

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 27 March 2019

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Members present: Mrs Maria Miller (Chair); Angela Crawley; Eddie Hughes; Jess Phillips.

Questions 273–323

Witnesses

[I](#): Professor Sir David Metcalf CBE, Director of Labour Market Enforcement; Emily Eisenstein, Head of Policy and Stakeholder Engagement, Office of the Director of Labour Market Enforcement.

Examination of Witnesses

Witnesses: Professor Sir David Metcalf CBE and Emily Eisenstein.

Q273 Chair: Can I welcome you, and also people who are watching online or in the public gallery? We are hearing evidence today as part of our ongoing inquiry into enforcing the Equality Act: the law and the role of the EHRC. Today, we are delighted to be hearing from Professor Sir David Metcalf, who is Director of Labour Market Enforcement, and his colleague, Emily Eisenstein. We are really very grateful to you for coming along. You are doing a very new body of work for the Government, and we are really interested in hearing more about what you are doing and how that relates to the work we are doing around the EHRC.

As usual, we have a series of questions that colleagues are going to ask, and people will be coming and going. It is a bit of a busy day in Parliament today, so I apologise if there is quite a bit of toing and froing.

I am going to start off with a very simple question. Why was your role created? Tell us more.

Professor Sir David Metcalf: I will come full circle. About six or seven years ago, the then Government mulled over merging the state enforcement bodies to do with the labour market. It was probably held that it was a good thing to do, but it was held at the time that the practicalities were too difficult. Therefore, in lieu of that, they set up my role: Director of Labour Market Enforcement. "Strategy" is an overused word but the role is essentially to provide a strategy for the three bodies individually. As you know—and I think you are going to ask in due course—the Government are now, again, about to issue a consultation on whether the three bodies and possibly more should be merged.

My position on that has always been that, if we were starting with a blank sheet of paper, we would have only one inspectorate. If we can get over the practicalities of any merger or, indeed, any new body—I would prefer a new body—that is what we should have.

Q274 Chair: You said that the initial response was to not merge the bodies. Why was that decision taken?

Professor Sir David Metcalf: I do not know all the details but, for example, not everybody who worked for all these organisations was a civil servant. They had different terms and conditions. They were dotted all over the country. It was just held that the practicalities of doing it were a bit too difficult. My own view is that that is the wrong way of thinking about it. You should think, "Is it a sensible thing to do? Does it help firms in terms of their compliance and deterrence? Does it help workers in the same way?" Make the decision on that and you can grapple with the practicalities subsequently. The practicalities at that time were held to be all a bit too difficult.



Q275 **Chair:** Talk a little bit about why the Government chose to limit the role of labour market enforcement to the areas of agency workers, gangmasters and payment of the living wage, and not to look at other areas.

Professor Sir David Metcalf: They are three of the four main bodies. The fourth one is health and safety, which has more resources than the other three combined. As an aside, both HMRC and the gangmasters have had quite a big boost to their resources. HSE, essentially, deals with safety, whereas the others are enforcing wages or conditions. It was held that, probably, HSE was going to be a bit too big to put into the mix, but I do think that this will need looking at again. Particularly, you could imagine, for example, the working time components of the Health and Safety Executive going into the remit of a single body.

Q276 **Chair:** Has this limit on the role had any practical difficulties in terms of your development of a strategy that is effective?

Professor Sir David Metcalf: That is an interesting question, if I may say. One of the key things that we have tried to do—indeed, it is part of my remit—is to stop silo working and to get the bodies to work jointly on occasions. Working jointly has, essentially, two components: one is information and intelligence sharing; the other is joint operations. Mainly, one would think of this as joint intelligence sharing and information sharing, because the joint operations are very resource intensive.

In some senses, it has taken quite a lot of effort to get the three bodies to do more information sharing and, on occasion, work with other bodies. It is also the case now—and I am not saying it is me; the existence of my office has encouraged this—that they operate, for example, with local authorities, with the Health and Safety Executive, and sometimes with Immigration Enforcement, although I am rather careful to try to get Chinese walls with my role in that.

For example, there was quite a lot of publicity about an initiative in Leicester. Leicester is well known as having quite a strong non-compliant garment trade. Although it is well known, there was not, in a sense, that much intelligence about it, but it was pieced together. Because health and safety is allowed to kick the doors down, whereas the other three are not, health and safety sometimes led in this initiative, but it was joint. I am not really supposed to go into all the details of the outcomes yet, and we do not know them completely, but it has had at least one with the GLAA, on the Modern Slavery Act 2015, and quite a number on minimum wages.

Getting them to work jointly on occasion is clearly a worthwhile initiative, but joint working is not motherhood and apple pie. It depends. It is horses for courses. Sometimes it will be worthwhile; sometimes it is worth just sticking to your task.

Q277 **Chair:** Really, what you are pointing at there is that the different powers



HOUSE OF COMMONS

that different organisations have can be used effectively if they come together, and perhaps make up for the inconsistency in the powers as well.

Professor Sir David Metcalf: Yes. As you alluded to, should you go ahead with a merged body or a new body incorporating things, it will be a nice question as to whether some of the inspectors, for example, have different powers to the others. If you take presently the GLAA—the Gangmasters and Labour Abuse Authority—it has a group of people now with police powers. Labour market inspectors mostly do not have that. It is an open question for the Government to decide whether they would wish to retain that or whether, for example, the police powers should be given to the police. There are quite a lot of practical questions. It is easy to say, “Yes, let us merge them”, but the practical questions are quite serious.

Chair: That is really helpful.

Q278 **Eddie Hughes:** I think we are going to move smoothly onwards to this. Many of our witnesses have argued that employers and service providers are able to ignore the Equality Act 2010 without fear of challenge. Can lessons for enforcement of the Equality Act be drawn from your work on developing an effective model of labour market enforcement?

Professor Sir David Metcalf: Well, forgive me but although I know a little about the Equalities Act—not least because the wonderful secretariat managed to give a good briefing on it yesterday—I do not know very much about it. In some senses, my issue would be that the three bodies—and, indeed, health and safety—have not an army of inspectors, but quite a large number of inspectors going out into the field. Whether that is a route that the equality and human rights body would wish to follow, I am not sure, because, as I understand it, there are some people who will go and visit firms, but it is not operated in quite the same way.

If you wished to adopt the model that the three bodies have, for example, they each respond to complaints. I am sure the Chair will forgive me for saying that Ministers love standing up in Parliament saying, “We respond to all complaints”. That is not sensible policy.

Chair: We are here to scrutinise those Ministers, so do not worry about it.

Professor Sir David Metcalf: It is not a sensible policy because the most vulnerable workers are prone not to complain, so you have to have, intelligence-led, proactive, as well as complaint-led, enforcement.

Q279 **Eddie Hughes:** Let me interrupt because this is a valid point. In your most recent strategy, you are arguing for a balance between compliance and deterrence.

Professor Sir David Metcalf: Yes.

Q280 **Eddie Hughes:** How do you know when you have that balance?



Professor Sir David Metcalf: That is an impossible question to answer truthfully. We are just putting this year's strategy to bed this week, and one of the major issues we have confronted is that, in the Act that set the body up, they are supposed to have some idea of the extent of non-compliance. In the last report, we went into how much non-compliance there is with the minimum wage and how much non-compliance there is with holiday pay, so we set that up, but that was from official data and it is quite plausible that we are not picking up the material in the informal economy.

We have pretty good compliance with the three bodies but it, for sure, can be better. For example, in the strategy we are just completing right now, we go into a discussion. We are not absolutely adamant about this but we are raising questions: does HMRC focus too much on the low-hanging fruit? It has had substantial investigations into retail, for example. That covers a lot of workers, but the average wage arrears HMRC is finding are very modest—£60 or so. It may be that the more serious non-compliance is not getting quite enough resources. I shadowed serious non-compliance people up in Manchester and Preston for a bit. The compliance is quite good.

Q281 **Eddie Hughes:** Sorry, I am not sure I understand. You are suggesting that they are targeting the lower levels, but where else might they go? It strikes me that that is more likely to be where, although the amounts might be small, the numbers of people affected would be large.

Professor Sir David Metcalf: That is right. It is a question of balance. Take carwashes, nail bars, the care sector—that has been well turned over. There is quite a lot in construction, although not big building sites, and there are plenty of other sectors. I am not saying that they do not do that, but they have focused on some major retail firms. You are absolutely right: it is a nice question as to whether it is about the number of workers affected, or whether you should be going for the people who owe £5,000 rather than £50.

What I was going to say is that compliance is mostly pretty good. In some ways, I am a bit surprised that it is. This is a contrived figure and, if I may, I will qualify it. If you take the national minimum wage, the probability of an inspection for the average firm is once every 500 years. The fine is twice the wage arrears. That is not a strong incentive to comply. It is a contrived figure, because, to the extent that it is complaint-driven or intelligence-driven, there will be a probability of inspection maybe once every 25 years rather than once every 500. In terms of the resources and the fines, in some ways—and I have said this publicly—what surprises me is how many people comply.

My observation is that compliance is pretty good. We are law-abiding. But some firms have a business model that is not to comply. They are recidivists. They will be closed down and set up again the next day. That is a good example of joined-up Government. We have an agreement now between HMRC and the Insolvency Service that they will work together to



HOUSE OF COMMONS

try to stop that sort of phoenixing. It is hard to know exactly how good the compliance is. I think it is pretty good but it can be made better.

Q282 **Eddie Hughes:** Can we briefly go back to when you said those people who are most vulnerable are least likely to complain and, therefore, hardest to access? How do we address that? How do we go about reaching those vulnerable workers?

Professor Sir David Metcalf: That is absolutely right. One considerable advantage of a single body is that we would have one route in. Then it would become known what the route in is, whereas, right now, there are quite a plethora of routes. Oftentimes, people will go to the Citizens Advice bureaux first of all and then find a way in.

Q283 **Eddie Hughes:** Should there be or is there a helpline?

Professor Sir David Metcalf: There is and, indeed, for the minimum wage, you can have an online form, which will get processed. Over and above the single portal, if we can get improved intelligence sharing and information sharing among the three bodies, and also, for example, with local authorities and other state bodies—we have had quite close dealings with Newham local authority, which has a data warehouse, and we have encouraged it to work with HMRC to do things—we can make sure that vulnerable workers get looked at and looked after rather better than they probably have been.

Q284 **Eddie Hughes:** That data would be published and we would understand who the greatest offenders were.

Professor Sir David Metcalf: Yes. This is not an HMRC policy; it is a BEIS policy, particularly to do with the minimum wage, and naming and shaming. The GLAA is pretty assiduous in its publicity. The employment agencies body is really a tiddler and does not have many resources at this stage, but it does publish lists of who it disqualifies.

Q285 **Eddie Hughes:** A number of the recommendations in your 2018-19 strategy are similar to those that this Committee has made, such as mandatory statements of rights at the start of employment or more severe financial penalties. Remedies under the Equality Act were intended as compensation for the individual rather than as penalties for non-compliance. How important are financial penalties as a punishment for non-compliance to enforcing labour market rights?

Professor Sir David Metcalf: The Government rejected my recommendation. I come at it as an economist, and I think there is a trade-off. If you have lots of enforcement resources, you do not need high penalties. It is the same as road traffic speeding. If you have lots of resources, you do not need high penalties. If you do not have the resources, you need higher penalties. To be fair, HMRC has had its enforcement resources pretty much doubled over a three-year period, up to £25 million now. The GLAA has had a big boost but that is because it



HOUSE OF COMMONS

has taken on these police powers, and it has gone from £4 million to £7 million in a two-year period.

In these troubled times, it probably would not have found favour if, in the very first strategy, I said, "We need more enforcement resources". Indeed, I wanted to really see how the enforcement resources were being used, first of all, as they expanded. Therefore, I suggested that the fines are too low. The average wage arrears last year were £75, so the average fine per employee will be £150. That strikes me as too low. BEIS says it has had advice that, if it was to increase the multiplier, it could be disproportionate. Therefore, although that was a recommendation, it was rejected.

Q286 **Chair:** Disproportionate on what basis?

Professor Sir David Metcalf: There is a lot of hand waving that goes on. It sort of comes over in this way. To be fair, they have gone from 50% to 100% of the wage arrears, and up to 200% of the wage arrears, in quite a short time. It is legitimate to say, "Let us evaluate as we have gone from 50% to 100%, up to 200%". Although they have not done such an evaluation, it would be legitimate to say that.

They then go on to say, "If it was five times the arrears"—that was a figure that I suggested could be in the right ballpark—"it becomes more like a criminal offence". Therefore, the legal advice that they have had is that going to 200%, twice the wage arrears, is pretty tough.

Q287 **Chair:** Before we go on to the next section, in your view, could the Equality Act be effectively enforced using the current approach of individual litigation combined with a strategic regulator as the enforcement body? Do you find that a convincing model of enforcement?

Professor Sir David Metcalf: Yes. Forgive me, but I do not know how much of the present Act is enforced through you saying to the BBC, "We are going to investigate your gender pay gap", as against going through the tribunals. Some combination of the two is very useful. Most of the work with minimum wages or with gangmasters does not end up at tribunal. A bit of it does, perhaps sometimes when they are not getting their wage arrears, but it is mostly done by the bodies.

Q288 **Chair:** In terms of what, direct enforcement?

Professor Sir David Metcalf: Yes. HMRC will say to Brand X, "You have a problem with uniforms and salary sacrifice schemes. You are not paying the minimum wage. Therefore, you have to pay the wage arrears, possibly going back six years, and we are fining you X". It is, essentially, done via the state enforcement body rather than through the tribunal.

Q289 **Chair:** Through powers to fine organisations, which HMRC does have.

Professor Sir David Metcalf: Investigate and fine, yes.

Q290 **Angela Crawley:** We have covered quite a few of these points, but I



HOUSE OF COMMONS

wanted to ask specifically about the Equality Act. To what extent has the Equality Act been part of your strategy for improving the enforcement of workers' rights?

Professor Sir David Metcalf: Hardly at all in a direct sense, because I have a very specific remit. The remit was under the 2016 Immigration Act, and it is to produce an annual strategy for the three bodies, an annual report to report on the extent of non-compliance, and maybe one other thing.

Emily Eisenstein: Any other reports.

Professor Sir David Metcalf: Yes, we can be asked to do random reports. I have thought about this. I thought, when I spoke to your Committee Clerk, maybe I had been remiss. We meet loads of stakeholders. This year, we were doing deep investigations into warehousing in hotels and restaurants, so huge numbers of stakeholders from there, for example. It crossed my mind that maybe I have been remiss in not reaching out and talking to the equalities and human rights people. When we discussed it in the team, we thought no, because it is not part of the remit. I would be very happy to talk to them; it goes without saying. I am sure I could learn something and, equally, they could learn from our experience, but the remit is very specific.

Q291 **Angela Crawley:** Does the development of your strategy that you have outlined take into account the duties of the enforcement bodies within your remit under the public sector equality duty?

Professor Sir David Metcalf: No, not directly. If you take HMRC and it is doing the minimum wage, in some senses that will have an indirect overlap with your work because women are disproportionately covered by the national minimum wage. Making sure that people who should be getting the minimum wage are getting it is, de facto, helping to reduce discrimination, when they do that. That is not how I would think about it or, indeed, how they would think about it. They would say, "Is the worker getting the minimum wage?" but because it would disproportionately impact on women, by implication, it therefore has some indirect effect on discrimination.

Q292 **Chair:** What about the particular issue of the public sector equality duty? They are public bodies, so they have a public sector equality duty.

Professor Sir David Metcalf: Sorry, I do not know what that is. Could you just explain what it is?

Q293 **Chair:** Let us not even go there. That is an answer in itself. It is a duty to take into consideration issues of equality. All public sector organisations have an obligation under law to think about how they can improve issues around equality. The fact that you are not cognisant or aware of that is quite telling.



Professor Sir David Metcalf: It may well be. Let us stick with the minimum wage, for a minute, because that is the biggest of the three bodies. HMRC does the enforcement on behalf of BEIS under what is called a service-level agreement. They negotiate it, and I have some minor role in the background, but then they do what they are told, as it were. It may very well be that the public sector requirement is there in the background but it is not something I have ever come across. I know what is in the service-level agreement but—

Q294 **Chair:** It is in the law.

Professor Sir David Metcalf: Yes, I am sure, but BEIS has to do—

Q295 **Chair:** Organisations like HMRC are all subject to the public sector equality duty, so the strategy that they are following should also probably be looking at that. That might be something that you want to come back to us on.

Professor Sir David Metcalf: I am always keen to learn from experience. Frankly, it is not something that has ever come up.

Emily Eisenstein: No, we have not seen it in the strategy.

Q296 **Angela Crawley:** You have mentioned the national minimum wage. Are there any other examples of evidence of discrimination in your enforcement work that you have considered to be within the remit of the enforcement bodies that you work with? Are there any examples of any other areas where you think you have tackled discrimination?

Professor Sir David Metcalf: No, again, not directly. If you were to take the Employment Agency Inspectorate, it would look to make sure that people are not being charged wrongly by the agencies, and to make sure that people are getting their holiday pay, which, oftentimes, they are not. As I understand it, it does not especially go and say, "Are men and women doing the same jobs and getting the same wages?" That is not something that it especially looks for but, on the basis of what you are saying, perhaps it should be doing that.

Q297 **Angela Crawley:** That is fair. My next question was going to be how that could be done better in the future, but you acknowledge that that is not an area that you have come across before and it is something that you could look at. Specifically with relation to your relationship with the Equality and Human Rights Commission, it sounds like you have not had a lot of dialogue.

Professor Sir David Metcalf: Any.

Q298 **Angela Crawley:** None. The EHRC should be part of the information hub that you work with, and it should inform some of the work that you do. Why do you think you have not been in communication with it before? Why do you think you have not had that dialogue?



HOUSE OF COMMONS

Professor Sir David Metcalf: As I said, when I spoke to the Committee Clerk, we did mull over whether I or we had been remiss in not having links. There may very well be a case for the information hub having some connection with your body.

Q299 **Angela Crawley:** Is it not one of your key stakeholders listed in the strategy?

Professor Sir David Metcalf: No.

Q300 **Angela Crawley:** Why not?

Professor Sir David Metcalf: It is because I have this very specific remit, but you are absolutely right. It is quite a difficult job, trying to build up this information hub. We have reached out. We have some police involved and the National Crime Agency involved in it. Sometimes, some local authorities come. Therefore, I will make sure that the secretariat gets in touch with the relevant people to see whether it would be helpful to involve colleagues from the equality and human rights part of that, yes.

Q301 **Chair:** Which Minister do you report to?

Professor Sir David Metcalf: Both the Home Secretary and the BEIS Secretary.

Q302 **Chair:** The Home Secretary and the BEIS Secretary, so Sajid Javid and Greg Clark. Has either of those Ministers ever talked to you about the importance of outlawing discrimination as part of the work that you do?

Professor Sir David Metcalf: I have not seen Sajid Javid yet, but I did see Amber Rudd when she was Home Sec.

Q303 **Chair:** And she was Women's Minister at the time, so did she raise the issue of discrimination?

Professor Sir David Metcalf: She will have, but not directly. She would not have said, "It is important to make sure we do not have discrimination". She would have said, "It is important to enforce the minimum wage because it disproportionately affects women", rather than specifically mentioning discrimination. When I saw Greg Clark a couple of months ago, we went through a lot of last year's material and a lot of the material that is going to be in this strategy, and we had a discussion about the single enforcement body. We did not discuss discrimination.

Q304 **Chair:** When you have met those Ministers, they have never talked to you about the importance of complying with the public sector equality duty under the Equality Act, because you are dealing with public organisations.

Professor Sir David Metcalf: They have not, no, but I would not want to blame the Ministers. It is me who is remiss for not knowing it. I just did not know it.



Chair: No one is asking you to do a job, are they?

Q305 **Jess Phillips:** Keeping on the old Secretaries of State, and specifically the BEIS Secretary of State—BEIS has announced its intention to consult broadly on establishing a new body to bring together the relevant enforcement functions of the Gangmasters and Labour Abuse Authority, HMRC and the Employment Agency Standards Inspectorate. They will have to come up with a long acronym. What discussions have you had with the Secretary of State about the remit for this potential new body?

Professor Sir David Metcalf: I probably should add for completeness that he was once a student of mine.

Chair: In your august institution, which I was also an undergraduate at, so that is fine. I will declare an interest as well.

Jess Phillips: We all declare different interests.

Professor Sir David Metcalf: When I met him to go through the Government's response to last year's strategy, what is in this year's strategy and the possibility of a single enforcement body, he was very keen to talk about the possibility of a single enforcement body, possibly recognising that, as I said at the very beginning, if you were starting with a blank sheet of paper, you would go for a single body or inspectorate. There are considerable advantages with that.

We went through some of the issues where that would be helpful, which would be one route in, trying to make sure that you then get better compliance and that the deterrent effect would be stronger. We discussed the sorts of things that you would try to discuss in terms of making the case for the single body.

Q306 **Jess Phillips:** I suppose I want to know whether you expect significant changes in the way that it will be used as a single body to enforce employment rights.

Professor Sir David Metcalf: It would mean that, where part of my job is to encourage joint working among the three bodies, that would, in a sense, be automatic.

Q307 **Jess Phillips:** Would it be a single enforcement body?

Professor Sir David Metcalf: The Government consultation paper, which they are working on—as I understand it, they are trying to get it out before Easter, but I doubt they will—

Jess Phillips: They are a bit busy.

Professor Sir David Metcalf: It is about a single body, yes. You could, for example, merge the two that deal with labour supply—the gangmasters and the employment agencies—without going for the single body, but the intention is to have a single body. Of course, that raises questions about, for example, whether what your body currently deals with—the labour market stuff—could also be within the remit of the body.



HOUSE OF COMMONS

Q308 **Jess Phillips:** To your knowledge, have there been any conversations about whether a single labour market enforcement body should have powers to enforce employment provisions of the Equality Act?

Professor Sir David Metcalf: I do not know but, frankly, I would be surprised if there had been, because the officials' view is that they have enough on their plate trying to deal with the three bodies, and possibly a bit of health and safety, the working time things. I do not know for certain but I would be surprised. There are all sorts of areas that they will need to take a view on, which I doubt there has been much discussion of. For example, does the ACAS helpline come in under this body?

Q309 **Jess Phillips:** You have given a lot of examples of the most vulnerable workers, such as nail bars and carwashes. As a woman who has her nails done and as a constituency MP in a diverse area, I have lots of both of these institutions that you have highlighted. Is it not the case that, of the enforcement that you are talking about, even specifically about the minimum wage, the vast majority of people falling under the line have at least one of the protected characteristics of the Equality Act?

Professor Sir David Metcalf: I should think they do, yes. I would be surprised if they did not.

Q310 **Jess Phillips:** Would making a single enforcement body, looking at trends of migrant women's work, for example, or eastern European men's labour, potentially help throw a better light on future strategies rather than just looking at all people who do not have the minimum wage?

Professor Sir David Metcalf: It may well do.

Jess Phillips: It is not a criticism. I do not wish to criticise.

Professor Sir David Metcalf: No, it is all right. It is not that. What I am thinking is that it takes you down a slightly different channel as compared with what they have been doing and what my remit is. It is not to say that it is not worth thinking about.

Q311 **Chair:** Going back to the limited-resources problem that you have, if you are then using resources to target areas where you know it is most likely that you are going to encounter issues around the minimum wage, equal pay and things like that, because you are looking at sectors of the market which are mostly going to be employing certain groups of people, it would help to target your resources and to target which environment.

Professor Sir David Metcalf: Absolutely, and that is one reason I was thinking, when you were saying it, that it would be good to have a link with your colleagues in the information hub. The way they do the at-risk sectors now is called MoRiLE, which is a police thing for ranking risks. The three bodies put their input in. The National Crime Agency puts its input in. We have some of our own information. Then we produce a ranking by sectors, and having extra information on that would, indeed, be helpful.

Q312 **Jess Phillips:** Would you support the inclusion of rights under the



HOUSE OF COMMONS

Equality Act 2010 within the remit of a single employment rights enforcement body?

Professor Sir David Metcalf: At this stage, I do not know. That would require quite a lot of thought.

Jess Phillips: You do not have to answer now.

Professor Sir David Metcalf: No, but it is a very interesting question. Equality and human rights is not just the labour market. Are we saying that we will take the labour market stuff away from that and then put it under the single body to do with all the other labour market things, for example? I asked the secretariat if they could very quickly find out about other countries, and we have managed to find a bit about Australia and about Canada. Essentially, both of those have separate labour market enforcement bodies and human rights activity. In some senses, we are not in any way unusual, but there may well be a case—and it needs some thought—to say you take away the labour market bit of equalities and human rights, and put that under the single body.

Q313 **Jess Phillips:** I am certainly not advocating getting rid of the specific arm that our equality and human rights have in the system, as we are describing, but I suppose that the rights under the Equality Act specifically would form part of the work of the single body.

Professor Sir David Metcalf: They could do but, if I may, I would rather say that that is not a matter for me. That is a matter for the politicians to decide.

Jess Phillips: That is absolutely fine for you to say that.

Q314 **Chair:** You see that as a political decision but you think it is worthy of consideration.

Professor Sir David Metcalf: Absolutely.

Q315 **Chair:** That is really helpful. Could I just press you on a couple of issues around the Equality and Human Rights Commission? As you rightly say, it is a human rights commission but it also has a regulatory function in terms of enforcing the Equality Act, so it has two very different functions here. The reason for our report is to grapple with how it can be effective in enforcing the Equality Act because, as we have set out right up front, its effectiveness is really questionable. We are quite interested, from your experience, in what the most important actions are that the commission could take to prevent and tackle discrimination by employers. You have extensive experience in this through the labour market enforcement strategy role. Are there particular things that you think the commission could be doing to prevent and tackle discrimination by employers?

Professor Sir David Metcalf: That is a very big question. It has almost been the centrepiece of all our work. You have to try to get the compliance. In my experience, most firms want to comply with whatever the regulations are, but some are recalcitrant. For them, you have to



have proper deterrents. It is about trying to get the right combination. How do we get compliance? If I may, I will not go to discrimination but will use the minimum wage as an example. The regulations are too complicated. They are all over the place. They are not in one bundle. There is very little sector guidance, for example. BEIS and HMRC could be working with trade bodies and trade unions to provide guidance on sectors. The British Retail Consortium would be falling over itself to do that, or Unison would be for the care sector, for example. Making it easy to comply in the first instance is very important.

I visited the Pensions Regulator down in Brighton, and the general story is that the Pensions Regulator does an excellent job in making it easy to comply with auto-enrolment, for example. Then you need the penalties for the recalcitrant firms. My own view is that, as I have said, the fines are not quite high enough, but you also need some prosecutions, and you should give the prosecutions, when they come off, considerable publicity. For the minimum wage, there have not been 20 prosecutions in 20 years. The CPS decides this and it has a high threshold to take a prosecution.

We now have, in the enforcement laws, something that would perhaps—I do not know—spill over into the labour market part of your area. The three bodies can issue a labour market undertaking, so the firm has to undertake to put its house in order. The body then says, “I am coming back three months later”. If you have not put your house in order, it then issues an order to you. If you do not abide by that order, you can go to court and that will then carry a two-year jail sentence. This is very important.

Q316 **Chair:** Where is that set out? Which piece of legislation governs that?

Professor Sir David Metcalf: It is the 2016 Immigration Act. It is called labour market undertakings and orders. It is an important piece of legislation because, right now, you have 10 years for modern slavery, and civil penalties of £150. Now you have something in the middle. There has been some teething trouble with this but the bodies are all in the process of taking some of these cases. Those will be very important in terms of generating publicity in order to get deterrence. My response is this: to try to get the compliance, make it easy to comply, and then come down heavily on the ones that are not complying.

Q317 **Chair:** Would pursuing a critical mass of discrimination cases, as suggested by some of the witnesses we have heard from, be an effective deterrent?

Professor Sir David Metcalf: What penalty do they get now?

Q318 **Chair:** The strategy that is pursued now by the EHRC is overwhelmingly to do test cases to show where the edge of the law lies: what is beyond the law and what is within the law. Its strategy is to have a series of test cases. Witnesses have said to us, “That is all well and good. That can help clarify the law, but if you have a critical mass of cases that shows



HOUSE OF COMMONS

there are consequences to not abiding by the law, that could be better”, although the cost of doing that is quite high to the organisation.

Professor Sir David Metcalf: Let me put it this way: most firms, and particularly brand names, are very jealous of their reputation. For example, on the minimum wage, they do not want to be named and shamed. Alas, there will be some firms that just do not care one way or the other. If you have your discrimination cases and you can make good publicity about them, it would, indeed, have a deterrent effect.

Q319 **Chair:** The use of reputational penalties like that—

Professor Sir David Metcalf: It has a very strong impact, yes.

Q320 **Chair:** As you identify in your most recent strategy, the agencies within your remit can use a wide variety of powers and penalties, ranging from fines to naming and shaming, and to criminal prosecutions. Is it an important aspect of your work that you have a wide range of powers available to you that you can use as appropriate?

Professor Sir David Metcalf: It is not up to me but to the bodies, but absolutely it is, with the proviso that my view is that the fines are a bit too low, although I stand corrected, if BEIS’s argument is correct that it could be disproportionate to go higher. The new, potential two-year offence will turn out to be very important. You have to get some prosecutions to have a deterrent effect, but the existence of these wide powers is important. Within the last strategy, we also recommended that the employment agencies be given civil penalty powers, and that will be quite important as well. They are, essentially, all compliance-driven and do not take any prosecutions.

Q321 **Chair:** I just want to finish by talking about one particular area that we have had raised with us in terms of issues around enforcement, which is maternity discrimination: women who are pregnant being discriminated against, made redundant or forced out of jobs. Women tell us that around 50,000 a year leave their jobs simply because they are pregnant. It is wrong, it is against the law, and it is a huge waste of people as a resource. Could you see that fitting with the sort of work that you are dealing with in terms of enforcement? These are individuals who, if they thought there was a track through, would come forward but, at the moment, their main option is going to a tribunal, which could take many months and years, and cost them a lot of money. That is one particular, very discrete group of people for whom a remedy is really quite important.

Professor Sir David Metcalf: Yes. That is a more difficult case. If we were to take a couple of “easier” bits, maternity pay and holiday pay seem to fall naturally under the remit of any merged or new inspectorate. Therefore, you could see what you have just described—maternity discrimination—as coming under that remit. It strikes me that the investigations would be that much more difficult, but that is not a reason



HOUSE OF COMMONS

for not doing it. I would like to think about this and discuss the pros and cons of it, but in principle, why not?

Q322 Chair: It would be incredibly helpful to the Committee if you were able to ponder our conversation a little more and maybe, following a conversation with the Equality and Human Rights Commission, either meeting again more informally or through correspondence, set out for us where you think there might be a role for enforcement of the Equality Act through this new single organisation. There seem to be some areas where there might be overlap but I understand your cautiousness on this, because setting up the new organisation is a difficult job in its own right.

Professor Sir David Metcalf: I would be very happy to do that but with one proviso: this week, we are putting strategy 2 to bed and I cannot do anything this week.

Q323 Chair: Do not worry. I was not at all dreaming that I would ask you with that short a timeframe, but maybe have a conversation with Tansy or other members of staff to understand when that might be possible. From our conversation today and having read your strategy, there is a lot of synergy, at the very least in terms of learning how we can enforce better and how we can enforce a more compliant environment, all the way through to, potentially, the work of this new organisation.

It has been an incredibly helpful conversation. Thank you very much for your time, for coming in front of a Committee that you may not have expected to be in front of, and for sharing with us the work that you are doing.

Professor Sir David Metcalf: No, thank you very much for the hearing. It was very good. I always like the theatre of these events.

Chair: We are sorry about the theatre.