

Women and Equalities Committee

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

Wednesday 16 January 2019

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Members present: Mrs Maria Miller (Chair); Tonia Antoniazzi; Sarah Champion; Angela Crawley; Vicky Ford; Eddie Hughes; Gavin Shuker.

Questions 138–176

Witnesses

[I](#): Barbara Cohen, discrimination law consultant, Niall Crowley, independent equality and human rights expert, Mike Smith, chief executive, Real, Nick Webster, senior solicitor, Leigh Day.

Written evidence from witnesses:

- [Barbara Cohen and Razia Karim](#)
- [Niall Crowley](#)
- [Leigh Day](#)
- [Equality and Human Rights Commission](#)

Examination of witnesses

Witnesses: Barbara Cohen, Niall Crowley, Mike Smith and Nick Webster.

Chair: Can I welcome our witnesses, as they take their seats, and everybody who is watching online and in the Public Gallery? This is the third evidence session of our inquiry into enforcing the Equality Act. We will today focus on how the Equality and Human Rights Commission uses its enforcement powers and how effective it is in doing that. Today we are joined by Barbara Cohen, an independent discrimination law consultant, Neil Crowley, an independent equality and human rights expert, Mike Smith, the CEO of Real, and Nick Webster, a solicitor at Leigh Day. Thank you all very much for taking the time to be here today. We will follow the usual procedure, which is that colleagues have a number of questions to ask. There will be a bit of to-ing and fro-ing today; colleagues have different requirements today so people might be coming in and out. I apologise for that in advance.

Q138 **Sarah Champion:** Thank you ever so much for coming in today. I want to start off with quite broad questions. When we look at the EHRC, in your opinions, what works? How does it match up to similar bodies internationally? Do you think there are significant gaps in the legal and policy framework that governs the EHRC? Barbara, may I start with you?

Barbara Cohen: I would like to defer to Niall first, because his work internationally is probably a good starting point.

Sarah Champion: I was going to focus on Niall in my follow-up questions but, Niall, over to you.

Niall Crowley: It is a very long question. There is a lot in it.

Sarah Champion: Start with what works.

Niall Crowley: The work I have recently been involved in was the "Equality bodies making a difference" report for the European Commission, looking at equality bodies across the European Union. The Equality and Human Rights Commission emerges very well, with regard to the powers and functions that have been created for it. It stands well in comparison to other equality bodies across the European Union. Much of the work done by the Equality and Human Rights Commission stands out and informs the work of equality bodies in other areas of the European Union as well.

Q139 **Sarah Champion:** Could you give us some examples?

Niall Crowley: Often it is work in the areas of research and internal management. It is one of the few equality bodies that have a good planning and evaluation system in place. Those two areas stand out in that regard.



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In terms of matching up, a number of issues arise. An interesting one is the area of resources. It compares well with other equality bodies across Europe in terms of resources, yet it stands out as one of two equality bodies that have suffered disproportionate cutbacks over previous years. Disproportionate cutbacks have a hugely chilling effect on the work of equality bodies. The UK and Poland stand out in that regard. There is a significant resource issue evident in that regard, particularly with a precipitous drop. The standards of the Council of Europe and the standards of the European Union in relation to equality bodies warn specifically against disproportionate cutbacks, because of the damage they can inflict. What emerged from the research is that, in relation to enforcing the Equality Act, it is particularly damaging in the area of enforcement. That is the area that seems to be at issue.

In terms of matching up with similar bodies, there is an interesting element in the trend, which is beginning to grow across Europe, of merging equality mandates and human rights mandates. It is within that trend but significant challenges emerge. Of the 43 equality bodies, 14 can be identified with that multi-mandate setting. It is clear that for that to work it requires an active management of the different mandates. Seven of the bodies did not evidence an active management. One of those was the Equality and Human Rights Commission. There is a challenge there in finding ways to manage mandates that both the European Commission and the Council of Europe have identified as having different traditions, different approaches and different types of objectives. What can be seen is that where there is not active management, a human rights tradition and approach tend to take precedence, and that tends to have a chilling effect on enforcement work. Less litigation is carried out by such bodies.

The two challenges with regard to matching up are that we need to think through how we can combine multiple mandates. Limited work has been done in relation to that, but the good practice and active management identifies the importance of designated leadership for an equality mandate in relation to the work, particular staff expertise, units for the equality mandate and specific reporting and planning for the equality mandate. Those are the good practices that have emerged. That is still limited. We need to go further in working out how those mandates sit together in ways that they could mutually reinforce each other instead of competing with each other.

Q140 Sarah Champion: You talked about the impact that cuts are having on the EHRC's effectiveness. In your opinion, as things now stand, can the EHRC carry out its mandate, as it is legally obliged to do?

Niall Crowley: You would need to research that specifically in order to given an answer.

Sarah Champion: In your opinion?

Niall Crowley: In my opinion, looking at the equality bodies that have been forced to downsize in a radical way—there have been a number



over the years—they have not been able to implement their mandate fully.

Sarah Champion: Thank you. That is a good politician's answer.

Barbara Cohen: I want to add, first, that equality bodies in Great Britain have a long history, and a much longer history than most of the equality bodies in the EU, because until the European directives—particularly the race directive and the employment framework directive, which brought together a number of different grounds and made it mandatory, particularly for new member states, to have national legislation, in relation to both race and gender, and an obligation to set up some sort of body—many of those countries never had anything like that at all. We are building on a very long history.

Interestingly, most of the structure and powers of the EHRC very closely replicate the powers of the Equal Opportunities Commission, which was set up in the 1975, and the Commission for Racial Equality, which was set up in 1976. They are good models, and they were much more complex models than many of those adopted in the new EU member states. One of the reasons they combined human rights with equality was that they already had a human rights ombudsperson. In looking for a way that did not cost very much, they did not have to set up a new institution.

Q141 **Sarah Champion:** Is ours fit for purpose now, given that it is based on a model that is 50 years old?

Barbara Cohen: The answer is that all the structures are there. The legislation is there. If your budget is less, you use your budget more carefully, but you need to make some decisions on whether some of your powers need to be put on the shelf or whether you want to use them because, even in economic terms, in terms of impact they might be a better use of resources than some of the other ways you are currently spending your money.

Q142 **Sarah Champion:** With the resources it has now, is it fit for purpose, in your opinion?

Barbara Cohen: The resources of the EHRC are considerably better than the resources of very many of the equality bodies in the EU. The answer is yes.

Sarah Champion: You think it is fit for purpose.

Barbara Cohen: Yes.

Nick Webster: First—this relates to the work I do as a solicitor—when you work with the EHRC it is incredibly effective. It enables you to pursue important claims that otherwise would not happen, which improve the lot for people with protected characteristics. Last year we had a significant success in a disability discrimination claim, which did change the legal landscape in that respect and could benefit potentially thousands of other people. Had the EHRC not been involved and taken a significant risk in



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using its limited budget, the case would not have happened and we would be in a worse place for it.

As was just said, one of the issues is balancing the different mandates that it has appropriately. As Barbara may have been touching upon, discrimination happens every day and there is regular discrimination that is not headline-grabbing. It does not necessarily need to be challenged from a strategic point of view, but it does have to be challenged. Maternity and pregnancy leave discrimination happens every day—we do inquiries every week about it. Reasonable adjustments in service provision, premises and the workplace, work around mental health in education, race discrimination and stereotyping—it is happening all the time. What would be incredibly beneficial, from a solicitor's perspective, is if the EHRC were able to fund more of those types of cases, which are going to change the legal landscape. They are incredibly important.

It is important to instil in employers, service providers, landlords, and people who run associations, universities and so on, a fear that the EHRC will not only get involved when it is strategic, but challenge you on day-to-day decisions.

Q143 Sarah Champion: Within its existing legal and policy framework, does it have the powers to do that, or are there gaps that need to be addressed?

Nick Webster: There may be a gap, because when we applied for funding, in broad terms, you will tend to get funding if it is potentially going to set a legal precedent or is of strategic importance. Somebody who has been dismissed by reason of redundancy when on maternity leave is probably unlikely to get EHRC funding. It might fund getting initial advice and doing a particular piece of work, but it is probably not going to fund a full claim.

Q144 Chair: Is that a legal gap or is that just a decision the EHRC has made? Is that a gap in the legislation?

Nick Webster: It is not a gap in the legislation, no.

Q145 Sarah Champion: It is a choice, rather than a restriction that is put upon it.

Nick Webster: As far as I understand, yes.

Q146 Sarah Champion: Mike, in relation to the EHRC, what works? Are there any gaps in the legal and policy framework that are inhibiting it, or preventing it from doing what it needs to do? What does not work?

Mike Smith: It is very important to consider the EHRC in the context of the whole system. It is a regulator. It is an enforcer. It has certain powers but it is not the organisation that takes the legislation; the Equality Act 2010 is designed so that it is individuals who take the legislation. At one level, you need to look at the whole system: the funding for the Commission, legal aid and the support that individuals get to take cases. Look at the whole scale of the problem.



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In the context for many disabled people, it is de facto impossible to achieve justice in many areas, particularly on goods and services, because it is so difficult to put a case together to bring it before the Crown Court, to get the funding for voluntary and community sector organisations. The support there has been cut as well. The whole pipeline of cases that would even get on the radar of the commission has probably dropped significantly. When I did some research contacting organisations in the run-up to today's session, I found that very few people are seriously considering litigation because it is outside their means and their scope.

There are potentially things that would support the EHRC in its wider role but also support individuals. Allowing the commission to take cases in its own name on behalf of people would support those cases where individuals just did not have the right circumstances or the capacity to do that. Permitting class actions could help. Permitting claims to a small claims court with simplified processes could give a much deeper range of access to the kind of pervasive inequalities and disadvantage that people often experience, which was referred to by Nick.

In certain situations we could extend the obligation to prove that discrimination has not occurred, not just in an employment situation but in other cases, particularly where the defendant has a large amount of resource available, because they can generally win their way out of court or have out-of-court settlements.

I remember that when I was a commissioner there was quite a lot of problems with the fact that we could not take HRA cases in their own right, because there had to be a discrimination element. Perversely, sometimes that even meant us talking to lawyers and trying to find a discrimination element that they could hook into a case in order to fit in human rights issues, or you would hook it into a public sector equality duty, for example, as the commission has done recently with the clinical commissioning groups.

Sarah Champion: Mike, could I pause you? Nick, would you mind moving that? I am a bit deaf too and I am trying to lip-read. Can you repeat what you said about the discrimination? You were saying that the EHRC was having to find a discrimination angle on human rights cases to be able to take them forward.

Mike Smith: There were times when it was necessary because if a legal firm says, "Can we ask for your support with this human rights case?", we say, "No, we cannot, because the law does not allow us to under the Equality Act 2006, but if you can find a discrimination element or a public sector equality duty element within your case, then we have the legal powers to support". There were practical issues where the Equality Act 2006 would have prevented us from doing what was logically and morally the right thing to do.



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The elephant in the room is, on resources as well, that clearly the commission needs to be as effective as it can be and use resources wisely, shrewdly and work out how to work in collaboration with other regulators and other parties, but there is a reality to the original budget 10 years ago being £70 million, which is the equivalent of the three legacy commissions. It then got six extra protected characteristics and human rights and it now has only 70% of the original budget. It is going to be forced to make some tough choices. It is never going to be a mass litigator on that budget. Even when I was a commissioner, between 2009 and 2012, we were still making cost-based decisions on the chance of success and the risk of costs being awarded against us. I assume that is even more prevalent now.

Q147 Angela Crawley: We have heard from witnesses who have suggested that organisations and businesses do not worry about enforcement action by the commission. Do you think that is a fair criticism, and do you agree?

Barbara Cohen: That is right. One of the concerns that I have is that the EHRC does not advertise itself as an enforcer. It funds interesting research. It will have one announcement and nothing more will happen. The inquiries that are carried out will expose things that should not happen, and then nothing. It does not go on. I am very concerned because almost from the start until now, it has not used its unique enforcement power. I am thinking of investigations that, from my experience of the Commission for Racial Equality many years ago, actually did frighten employers, service providers and local authorities, because the CRE would do it with a flourish; it would tell the world and it was reputationally really bad.

Picking up on the litigation that the commission funds, when it gets an important result, which could be generalised—because very rarely does an incident of discrimination happen only at a single workplace; it is going to be replicated, sadly, many times—even just using relatively inexpensive advertising, public relations and media to say, “The case showed this and this, and the commission will be looking out for other cases” or “will be using its enforcement powers in order to tackle this,” just beginning to shout, “We are the big bad wolf and we are coming for you” just has not happened. First, it is not doing it and, secondly, when it is using resources, funding cases and carrying out the search, it is not doing enough with it to create that sense of fear that Nick just mentioned. People are not frightened of the EHRC.

Q148 Chair: Barbara, when the EHRC’s budget was significantly higher pre-2012, did it take the approach that you were advocating there, and pursue individual areas and set itself up as an enforcer. Was that its approach then?

Barbara Cohen: Sadly, I had limited experience, but it did fund a really important research project, which was about the treatment of migrants and refugees by different public authorities, which would have opened the



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scope for the public sector equality duty. It was an outstanding piece of research, but there was one very brief press release and that was it. It could have used that fantastically in a whole number of ways, and that was before its budget was cut.

Q149 **Chair:** Perhaps it was more of a strategic decision than a budgetary decision.

Barbara Cohen: It is hard to say. It should be using the information it has in stronger enforcement-type ways. That is all I can say, having watched it from the outside as a concerned equality lawyer. I just wanted it to do more.

Mike Smith: I came in in 2009 on the second round of commissioners. It is fairly safe to say that at that point the organisation was still struggling with the combination of three legacy commissions with three quite different cultures. There was something about the operational effectiveness and efficiency of the organisation at the time, more so than a strategic decision not to try to do those things. I do not think it was incredibly well organised and did not have a well-functioning comms department and had not worked out how to link together its different internal organisations. It was more a mistake in the design that it was not more effective in its comms in those days.

Q150 **Angela Crawley:** On that point, what would make more people concerned about the prospect of enforcement action now under the EHRC?

Mike Smith: I was thinking about this question in advance, and it seems to me that there is, again, the stuff the commission can do or could do and does not but also some wider context. Thinking back to the case of *RBS v. Allen*, which was a physical access case against one of the big banks, the commission nearly did not support that section 28 case to start with because it thought it was just another physical access case. Luckily, the disability committee had its independent powers at that point and reversed the decision of the main decision-making process. It was a really good case to have taken because it was strategic. It talked about how, if you can afford it, you really should be making those reasonable adjustments. What was unfortunate was that the comms machinery did not then kick in and work out how to capitalise on that by persuading a larger number of organisations that there were cost and financial consequences.

It then comes back down to the wider environment. The risk of getting caught or facing legal action for doing something wrong is pretty low for any goods and services provider. If they do, they know they have the effort of someone taking a case against them and mostly they get settled. I do not think most organisations think that there is much risk associated with breaking the Equality Act, either in terms of reputation or in the financial consequences. You can contrast that with the Disabilities Act in the USA. In a much more litigious environment, with courts



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awarding much higher levels of cost, there is a genuine risk to not complying with the law. Anytime I go to the States, I am always amazed at how much more effective the manifestation of the legislation is, but that is partly because of the litigation environment. Maybe we need to look harder at how we can make sure that there are consequences for organisations of breaking the law in the first place. That might sharpen their minds. Whether that is direct fines from the commission or just a wider look at how we get penalties or consequences for breaking the Act in the first place.

However, the commission has done some good things recently where their strategic action has had a wider impact. I was quite impressed with the work done to get the clinical commissioning groups to change their unilateral caps on the continuing healthcare funding. That was a group action against 13 CCGs that will all know perfectly well what they cannot do. By reissuing their guidance, they changed the lives of many hundreds of disabled people across the country.

Similarly, the action against the Department for Work and Pensions, in relation to personal independence payment and the clarification of who could qualify on the difficulty of planning and following a journey, was a very significant intervention that affected the lives of thousands of people. It was compelling enough that the DWP did not even appeal. The commission has done some good things where there is a nice impact, but it tends to be more in the public sector environment than in the corporate environment.

Niall Crowley: I would suggest that it is a twofold challenge of enforcement and communication; they are linked in a way. One of the issues—and it is an issue that is not unique to here—is about strategic litigation and the search for cases that set a legal precedent or change court procedures. When it comes to the type of institutional change you are talking about, that is not sufficient. That is too narrow an understanding of strategic litigation. It is quite interesting that the recent Council of Europe standard in relation to equality bodies has argued for a different model of strategic litigation. Central to that model is supporting a critical mass of casework. If there are not enough day-to-day cases, as Nick was saying, you do not get that culture of compliance.

If you pursue a strategic litigation strategy that is purely about high-profile, precedent-setting cases, you get greater clarity about the law but you do not get a culture of compliance. You need a critical mass of cases across all the grounds covered by the Act. That requires a very particular legal strategy. It needs to be linked to a communication strategy that is about motivating change, rather than instilling fear and anxiety. Yes, the critical mass of cases has to be communicated, but in a way that can stimulate institutional change. Again, the Council of Europe is clear on that.



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We know that fear and anxiety do not stimulate real cultural change within organisations, in terms of the culture change that Mike was talking about. It has to be a values-based communication that engages a different set of business values that relate to human dignity, inclusion and justice. Those values are there but the communication needs to call up those values, engage them and engage institutions in giving life to those values in response to a critical mass of casework. The core of it is that you do not get that change without a critical mass of casework.

Nick Webster: I completely agree. In our work, there are serial offenders in terms of discrimination—it is the same employers. They do not seem to be that concerned about a claim being pursued against them because they know they can settle it in most cases at the time of their choosing. As Mike was saying, in order to bring any type of claim you need to have access to funds, you need to have access to a suitable adviser and you need to understand that it is going to take you potentially over a year to bring a claim. It is incredibly difficult. You are going to go against a defendant who will have funding and a power law firm supporting them. They will try to make the rules, which are there to bring some balance, work for them, to cause the claimant to fear taking the case forward.

There is a massive imbalance between claimants and defendants or respondents. As Niall was saying, the strategic casework of bringing lots of cases is potentially more valid than bringing the one-off cases that set precedents, because that is perhaps the only way you are going to learn about what their obligations are and the impact their behaviour can have on others.

I completely agree that fear only goes so far, and when we see the same offenders coming back, they clearly are not scared. The EHRC used to conciliate disputes. That power was taken away from them and that was actually quite effective. However, if the EHRC could act as an ombudsman, it could come in and try to resolve a situation before it gets to court.

If you resolve a dispute through ACAS, which is a conciliation body in the employment tribunal that does a similar thing, ACAS would potentially have a body of evidence about the types of claims that are being pursued and the issues that are arising. If a claim is issued, it would be helpful if the EHRC were involved, as ACAS is involved in the employment tribunal arena, and was aware of the outcomes, whether a settlement or a judgment, because then it could see how these cases were ending. If an employer knows that this is going to happen, an employer will probably pay attention more to the issue in front of them, if they are aware that they are going to be added to a database that the EHRC is going to be watching. If fines could be imposed that would also be beneficial, because the level of compensation is so limited, particularly in disability discrimination claims for reasonable adjustments, compared with the costs involved, that defendants are not concerned about losing claims, if



a claim even gets all the way to trial. In a lot of cases, unless the EHRC helps them or they have £50,000 in their bank account, they cannot litigate.

Barbara Cohen: I am sorry if I am taking up too much time but I just want to mention that one of the special features of the EHRC compared with many other equality bodies is its unique enforcement powers. Once the commission becomes aware that there is a particular kind of discrimination case that is happening, building up this critical mass of cases, they can cut into it. We do not need to have 25 people suffering the same experience because once you have had a number, the Commission could apply for an injunction. Once you have one employer doing it more than once, you can see that there is a possibility or a likelihood this employer will discriminate again; you can apply for an injunction and publicise it, so that the world knows that if somebody is continuing to discriminate, they will have more sanctions imposed. It could enter into an agreement. Recognising this employer or this service provider does not understand that discrimination is unlawful, it could get them to sign up and indicate that there is a possibility of an investigation that will then lead to potentially even greater sanctions.

That is what is special about the EHRC: once you begin to see that there are some patterns, it does not need to wait for the patterns to go on and on. It is important—and I absolutely agree—that non-spectacular cases are supported, so that we can see what is happening, but then the commission can cut in with its special powers. That is what is really special. It can do this and communicate, so that other people in the same sector become aware that this is the kind of conduct that is no longer permitted and the commission will make sure that it comes to an end.

Nick Webster: That does necessitate cases going to the EHRC and it being aware of what is happening, and it is not aware of that because it is not getting fed enough information, particularly in an employment context. There is so much discrimination in an employment context and I do not know if it is getting that information from the helpline or not. I know it is talking about bringing it back in-house. We would certainly be in favour of that, because it needs to know what is happening on the ground with the day-to-day discrimination, in order to work out how to challenge it strategically.

Niall Crowley: European-wise, in not having that helpline, the EHRC stands out negatively. It is quite a strange set-up for it to not have that direct contact. It might get the information but it does not have the direct contact. Direct contact is quite important for both sides, for having confidence in the institution and therefore going to it, as well as the institution having knowledge about the people who are contacting it.

Q151 **Angela Crawley:** That was going to be my next question. Are there lessons from any other countries on how an equality body can create a culture of compliance with equality laws? Mike, you covered earlier that



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the USA is far more litigious. That seems to have a prohibitive effect, but are there any other examples that you could point to?

Niall Crowley: Some of examples are in the past, which is worrying. It is that shift away from the culture of compliance to strategic litigation that you see. France had a very active culture of compliance approach. Ireland had a very active culture of compliance approach. It is not evident in either instance at the moment. Both bodies have suffered mergers in terms of human rights functions. I am not sure that it is not in some way linked to a failure to integrate those two traditions properly, and therefore you do not get the best out of both. Certainly, France has a track record and Ireland has a track record of it.

Q152 **Angela Crawley:** Do you think in those instances that again it is a resourcing issue, in terms of you saying that they have merged?

Niall Crowley: In Ireland there was a loss of resources as well. It is both. Resources have an influence. You do need resources to pursue that type of strategy. It is a resources one and it is an institutional one, but it is also a strategy one. Strategically, how are you going to approach it and what is your model of change in that regard? Is your model of change that a legal precedent is going to create the sort of social change that an Equality Act has the ambition for? To my mind, there is no evidence that it does, and it has not. The critical mass of cases, however, does generate a public debate, does generate stakeholder engagement and does generate a duty bearer engagement that is quite different, and that has been seen in practice. That can lead to that type of cultural change, whether it is a culture of compliance or a more ambitious culture of equality and non-discrimination.

Q153 **Angela Crawley:** Does anyone else have any other examples? It is okay if you do not. The Commission is planning to develop a new enforcement strategy with a firmer approach to non-compliance. What do you personally believe should be part of this new strategy?

Barbara Cohen: I have read the draft strategy and I have also read its submission to this Committee. Like any of us, you prefer to do the things you know you already do well, and you are a little bit reluctant to take on the things you have not done very much of and think might be difficult. It talks about a three-word thing, which I forget, but compliance was part of it. I am concerned that it is still going to shy away from using its unique enforcement powers, which the tailored review had urged it to do, and the GEO agreed that it should be using them. Part of that is, of course, supporting cases, but the other part is carrying out investigations.

I cannot stress more strongly how useful that can be in terms of changing practice and changing policy within an organisation and within a sector. It is not necessarily unduly burdensome. It is not necessarily expensive in terms of resources. You can do it in a particularly targeted way. In reading it, it does not appear to me that it sees that as one of the



particularly important ways that it is going to achieve the aims of its new strategy. The mechanisms, if we are enforcing the public sector equality duty, are slightly more cumbersome than probably they should be, but that is where we are. The public sector equality duty potentially should be changing the face of public authorities. It should be not only eliminating discrimination but advancing equality. We should not be having to litigate discrimination against public bodies but we are all the time, for long reasons.

I am just concerned that what it puts on paper is a little bit unclear in terms of what it sees as the way it is going to be doing enforcement and compliance work. You will have seen the table that shows that sadly it has not used those powers at all. They are fantastically useful powers. That is my concern. It is not pinpointed as to how it is going to do it; it simply says, "Compliance enforcement", and so on.

Q154 Angela Crawley: Nick or Niall, do you have anything that you feel is missing from the strategy that you think should be there?

Niall Crowley: I would put litigation centre stage. The critical mass of casework is crucial to compliance. The link to the investigations is crucial and the link to the public sector duty is crucial as well, but the bedrock is that critical mass of cases. To do that, you need to have concern with under-reporting. The vast bulk of people do not report instances of discrimination, not because they do not know how to but because they do not believe change is possible, because they believe discrimination is normal. That has to be broken. You only break that by showing that change is possible. That is why you need a critical mass of casework. We do need to understand, and the equality body needs to understand, under-reporting, not in terms of its level, which is inevitably high, but in terms of the particular dynamics of under-reporting in relation to the different groups experiencing discrimination. That is fairly central.

Issues of accessibility are central and the divorce with the helpline does not help accessibility. The lack of local outreach and the lack of regional offices do not help accessibility. They are all identified across Europe as central to accessibility.

Formal engagement with civil society is important. Civil society needs to offer key channels of communication into communities that are experiencing discrimination. There are few equality bodies that have formal engagement with civil society in terms of their own operations and their own work. They will have it about particular issues. A number of equality bodies stand out in that regard, in terms of having advisory councils to support a better response to under-reporting.

Communication and particular forms of communication are crucial as well. It is not communication about what we are doing, but communication as a tool for change; communication that can build a culture of rights where people are supportive of people who take a stand on discrimination. It is about the culture of compliance that we talked about, in terms of



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employers and service providers, and a culture within communities experiencing discrimination that change is possible. That calls for very specific communication strategies. The heart of it, for me, is the critical mass of casework.

Nick Webster: I completely agree. It would be very helpful if funding was opened up to build up this critical mass of casework so that more could be done by the EHRC, and seen to be done, in terms of enforcement. If a large amount of claims are issued and the employer routinely hears that the EHRC is funding this, then they will become more aware of the EHRC and that enforcement action could be taken against them. If you spoke to most employers, they probably would not know much about the EHRC or be concerned about it. If it was a regular face in terms of day-to-day discrimination litigation, that would be very helpful. If there was some way of having some shortcuts for its enforcement powers, particularly imposing fines and not having to go through the process it has to go through—because ultimately it has to go to court to do anything and that costs money, exposes the EHRC to risk and takes time, and all defendants know that—that would be useful. If there was a way it could levy fines without having to do that, that would be useful.

As Niall was saying, education about rights is really important. Most people do not understand their rights. It has a very good code of practice but it is very long. If there was more focused guidance that was perhaps easier to access, on your rights and what you can do to enforce them, that would naturally result in people turning to the EHRC. If you googled “Enforcing my rights” and “Discrimination”, it would probably take you a little bit of time to find a suitable guide and then more time to work out what you can do about it. Fundamentally, there is not funding available for claims to happen and that needs to change.

Q155 **Angela Crawley:** Mike, do you have anything to add?

Mike Smith: I very much agree with the comments around breadth of cases and linking it to communication strategy. I will try to add a couple of different points. I remember at the time when we were doing the strategy back in 2010, there was quite an interesting context in which the commission by default had to be reactive in terms of the things that were brought to it, because in general the proactive powers involved quite a lot of planning, cost, the section 16 inquiries and the deeper reviews. You did need to have an evidence-based approach from which to start those actions. It was quite complex to do that. A lot of the powers were based around trying to right a wrong that had happened already. It was quite hard to plan meaningfully, notwithstanding that there are things that the commission could do better when it has won cases or when it has done section 16 inquiries. I am happy to talk a bit more about what we did well on the disability harassment inquiry and what could have been done differently, if members are interested.

Some of the changes to the Equality Acts 2006 and 2010 at the time of the coalition Government did not make obvious sense to me at the time,



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in terms of trying to achieve wider change. In terms of separating the advice line, it was really hard to understand a logical rationale for doing that, other than just reducing cost from the budget to the EHRC. It seems inevitable that if you outsource a function like that, it is hard to get meaningful intelligence that just comes from conversations, rather than data flows, between frontline advisers and policy and legal officers. The removal of the grants programme, whilst it really was not managed well at the time, did stop that more strategic collaborative work with the voluntary sector and civil society to create some of the wider knowledge and change that Nick was just talking about.

In terms of particular cases and the way that the powers worked at the time, I do remember there was a lot of deliberation in the regulatory committee about the risks and costs of a particular case, in terms of a bad outcome in terms of the legal consequences and what that might mean for the overarching environment and so not wanting to fund cases that did not have a good enough chance of success; a case might have come up with a result that we did not want.

Also, there was quite a concern about the risk of costs against the commission by big organisations countersuing or claiming that we were not using our powers correctly. I seem to remember there were quite a lot of detailed steps that one had to go through in order to prepare and properly show you were using public money appropriately. It was always quite an expensive and drawn-out process to get to the stage where you were sure that you were using those powers appropriately.

With the GEO being quite a close-at-hand sponsoring body, with 80% of its budget being spent on the commission, there was quite often a level of scrutiny or commentary where you might get comments from the GEO saying it was not sure that the commission should be taking a particular action. That close level of scrutiny sometimes hampered the true independence in how decisions got made, in terms of what powers to use against and when, certainly in relation to potential action against other Government Departments. That was quite unfortunate.

In terms of the overall strategy, there might be some extra work to do, particularly in relation to human rights. The UK got a very negative report from the United Nations Committee on the Rights of Persons with Disabilities. From an observer's point of view, it seemed as though the Government just reviewed that and said, "We do not agree with the UN committee," and that was kind of the end of it. If there was a better framework for challenging and enforcing the rights that should be afforded by those conventions—there are other examples too but I am more familiar with disability—that might be a better way of having a dialogue that creates the wider change that people are looking at. In many respects, for disabled people the non-realisation of rights is a greater impediment to equal living than overcoming discrimination.



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Barbara Cohen: I am concerned that we are underestimated how awful it is to bring a discrimination claim. What you are saying is, "I was treated badly not because I did not have the skill but because of who I am." Very many people who bring discrimination claims never work again. Of the sexual harassment cases I brought in the past, I can think of only one person who ever went back to work again after experiencing sexual harassment and having to go through it again and again through the litigation process. It is similar with racial harassment. We need to be careful about saying that we are relying on individuals to complain and go through the litigation process in order to bring about change.

Q156 **Tonia Antoniazzi:** As well as other duties under the Equality Act, the EHRC is bound by the regulators' code, which, amongst other things, requires the EHRC to provide those they regulate with the opportunity to put things right before enforcement action. This question is for Niall. Could this requirement create any problems for its ability to meet international standards for national equality bodies?

Niall Crowley: It does seem to run counter to standards of independence, in that both the European Commission and the Council of Europe obviously emphasise the standard of independence but they put it very strongly as well, particularly the Council of Europe. It talks about operating without any interference from the state. This would seem to be a form of interference from the state. It is something an equality body might logically do in certain instances, but it should be its choice and the requirement to do it has to limit the exercise of its enforcement function. Again, in the European Commission, even the directives state that the functions have to be implemented independently. That includes the handling of complaints.

Q157 **Tonia Antoniazzi:** The regulators' code allows a commission not to apply this restriction where it can demonstrate that immediate enforcement action is required or where doing so would defeat the purpose of enforcement action. Are you aware of any instances where the commission has used this exception?

Niall Crowley: You would be asking the wrong person there.

Barbara Cohen: I would simply say that because the regulatory code applies to a very wide range of regulators and a lot of their work will be about failure to meet non-statutory obligations of that particular organisation, we are talking about the EHRC enforcing the law. It seems to me that is not a point where you sit and pause. If you think someone is acting unlawfully, that meets that test of urgency and "Do not delay." I would be surprised if it should normally feel constricted by that bit of the regulators' code.

Niall Crowley: I would even worry about naming the equality body purely as a regulator; it is a lot more than that. Barbara is talking about the difficulties that people have in bringing forward a case. People do have difficulties in bringing forward a case, but that is why equality



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bodies should be able to exercise their functions independently. That is why there should be no interference from the state. When you throw in things like this, you are increasing the hurdles that are already quite substantial in that regard. It automatically defeats the purpose of the enforcement function, or diminishes it at least.

Mike Smith: If I can come back to your primary question, I do recall us considering the regulatory code carefully at the main board and looking at how it would affect our different functions, both at a general strategic level and sometimes on a case-by-case basis. I do not think it ever prevented us from taking an action that we wanted to, but it did sometimes modify the way that we would approach situations. There were times when we sought to take pre-enforcement action and to get change to happen, rather than use full powers, because there was concern that if we went straight into some of the full investigations that we would be challenged for not having done lesser interventions to start with.

There is a slight inherent conflict between having to do that and then getting the strategic change or leverage that you want, because an out-of-court settlement is never as impactful as someone losing in court. The regulatory code may not have affected the Commission's actions itself, but it may have affected the impact it was able to achieve by the headlines and the outcomes.

Niall Crowley: It could also have a greater impact, though, if you were seeking a critical mass of cases and shifting from a strategic litigation approach.

Q158 **Tonia Antoniazzi:** Are there any particular circumstances where the use of this exception would be appropriate at all? We talked about the exception earlier.

Mike Smith: Can you repeat what the exception was, please?

Tonia Antoniazzi: Going back to my question, you did not give any instances of where the Commission has used the exception, but are there any?

Q159 **Chair:** In terms of the need for immediate enforcement action, what examples would there be where that is appropriate? I think you were talking about the fact that, because people were acting unlawfully, you could go straight to action rather than having to go through the regulatory approach of making things right.

Barbara Cohen: I would simply say that, for example, the requirements in the Equality Act 2006 for carrying out an investigation basically build in that you have to take particular steps before you begin your investigation, which means you need to inform the targeted organisation and give them an opportunity to make representations. In a sense, at that point, because you are thinking about quite a major form of enforcement, it is not urgent because it is looking at an historical pattern



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of discrimination probably, not stopping something from happening. In that instance, there are already structures that build that in, but in other instances, where something is brought to the commission's attention, it is about to happen and it looks like it is going to be really problematic in terms either of equality or human rights, they should not spend a lot of time. It seems to me they will recognise—that is their job—this is something that is urgent and say, "We are going to do it now".

Q160 Chair: At the moment, we are unaware as to how often that happens. The data is not given. We do not have that data.

Nick Webster: It can take a considerable period of time to get a decision from the EHRC when you make an application for funding. Discrimination, when you are trying to address it, is usually reactive and always urgent, but the acts have usually happened sometime in the past, so the EHRC cannot suddenly come in and say, "Stop doing that," because it probably happened three or six months before.

Q161 Eddie Hughes: We have touched on some of this earlier, so my apologies for going over some ground. Legal action by individuals is the primary means by which rights in the Equality Act are enforced. We have repeatedly heard that this places disproportionate burden on individuals. What is the role of the EHRC in reducing that burden?

Nick Webster: It can only do so much because litigation is incredibly challenging for anybody.

Eddie Hughes: And it is expensive.

Nick Webster: Yes. The expense is a given, but emotionally and mentally it is hard to litigate; it can consume your life. It can take over a year to do and you do not know when you are going to get an outcome or what the outcome is going to be. You are usually coming up against a defendant or a respondent who will be very robust in their defence and will try to make the system work for them; they have the means to do that. There is only so much the EHRC can do to mitigate that impact on potential claimants.

Where they could help is by giving claimants the security of funding and legal support, and less concern over, if they lose the case, whether they are going to have to pay the defendant's costs at the end of it. It may cost you £100,000 to pursue a claim. It probably costs the defendant the same or more. If you lose in a civil discrimination claim of that value, you are on the hook for the defendant's costs as well. You are doubling up the exposure just on a costs level. The remedy you will get will be potentially 10% of the costs you are spending to get to that point. It is very one-sided.

Q162 Eddie Hughes: From a financial point of view, that is not a good return on investment.

Nick Webster: In the employment tribunal and the civil courts, compensation is very limited when compared to the cost to get there.



There are caps in the employment tribunal on what you can get, and in the civil courts, if you bring a discrimination claim, you are usually looking for damages for injury to feelings or potentially injunctive relief, but that is quite rarely used. Damages will not be significant, or it is rare that they are significant. If the EHRC could help, it would be to remove that fear for claimants, when their only fear is dealing with the process itself in terms of the emotions involved and what it will mean to them to take something on.

Niall Crowley: It is difficult to take a case but I would not lose sight of how important it is for people to take a case in that way. I have done work with a lot of people who have taken cases and there is a sense of liberation in taking a case—liberation from what happened, liberation in terms of the respondent having to justify what was done—and a sense of how centrally important to that person in dealing with a really negative experience of taking a case was.

Yes, we have to reduce the burden, but we have to reduce it because it is so important for people to be able to exercise their rights in that way in terms of their wellbeing, their sense of themselves and defining their own future in a way that might be free from that type of pressure. In reducing the burden, you do have to remove the issue of costs. It is a major barrier where that exists. The more you can decrease that and decrease the risks of that, the more important it is.

The burden of time is also important. These things have to be resolved in a timely manner. That goes back to the regulators' code, in terms of introducing another delay being a real problem. Time is a major burden in that regard.

The relationships are also quite important. Some of the research on access to justice has emphasised the importance of emotional support. We tend to talk just about legal supports but emotional supports are very important, and the relationships with staff in the equality body have proven to be central in terms of people being able to manage litigation and take a successful case. At the same time, it is also important that equality bodies take their own-initiative cases, that they do conduct investigations and that they do chase the public duty in terms of ways of dealing with discrimination as well.

Barbara Cohen: I would like to talk a little bit about the other unique powers that are not litigation per se. I hope it will be helpful if I talk you through the way the Commission for Racial Equality, all those years ago, used absolutely identical powers of carrying out an investigation. The Commission for Racial Equality—the CRE—had been concerned for a long time about race discrimination in the armed forces but there had not been any cases. Finally there was a case. A black soldier who was in one regiment wanted to transfer into the Household Cavalry. The Household Cavalry rejected him. There were no black soldiers in the Household Cavalry. One of their arguments was that it would be okay if there were



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two because they could talk to each other. Anyway, the case went to the employment tribunal and the case was upheld completely.

In order to carry out an investigation you need to have some suspicion that the organisation will have committed an unlawful act. We had a finding of the employment tribunal. On the back of that case, the CRE began an investigation into the Household Cavalry and the ground for doing so was that we had a good belief that they had committed an unlawful act. The procedure was that we had to tell them what we were proposing, they could come to make representations and say why we should not do the investigation. The investigation went ahead. The investigation was very simple. It did not cost a lot and did not take a lot of time, because it simply meant that CRE staff interviewed all of the people up the chain of command who had any role in making the decision not to allow this black soldier to join.

Very quickly we were able to make a finding that discrimination had occurred, which enabled us then to introduce a sanction, which in those days was called a non-discrimination notice. That was prepared. Then we wrote to the Ministry of Defence and said that we were about to issue a non-discrimination notice against the Household Cavalry, a very old and distinguished part of the Army, which would be very bad for the reputation of the Army. The Ministry of Defence paused and the CRE said, "Well, alternatively we can enter into an agreement with you, not just for the Household Cavalry and not just for the Army, but for the Army, the Navy and the Royal Air Force, to carry out a whole range of steps to look at the way you are recruiting people into the services. We are going to give you some requirements to carry out. We are going to meet with you very frequently to see what happens."

The MoD, concerned about reputation, because they were struggling to get recruits at that time anyway, said, "Okay, we will do the deal. On the basis that you do not enter the non-discrimination notice, we will enter into this agreement with you," and they did. They had to record by ethnicity the people who made inquiries, the people who made applications, the people who then came to take the test, the people who got through the test and the people who then got placed. They also looked at issues about promotion up the ranks and reported with ethnic monitoring. We met with them, I think, every six months. Before that, they sent us these long reports.

Change began to happen. It happened more quickly in the Army than in the Navy or the Air Force. The Household Cavalry senior officer was a General. He was so concerned that he went absolutely out of his way and they went from no black soldiers to about 10 very quickly. That did not happen in the other services. They looked to see what happened. When people made inquiries, why did they not apply? If they made applications, what happened with applications? They looked and unpicked it, and they could see, for example, that the Army did not keep in touch and the



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family said, "You had better go and get another job," so they dropped out of the application. We went through the whole thing.

At the end of the three years, the MoD said, "There we are. Done." We said, "Actually, you have not made enough progress," so we could still serve the non-discrimination notice. We stuck with this agreement for another two years. First of all, they had all sorts of levels. We had meetings with General Guthrie about the war in Iraq because it went all the way up to the top of the chain of command at the armed forces. This was something they had to do. That was on the back of one case. The initial investigation involved very few resources of the CRE but it made a huge difference and it changed the face of the armed forces, not totally but it made a big difference.

Q163 Eddie Hughes: That is an excellent example of what the next question will be. Is the EHRC succeeding in undertaking enforcement action that has a strategic impact? That feels like an excellent extrapolation of a single case.

Barbara Cohen: The answer is no, not yet.

Mike Smith: Can I answer your first question first?

Eddie Hughes: You can.

Mike Smith: It seems to me that there are three elements here. Your question was fundamentally about reducing the burden of taking litigation. The first one is that they already do it in many respects; they just do not know they do it. Many advice providers or organisations doing frontline support regularly use the guidance quoted in correspondence or letters that get sent to employers or service providers. By quoting an official source as opposed to a general webpage, it allows individuals with one-on-one advocacy to make change happen at a small level because organisations respond. There is just no way the commission can understand the breadth of that impact. There is no way of measuring the impact. I know, from a grassroots level, that it makes a difference.

Eddie Hughes: It is useful.

Mike Smith: The second point is alternatives to litigation. It is unfortunate that they had their right to enforced arbitration removed in non-employment cases. Litigation is inherently confrontational. People are already going to be fighting. At least by the enforced arbitration, you often got examples of corporations or others saying, "Now we understand what we were doing. We understand the benefits of change. We will do it". Because it was less adversarial, you did get systemic change in a way that you do not get through straight litigation.

The third part of my answer to your question is going back to the other things that could be done around the commission that would help litigation: permitting claims through small courts with simplified processes; permitting class actions; and allowing the commission to take



cases in its own name on behalf of people. Those would all reduce the burden on individuals and help a greater number of cases or small cases come through the wider criminal justice system.

Q164 **Eddie Hughes:** Let us stick with you, Mike. You have direct experience of using the Commission's power to conduct inquiries. Did that work have the kind of strategic impact that you set out to achieve?

Mike Smith: I had the privilege to lead the section 16 inquiry into disability-related harassment that lasted 18 months in total. I had no idea what I was letting myself in for at the beginning, but it was probably one of the most rewarding things I have ever done in my life.

A section 16 inquiry allows you to compel people to give evidence and to force a change. I am going to blow the trumpet and then I am also going to critique it at the end. The important thing about the section 16 inquiry is that you first need to consult on terms of reference. We did that through a series of workshops around the country. That was key to bringing stakeholders on board and we changed the terms of reference of the inquiry as a result, because we were more informed about the problem we were trying to solve and we had already started getting some people to go on the journey with us.

I got an external reference group, which was key to getting soundings along the way and making sure we were taking key stakeholders with us on the inquiry. In the evidence sessions, we did formal sessions getting people to provide evidence. There would have been at least 100 in total, I think. I remember the members of the judiciary being very aggrieved that they were summoned, or threatened with a summons if they did not come voluntarily, but it meant we got all kinds of engagement. The powers that allow you to compel people to give evidence under a section 16 inquiry were very useful for getting people to take it seriously.

We did some geography-based reviews where something significant had gone wrong in the past—someone had been murdered or tortured or whatever. We got whole groups of agencies together, whether the police, local authorities, housing associations or local health authorities, to come and analyse a problem together. That was very instrumental in getting the group learning in those situations. In the end, we had tens of thousands of pages of evidence.

What was important about that inquiry was in the middle, thinking about how we get change as a result of having done this. Quite late on we decided to interview a bunch of permanent secretaries from different Government Departments, who were also a bit surprised to be summoned to give evidence, but that was very helpful in getting cross-governmental change at a later stage.

We also decided to publish the outcome in two stages, because it was very difficult to write recommendations on such a big issue that you would not find other organisations just dismissing. We published the first



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report, entitled "Hidden in plain sight". That amplified the problem and came up with a selection of draft recommendations upon which we were going to consult.

The idea was that we got all of the relevant bodies—the CPS, the police and all kinds of bodies—to then come up with their own action plans as to how they were going to address the issues raised. We published those action plan in the follow-up report out in the open. The idea was to get the other agencies to take ownership for their part in creating a solution to a cross-sector issue and own for themselves the changes that needed to be made to address the issues.

In the main that worked quite well, because we said we would follow up after three years and five years. However, I am not sure, with the change of commissioners and the focus, that the follow-up was quite as good as it could have been. They did a first follow-up but it did not have a lot of noise. I still sit on the Government's independent advisory group on hate crime. It is regrettable that, despite all of that, there has not been a greater level of change on the underlying issue, although there has been progress.

The point I am making is that when you use those enforcement powers, you need to have a wholesale understanding of what change you are seeking to effect and how you are going to use multiple agencies to create that change. The commission cannot do it on its own.

Q165 Eddie Hughes: Barbara, your submission suggests that the commission could have a greater strategic impact by using its powers to initiate enforcement action. If this is the case, why do you think the commission has made such little use of those powers?

Barbara Cohen: Pass. I do not know. One year there was a bit of money left over at the end of the financial year and they invited me, given my past experience, to come and do training sessions with their lawyers on the use of investigations in particular. At the time, they seemed quite enthusiastic to look again at how they might do an investigation. They have now done one investigation but I do not know why they are cautious. They may see them as too demanding on resources, which is why I tried to emphasise that you can do an investigation very narrowly focused, thinking about how you can best and most effectively use your resources, so there is not a long burdensome extra weight on the commission but something you can get done quickly and get a good outcome. It was not always perfect at the Commission for Racial Equality, but it sometimes really did make a difference.

Q166 Eddie Hughes: The commission has said that it aims to have at least three investigations in 2018-19. Will that make a significant difference?

Barbara Cohen: It could be absolutely fantastic, because if they target them and they use it, the lessons they will learn from that investigation are likely to be usefully translated across the whole sector. If they did an



investigation into the Ford motor company and found things in the practices of recruitment and training, or whatever it was, they would then talk to all of the motor manufacturing companies, and other companies doing other kinds of industrial processes, to say, "This is what we found at Ford. Do you want us to come and look at what you are doing? I hope that you are doing it well." That is how you can use what you learn from an investigation.

Eddie Hughes: Let us hope so.

Barbara Cohen: Fingers crossed.

Q167 **Eddie Hughes:** Are there enforcement models from other countries that have been particularly successful in securing compliance with their equality laws? If so, what can we learn from them?

Niall Crowley: There are three things about enforcement models. One is the powers that are in place, the second is the strategy that is in place to use those powers, and the third is what is happening in the context. I have looked at contexts across Europe of fear essentially, in terms of where enforcement has become controversial, where budgets get downsized and where competencies get stripped, equality bodies tend to be more cautious. That is certainly a European experience. I do not know if it is directly applicable to the UK but certainly the conditions are there for it.

If I look at the mix of enforcement powers that are here—and we did for the research—it stands up very well in terms of the European level. The public sector duty is important. The investigations are really important. The legal standing before court is really important in terms of supporting cases, taking cases on own initiative and *amicus curiae*. All of those stand up very well in the European context. The next question that has to be asked is about strategy: first, what priority do you give to that party or functions and, secondly, what strategic mix of those do you deploy?

Q168 **Chair:** Are there other countries that are doing it really well?

Niall Crowley: It can vary, but yes.

Q169 **Chair:** Are there specific examples of countries that are doing better.

Niall Crowley: I will answer the first question, on whether they are doing it well. Belgium seems to be pursuing a very interesting mix of enforcement powers, in quite a difficult context as well. Belgium stands out. Croatia has stood out quite well in terms of an emerging equality body; it has taken risks and has put in place a critical mass of casework and development initiatives off that. I am not aware of inquiries or investigations there but they have used their litigation powers as an ombudsman office very well.

France went through a hugely positive period under HALDE, the high authority for discrimination—I cannot remember the exact translation. Before it got merged it had a very good enforcement strategy. I am



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biased but I would say that Ireland pre-2009 had quite a strong enforcement strategy as well.

Q170 **Eddie Hughes:** More generally, should the EHRC have additional powers to directly enforce the Act, for example through an ombudsman-type function or the ability to issue fines, which you may have touched on?

Nick Webster: It should, in short. As Mike mentioned and as I mentioned earlier, the decision to take away the ability to conciliate and mediate did not make much sense, because it was very useful and could be very useful. Having a body that can come in and act independently between two people in dispute is very important and works well in an employment context. Acting as an ombudsman in addition to that would also be useful, to have some sort of oversight, and in particular for employers to know that they do not just have to deal with a tribunal, or with their employee or their employee's representative or union; they also have to deal with a Government body that is potentially going to come in and look at what they are doing and issue fines as necessary.

I know that we have talked about fear and whether it is good or bad, but employers are fairly relaxed about the threat of tribunal. If there was some additional consequence for them that is not just settling the claim in front of them but leads to potential future change internally that they have to do, as Barbara was talking about in terms of the services—there was some sort of investigation—that would be incredibly useful, from my perspective anyway. Yes to fines and ombudsman powers.

In addition, as I mentioned before, if there was some sort of register about types of claims being pursued, issues arising and outcomes achieved, which employers, in particular, were aware they were going to be entered on to, that might help.

Eddie Hughes: To increase the fear.

Nick Webster: It is not necessarily fear, but awareness. You hope that people do learn. In my experience, they do not. You hope they will change their behaviours. In my experience, they do not. That is because they can deal with that issue, and then it is Monday and things move on, whereas if that is not the end of it—if something then happens as a result of that, and there are 10 maternity leave claims being pursued against the same employer and that then results in the EHRC being able to do something instantly—then they may decide, “We need to look at how we deal with people that are on maternity leave,” beyond giving them a pay-out and getting them to sign a confidentiality clause in a settlement agreement, which is what happens in the majority of cases.

Q171 **Eddie Hughes:** Does anybody else have any thoughts on additional powers and why?

Barbara Cohen: My experience generally is that employers and service providers are much more concerned about reputation, unless the fine is going to be overwhelming. I know another committee is looking at non-



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disclosure agreements. Employers enter into non-disclosure agreements because they protect their reputation. They will pay out large sums of money on a confidential basis in order that nobody knows what they have done. I am not persuaded by a system of fines. For the commission to operate as an ombudsman means they need to set up a whole new skill base of investigation, which they do not currently have. Fines are not the answer. The EHRC gets from the employment tribunal all the discrimination cases and the outcomes. They could publish every month or every year the names of all the employers who have been found to discriminate by employment tribunals. That would be more persuasive, in some ways, than introducing fines.

Eddie Hughes: We in this Committee are not keen on non-disclosure agreements. I think I can safely say that.

Mike Smith: I agree with what Nick said, so I will not repeat it. I have already mentioned throughout the rest of my submission a number of suggested powers or changes to the Equality Act. There are two other points that have not been raised. The perception that the public sector equality duty was watered down has limited the commission's ability to get effective change within public bodies. I have certainly had it said to me by offices in public bodies that they do not need to do equality impact assessments and that they do not need to consider that anymore. It is now considerably harder to evidence that a public body has not acted in accordance with the public sector equality duty. The level of proof is much harder. I do not think public bodies take regard to the duty in any way, shape or form in the same way that they used to. Something could be done about supporting greater enforcement of that.

I also, in the last couple of evenings, was reading the tailored review. The commission had asked for five powers in its submission. They seemed pretty sensible suggestions to me—one on extending the human rights enforcement, two on section 20 and some on the notices or sanctions. It seems quite limited and measured. What I did not really understand was the response in the tailored review that it should use its other powers first to improve its effectiveness and impact. If the commission is saying that these five powers in themselves would improve effectiveness or impact, I did not see a logical reason not to consider that in some way. It did not quite make sense to me.

Nick Webster: I completely agree with Barbara about naming and shaming. That would definitely help.

Eddie Hughes: That would have some effect and impact.

Nick Webster: I think so, yes, because the two fundamental parts of a settlement agreement are, "You will not talk about the settlement agreement or what we have agreed within it. You will not talk about what happened to you at work. You will not talk about what we did to you at work, and you also will not sue us," and, "In return, you will get these particular terms." They are integral to any type of settlement agreement.



If there is a way of naming and shaming that does not impact upon the confidentiality—because you have to think about the confidentiality for the individual as well, which is incredibly important for people—that would be a useful additional concern.

Taking away confidentiality potentially exposes an individual to have to talk about what they went through. For lots of people, it is important that they do talk about that, but they talk about it in the right context and to certain individuals, not to the greater masses. The tribunal system changed fairly recently, with judgments being published online. Now you can go online and you can find out about tribunal outcomes. Previously that did not happen. If I had to bring a tribunal claim and somebody googled my name in the future, the first match might be LinkedIn and the second match would probably be the employment tribunal judgment. That is an additional concern for claimants, because they are very worried about anybody else—family members, future colleagues, future employers, their neighbours—knowing about whether they have a disability, whether they have been harassed at work or whether they have blown the whistle. These are things people want to keep confidential to themselves or to their legal adviser or their immediate family. There is a benefit, but I just needed to add some balance in terms of the confidentiality and individuals having it in an agreement.

Q172 Chair: The last set of questions is about how you identify strategic litigation cases. You have put forward very forcibly in the evidence today that the idea of critical mass strategic litigation could be an important way forward. How we identify those cases is important as well. The Committee on a number of occasions has been somewhat quizzical—and in fact you have reiterated it today—as to why the EHRC put so much store on having an in-house helpline. Particularly as Members of Parliament, we get approached every day of the week by people who have discrimination claims. Jess is not here today but she particularly has a backlog or a catalogue of people who have discrimination claims. We obviously have, through people like Nick, a network of expert legal advisers throughout the country who feed into the EHRC triaged cases, rather than people who might call up on a telephone line.

Why is there such an analogue answer in a digital world? Why is the telephone line still so critical when we could be using other ways of identifying? Jess in the past has said that if you put a note out on Twitter, you will get quite a lot of people coming forward with discrimination claims quite quickly. Could you explain in a little more detail why the telephone line is so much better than all of those other ways of identifying cases?

Nick Webster: It is the personal touch. Speaking to somebody is very important. I would be surprised if people tweeted, “I have suffered sexual harassment at work.”

Chair: They do. They may not to you but they do to us.



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Nick Webster: It may be one out of 10 people who have the confidence to do that. People may have more confidence picking up the phone and knowing that they are speaking to somebody who has a wealth of experience and expertise on their particular issue. It will go no further than that phone call unless they want it to.

Q173 **Chair:** Do you not fall into that category as a solicitor? People have confidence in you because you are a legal adviser, as opposed to a helpline that they have never heard of, because they have never heard of the EHRC.

Nick Webster: Precisely. If they were aware of the helpline, if they were aware of the EHRC, it would be more effective. For example, if somebody went to the CAB and said, "I have suffered discrimination," if the CAB could immediately turn around and say that there is a brilliant helpline, staffed by an expert that you will not have to pay for, they will pick up the phone, talk to you in confidence and guide you on what to do, that would be great. I do not think that is happening enough.

In terms of my work, we do get inquiries about discrimination and we will help where we can, but the central problem is funding. There is not funding available. Legal aid does not exist, really, for these types of things—it does not exist in employment law at all. There are limited circumstances where you can get advice for civil discrimination claims. Law centres are closing all the time. South West London Law Centres nearly closed last year, and it had over 1 million hits on its website. The majority of those people were looking for pro bono assistance because people cannot afford to pay for legal advice.

The big importance of the EHRC is the fact that it has funding and it can help people who would not be able to afford to pay for lawyers to help them or cannot get the expert advice they need at the CAB, unless they are lucky enough to live in a postcode that has a law centre that is still open and can help them. If there is a helpline that anybody in the country can call and they will be answered by somebody who knows what they are talking about and they do not have to pay for that advice, that would be very helpful.

Q174 **Chair:** Nick, do you not find it slightly odd that the EHRC cannot seem to find a way of communicating with the helpline that is commissioned to serve it? We have had the helpline in front of the Committee and they seem to be quite a competent set of people, yet the EHRC seems to find it fundamentally impossible to get data from them on cases. That is odd. A lot of people outsource those sorts of things.

Mike Smith: I am going to come to your point, Maria. First of all, I want to support everything Nick just said about the importance of having good-quality advice. If you go back to the Disability Rights Commission, they had a nationally recognised quality advice line that gave people soft knowledge, soft skills, moral support as well as signposting to what they could do, what their rights were and what they could do about it. It was



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well understood. A part of that was because it was integrated with the rest of the functions of the organisation. The EHRC is not a specialist in outsourcing arrangements, as far as I am aware. In an outsourcing arrangement, you have to define the information channels, the frequency of reporting and the exact nature of the substance. It is very hard to do that when there are soft skill elements to those conversations that frontline advisers will be having. That could be with members of the public trying to support them, coach them and guide them, but also it could be with second-tier support to advisers.

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

I am not saying that it is impossible if it is a separate entity, but it just does not logically make sense to me, in terms of the natural conversations that people have, in the same way that you will do a lot of your business through Committees but you also have conversations in the corridor or in the lobby. People work in fluid ways. Having an integrated helpline seems to me an obvious benefit in terms of that link between the Commission knowing what is happening in the real world and then being criticised for not having that knowledge.

Niall Crowley: It is more than the transfer of data. Central, as Mike is saying, is the relationships that are involved, not just with the individual. It is about the standing of the EHRC in the community. One person might ring and go back and talk to family and friends when they have rung a helpline. If they go back and start talking about having rung the EHRC, it increases its profile within that community. That is crucial to people's knowledge about the body and confidence in the body, and knowledge about the legislation and confidence in the legislation.

It works two ways. You talked about MPs being approached every day of the week. Parliamentarians tend to be very close to the ground because of that personal contact. The EHRC similarly needs to be close to the ground, and it needs that personal contact to be attuned to the situation and evolving situation within communities. That is why I would think it is important.

The final bit is about what Nick has said about the kind of dialogue. That is also important, because the point at which a case becomes strategic is not at the first point of contact. It can often be quite late in the life of a case that something suddenly emerged. In Ireland there was a hugely



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strategically impactful case on the race ground in terms of a woman who was dismissed for stealing fruit. It was cut and dried that she did not steal the fruit. It was cut and dried discrimination. It was really clear and run of the mill. What emerged during the case was hugely strategic, in that the dismissal procedure had not taken account of cultural difference, and a new interpretation of Irish equality law resulted, in terms of accommodating, in this case, language difference that had not been there before. That only emerged three-quarters of the way through the case, and the dialogue was crucial.

Mike Smith: In terms of some of the big cases such as *RBS v. Allen and Cordell v. FCO*, which was about failing to make reasonable adjustments, I do not believe those cases would have been supported in the way that the commission did had there not been some kind of mechanism for a practical conversation with that first-level advice line, reporting on that and then a different part of the organisation saying, "Hold on a minute, that is actually quite interesting," and linking it up; otherwise, it just becomes quite transactional. Certainly when I was there, there was evidence to show that the integrated nature allowed you to spot strategic things and influence the part of those cases in a way that you would not have done if you did not have the advice line in-house.

Q175 **Chair:** There is one very final, specific question from me. When you talk about critical mass in terms of cases, what are we talking about? Is it five, 10, 50 or 100? I know there is probably not one answer but, as an idea, are you talking about 50 cases a year to make a point?

Niall Crowley: You are talking about a lot of cases. It will depend on the jurisdiction but you are certainly not talking about five or six. You are talking about 50 to 100. You need a critical mass across the grounds and across the various issues of employment and service provision. You are talking about a high level of casework, yes.

Q176 **Chair:** From what Nick was saying before, the average case cost of bringing something forward in that respect again is an impossible question to answer, but I am hearing it is £50,000 to £100,000 per case.

Nick Webster: As you say, it is difficult to answer because each case is unique and it depends upon how the defendant defends it and how a court deals with it, but yes, it would not be unusual to be spending around £50,000 to pursue a claim. I had a claim last year and the cost was higher than that and the remedy was less than 10% of the outcome. Costs are a huge barrier for people taking on claims. It would be unusual to get anything off £30,000 when bringing a claim in an employment tribunal. That is an average. They can be a lot more than that. It can be double or triple that to bring a tribunal claim. An employment tribunal, in comparison to the civil courts, was designed to be a bit more straightforward and for litigants in person, but the way the rules are sometimes used by respondents means that you cannot really do it on your own. You do need legal representation in most cases. Lots of people benefit from insurance but insurance goes only so far. There is no legal



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aid for employment law. There used to be legal aid for employment law and it worked well.

Yes, unless you have a lot of money, you have insurance and it is enough or you have some other means of funding, that is a massive barrier. Employers know that and they will say that to their employees or their representatives: "Are you really going to spend that sort of money to bring this to court, or would you prefer that we gave you this much money and you went away right now?" It is a really hard decision for people, because they want to have their treatment decided by a court but a lot of people just cannot take that risk.

Chair: Thank you very much. That is really helpful. I thank you all for the time you have taken to be with us today. It has been an incredibly informative session with a really good panel of witnesses. Thank you on behalf of the whole Committee.