rights and individual worth are respected and each individual has an equal opportunity to participate in society. This vision for Great Britain clearly cannot be achieved through enforcement alone. As we set out in our evidence to the Committee, using the range of levers at our disposal in combination is necessary to deliver long term and meaningful change, including cultural change. The Commission was established by Parliament to be a change agent in society, with enforcement being one of the ways that we can drive advances in equality. Enforcement is a powerful tool – but it is not the only one.

16. As the Government's Tailored Review recognised, and we strongly agree, we have the greatest impact when we use all of our powers in combination to achieve systemic change. Preventing discrimination before it occurs is our key goal and to achieve this we need to create a culture of compliance. Inquiries, for example, help organisations and people understand rights and responsibilities. They allow us to identify the barriers to compliance and pinpoint areas for intervention: for this reason, in future, we plan to make more use of them in our work. Continuing to enforce Equality Act alongside this work secures redress for victims and prevents discrimination from happening with impunity.

Access to intelligence

17. Our contact with stakeholders is critical to the success of our work. It is only if we hear directly from them about the inequalities and discrimination they experience that our work will be fully informed. The Committee recommends that the Commission should use social media, letters from constituents, local and national media, debates in Parliament(s) and the reports of select committees as information sources. We agree and we routinely draw on these sources of information as part of our intelligence gathering.

18. We agree with evidence from witnesses that not having a Commission-controlled helpline reduces our ability to detect relevant issues, trends, and individual cases. While we have a constructive working relationship with the current helpline contractor, this is not an adequate substitute for the helpline being integrated into our operations, a point made by witnesses in oral evidence to the Committee. We are working with the Government Equalities Office to review the arrangements, in line with the recommendations of the Tailored Review.

Our procedures

19. The Committee was critical of how long it took for the Commission to launch a formal investigation in into equal pay at the BBC, suggesting this reflected 'timidity' or 'lack of organisational confidence'. We strongly refute this. It is vital that we deliver decisive investigations based on the proper collection of evidence. Without this, we risk failing to

deliver the right outcome for those whose rights we want to protect, and wasting public money. The timescales reflect the complexity involved in a large-scale investigation and the requirement for us to gather sufficient evidence to establish suspicion of an unlawful act before proceeding.

20. However, we welcome the support from witnesses for our powers to be streamlined to reduce the procedural hurdles involved, enabling us to conduct more agile investigations and other enforcement actions. This could include enabling the Commission to compel evidence from witnesses before formally launching an investigation. We intend to engage further with the Committee on this point.

21. We have consulted on a new litigation and enforcement policy which will ensure enforcement is not treated as a ‘last resort’, while still complying with the Regulators’ Code. All of our decision-making on the use of our powers is firmly rooted in our Strategic Plan and based on careful consideration of the impact we will have.

The role of other enforcement bodies

22. The Committee makes some important observations about the roles of ‘mainstream’ regulators, inspectorates and ombudsmen (RIOs) in securing compliance with the Equality Act 2010. Such organisations are already required, under the Public Sector Equality Duty (PSED) to consider the need to eliminate unlawful discrimination and harassment and to advance equality of opportunity through their functions. We have advocated for changes to strengthen the PSED specific duties, and this would provide an opportunity to make clear how RIOs should implement these responsibilities in practice in relation to the bodies they oversee. We would also like to see a clear duty on oversight bodies to inspect for progress on the delivery of equality outcomes within their sector.

23. However, we do not consider that those organisations, including the proposed labour market single enforcement body, should have specific powers to enforce the Equality Act. Our own remit, which extends to all parts of the Equality Act, should not be reduced in scope. The Commission’s role as the enforcement body for the Equality Act would be undermined by such a change, and the coherence of the enforcement system for Equality Act claims would be lost.

Conclusion

24. We welcome the Committee’s scrutiny of our work and continuing contribution to this debate. In these turbulent times, the Commission plays a critical role in standing up for the right of every citizen to demand that they are given a fair chance in life. So while our remit is broad, our focus is increasingly targeted on the areas where we can make most difference: where we know we will have most impact, where we see flagrant, serious or systematic breaches of the law; where the most disadvantaged in our society are discriminated against. We look forward to working with the Committee on the challenges ahead.

Annex A: Recommendations made by the Committee and the Commission's detailed responses

Recommendation:

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

Response: We accept this recommendation in principle, though of course the volume of work possible will be subject to resources. Our approach is focused on proactively increasing the role of enforcement activity, within multi-faceted strategies, to tackle our priorities.

To support this we have established a new dedicated enforcement team, developed a new litigation and enforcement policy, and selected priorities in our Strategic Plan that best enable the use of our enforcement and litigation powers to challenge discriminatory practices or breaches of rights. All this will enhance our ability to undertake targeted, effective enforcement that supports broader strategies for change.

Listening to the views of the Committee, the Government and our other stakeholders, we have significantly increased our enforcement activity in recent years and have done so in the context of a reduced budget. Last year we doubled the volume of our formal enforcement work compared with 2014/15. This year we are undertaking three inquiries and two major investigations – a record for the Commission.

Recommendation:

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

Response: We agree that transparency is important and have developed a case study database for our website which will provide people with a deeper understanding of our enforcement work and its implications for both duty holders and duty bearers, increasing awareness of our enforcement activity. It will be available on our website, and promoted as widely as possible, during this year. We agree with the Committee about the importance of communicating the outcomes of our actions to motivate wider change. In addition to our wider communications, our Compliance team will gather the learning from our work to develop and deliver interventions to improve compliance across sectors.

Recommendation:

73. *We recommend that the EHRC assesses its enforcement policies and practices to ensure that the threshold for suspecting an unlawful act may have taken place is*

no higher than required by the law. It should publicly set out the type and level of evidence that will allow it to meet that threshold. If, after changing its policies, the Commission still struggles to meet that evidence threshold then the law must be changed accordingly.

Response: We accept this recommendation, indeed it is already the case. We agree that any threshold applied for suspicion of an unlawful act must be no higher than required by the law. Our revised enforcement and litigation policy, on which we recently consulted, ensures that this is the case.

Recommendation:

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

Response: We strongly welcome this recommendation which could enable us to pursue more strategically important cases and respond to the drivers for increased enforcement activity while enabling us to plan our budgets with greater certainty and focus our resources on achieving impact. We will consider the recommendation in greater detail in light of the Government's response.

Recommendation:

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

Response: We do not agree that the Commission lacks clarity or focus; and we have responded strongly and systematically to the issues identified by the Tailored Review. The organisation has gone through transformational change, particularly in recent years, to be more focused on impact. The culmination of this is our new Strategic Plan, the investment we have made to increase our internal expertise and the structure we have created to deliver our work. This includes a particular focus on impact and measurement of impact throughout the organisation.

Our approach has been welcomed by stakeholders who recognise that we can effect greater change by tackling a problem from several angles. For example, in relation to our work on sexual harassment and pregnancy/maternity discrimination, this included:

- Conducting landmark research to understand the extent and nature of the problem and shining a light on the most pressing issues
- Publishing guidance: for employers to understand how to root out this practice and for women, so they know how to assert their rights
- Calling for changes to the law to close gaps in protection
- Seeking and supporting individual cases to get access to justice for individuals

In another example, we identified a case (in liaison with the Scottish Public Services Ombudsman) where a British Sign Language (BSL) user had been in a Scottish hospital for seven days without BSL support. Our action included:

- Involvement in the case which led to the NHS health board settling with the individual
- Use of our enforcement powers to enter into a legally binding agreement with the health board and monitoring outcomes
- Follow-up research which identified other NHS boards without adequate BSL policies
- Engagement with NHS Scotland to highlight this as a Scotland-wide issue to change policy. The CEO of NHS Scotland required action plans to be developed by each health board to improve provision of BSL services. Progress against action plans has been monitored by NHS Scotland.

Our investigations concerning the Labour Party and the BBC will further amplify our impact and reach as enforcer of the Equality Act.

Recommendation:

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

Response: We agree that all enforcement bodies (regulators, inspectorates and ombudsmen, or RIOs) should use their powers in accordance with their responsibilities under the PSED, and should see ensuring compliance with the Equality Act in the sectors they regulate as part of their remit. While RIOs have an important role, giving them a role to enforce the provisions of the Equality Act within their sectors would be impracticable and undesirable – such a fragmented system of responsibility for enforcement would be unnecessarily complex, would undermine the Commission’s statutory role as enforcer of the Equality Act and may risk leaving gaps in enforcement; while also creating the risk of regulatory overlap.

Many Equality Act claims need to be tested through the courts because they involve nuanced judgement over, for example, reasonableness or objective justification. The regulatory model does not readily lend itself to vindicating the rights of an individual and/or compensating them, which is in many cases the appropriate outcome. Better access to justice for individuals to seek remedy in the courts therefore remains essential.

However, we would also like to see changes to the specific duties under the PSED to make clear how RIOs should implement in practice their responsibility to work towards the elimination of unlawful discrimination and harassment in the bodies they oversee. We would also like to see a clear duty on oversight bodies to inspect for progress on the delivery of equality outcomes within their sector. This is distinct from enforcement of the

Equality Act, which, as stated above, is and should remain the role of the Commission. We will continue to work with relevant RIOs, in line with our priorities, to inform how they discharge their responsibilities under the PSED.

Recommendation:

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

Response: Please see our response to the Recommendation above (121); the Public Sector Equality Duty (PSED) means that public sector enforcement bodies should see ensuring compliance with the Equality Act in the sectors they regulate as part of their remit and we consider that many of the aims of the Committee in relation to other enforcement bodies could be achieved by strengthening the PSED specific duties applying to such bodies.

We do not agree that the new labour market enforcement body should have specific powers to enforce the Equality Act because this would create a fragmented and more complex system, it would undermine the Commission's statutory role as enforcer of the Equality Act and may risk leaving gaps in enforcement; while also creating the risk of regulatory overlap. In addition, as we understand it, the proposed new body will address breaches of workers' rights that can be adjudicated based on the facts - whether or not a worker has been paid sick leave or the minimum wage, for example. Equality Act claims, on the other hand, tend to require judgements about, for example, reasonableness or proportionality. This must be based on an understanding of legal precedent and weighing up of competing claims, as well as examining evidence. We question whether the examples cited in the Committee's report have clear-cut legal requirements that could be enforced through an administrative process rather than in the courts. Therefore we cannot agree that the new labour market enforcement body is the right vehicle for enforcing Equality Act matters, which require a significantly different approach from that required in the majority of claims that it will be considering.

However, we welcome the proposals to create a simpler and more streamlined system for addressing clear-cut breaches of workers' rights and, as equality at work is one of our current priorities, we will want to work in partnership with the planned new labour market enforcement body to exchange expertise and make use of any new intelligence.

Recommendation:

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

Response: We have stated our intention to further our work with those who are responsible for overseeing a particular sector, such as regulators, inspectorates or ombudsmen. We encourage them to incorporate equality and human rights in the standards that they set,

in how they assess compliance and tackle problems in a particular sector. We would take the same approach with any organisation and we would consider enforcement action where appropriate, in line with our litigation and enforcement policy and Strategic Plan.

Recommendation:

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

Response: We are already working more closely with RIOs and, in line with our priorities, helping to inform their approach to securing compliance with equality law. However given the number of organisations concerned (some 145) and the need to invest in relationship management to secure meaningful agreements with them, we intend to focus on those that are most relevant to our current Priority Aims. We have established a dedicated team to develop joined-up strategies and build strong relationships with RIOs. Memoranda of understanding are not always the best approach to securing the outcomes desired by the Committee. As stated above, strengthening the PSED specific duties, to give RIOs an express mandate to inspect for progress on the delivery of equality outcomes within their sector, may have greater impact.

Recommendation:

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

Response: We welcome the recommendation that government ensures that the Equality Act 2010 forms a central part of work across government, as it should in line with the PSED, and we consider that these equality-focused objectives should also form part of Single Departmental Plans. We have consistently called on government to join up work across departments and we now need to see a coordinated response from Government on the actions needed to reduce inequality in society. We welcome the creation of Government's Equalities Hub, incorporating the Government Equalities Office, Race Disparity Unit, Disability Unit and Office for Tackling Injustices. This initiative has the potential to drive a strategic approach across government, with more effective oversight from the centre.

Recommendation:

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

Response: We strongly welcome the Committee's recommendation that the Government introduce new specific duties under the PSED provisions of the Equality Act 2010, to ensure targeted, effective action by Government Departments and other public authorities against identified inequalities. We are pleased that the Committee supports our call for the PSED to be more focused on outcomes. As discussed above, we also consider that there is an important role for RIOs in overseeing progress in relation to these outcomes.

We are particularly pleased that the Committee acknowledge the importance of evidence and data and make direct reference to our [Is Britain Fairer?](#) report – the most comprehensive review of how Britain is performing on equality and human rights – and recognise its importance in shaping action to tackle inequality in society.

Recommendation:

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

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

Response: We welcome these recommendations and will be responding to the Government consultation on the mandatory duty. In addition to our code of practice, we are developing guidance on the use of non-disclosure agreements.

Recommendation:

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

Response: We welcome this recommendation and agree that the duties should extend to all unlawful harassment and victimisation covered by the Equality Act 2010.

Recommendation:

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

Response: We understand Government is producing relevant guidance in connection with its strategy on violence against women and girls and specialist support services. We welcome the opportunity this presents to ensure that commissioners are clear on their obligations, and we will engage with Government on the development of this work. In addition, we are producing a guide for service providers (see our response to the Recommendation below (190)).

Recommendation:

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

Response: We do not accept this recommendation. We recognise that the law requires the consideration of the specific circumstances of each case and we are therefore producing a guide for service providers to aid their decision making. We agree with the Committee that there is a growing need for clarity on what the law says in reference to interplay between single sex services and single sex services exemptions – particularly in reference to transgender people’s rights.

The legal principle at issue is that of ‘objective justification’, which is already covered in existing Codes of Practice. Objective justification requires consideration of all the unique factors of a particular case, which makes guidance with examples of best practice or a Code of Practice very difficult as it cannot cover all eventualities that decision makers must consider. As the Committee noted there is no case law to draw on here.

Equality law cannot tell us exactly how to deal with all the situations that might arise in practice, and while case studies can be a useful aid they do not substitute the need to consider the specific circumstances of each issue. We believe that practical assistance is needed in how to make decisions in each instance and that is what we are working on developing for service providers, in discussion with providers, trans and women’s groups. We will be closely monitoring the impact of the guidance to ensure that it does provide the clarity that service providers and service users are looking for.

Recommendations on individual action in courts and tribunals: (201–225)

Response: We warmly welcome the Committee’s adoption and elaboration of a number of our own recommendations concerning access to justice and measures to increase the systemic impact of legal action, including:

- Ensuring that the systems for providing legal aid genuinely improve access to justice, making free legal representation available to those who need it and who cannot afford to pay for it themselves
- Amending the cost benefit test for civil legal aid to reflect the wider public interest
- Introducing qualified one-way costs shifting for discrimination claims in the county court
- Publication of county court judgments – we also recommend the publication of data on discrimination cases, to increase knowledge around the accessibility of courts for protected characteristic groups, increase learning and identify ‘repeat offenders’
- Restoring the power of Employment Tribunals to make wider recommendations. The Committee went further by suggesting the Tribunal should be able to make recommendations to support change within the wider sector. Further consideration of how these provisions would be enforced will be needed.