

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 8 May 2019

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[Watch the meeting](#)

Members present: Mrs Maria Miller (Chair); Philip Davies; Vicky Ford; Eddie Hughes.

Questions 377–463

Witnesses

[I](#): Melanie Field, Executive Director, Equality and Human Rights Commission; and Stephen Lodge, Principal Lawyer, Equality and Human Rights Commission.

Written evidence from witnesses:

- [Equality and Human Rights Commission](#)

Examination of witnesses

Witnesses: Melanie Field, Executive Director, Equality and Human Rights Commission; and Stephen Lodge, Principal Lawyer, Equality and Human Rights Commission.

Q377 Chair: We are rather thin on the ground today, but it is quality, not quantity that counts. We have a couple of other people joining us in a little while, but we wanted to crack on as we have so much to cover. Huge thanks to you both for coming in and sharing your expertise. That is really where this session lies—it is about understanding your expertise about what the organisation is delivering. We will be having your hierarchy in at a later date to answer for the effectiveness of the organisation, but that is not really what we are talking about today; we are talking today about the actual workings of it. Thank you for your time. Before we start with our questions, do you just want to say your names and your positions within the EHRC?

Melanie Field: I am Melanie Field. I am an executive director at the commission.

Stephen Lodge: I am Stephen Lodge. I am a senior principal lawyer.

Chair: Brilliant. That is wonderful, thank you. Philip is going to start our questions.

Q378 Philip Davies: The main way that the rights in the Equality Act are enforced is through individuals taking legal action, which differs from other rights, such as the minimum wage, which is enforced by HMRC, rather than individuals taking legal action themselves or having to do so. What is your view on the merits or otherwise of the Equality Act relying on individuals enforcing their rights following a breach?

Melanie Field: It is an interesting question, and I think there are challenges in both models. I think we would acknowledge that there are inherent challenges in relying on individuals, particularly those who are already disadvantaged because they are at risk of discrimination, to bring their own cases. However, previously in this country we had a system where there were race relations boards that conducted conciliation of matters, and we see similar models to that in other countries, such as the United States. The administrative cost of that is quite high. I think it is about ensuring that whatever system you have—this is the system that Parliament has determined in this country—the support is there to make the system work as well as possible.

Q379 Philip Davies: You say there are merits and problems on both sides, but if you had a choice and it was your decision, which model would you prefer? Would you prefer to see it as it is, or would you prefer to see it changed?



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Melanie Field: I think I would like to see improvements to the system we have to make it work better. We have the system of individual claims, but we also have a slightly mixed model, in that we at the commission have some enforcement powers, so we can support some cases. We have a legal aid system, advice agencies and conciliation services, so there is scope to make sure that those systems work well for claimants.

Q380 **Philip Davies:** Stephen, do you have a different perspective?

Stephen Lodge: No. As Melanie has said, there is scope perhaps for improving some of the enforcement mechanisms that do not rely on individual action. For example, with the gender pay gap, there could be scope for looking at whether the commission should have the power to fine for non-compliance there. That is the sort of thing that is a black and white issue, generally speaking. It is very much suitable for an enforcement body. If we contrast that with a complex discrimination case, such as a disability discrimination case where you have a lot of evidence, that is the kind of thing that probably is not very suitable for an enforcement body to be making a decision on, because it is essentially a quasi-judicial decision that is being made.

Q381 **Philip Davies:** The public sector equality duty was meant to shift the burden of tackling discrimination from the individual and on to the organisation, yet we still see evidence of discrimination in public sector organisations, most notably with the BBC and the pay of women compared with men. Do those issues and that evidence represent a failure of the implementation of the duty, or is there something lacking in the duty itself?

Melanie Field: I think we would say that there is something lacking in the duty itself, in so far as the specific duties in place are very light touch and do not really drive organisations to tackle the big issues that are facing them. We would like to see stronger specific duties, which direct organisations to set clear objectives and take action to tackle the big issues that we know are there. We produce a regular report on the state of equality and human rights in Britain called "Is Britain Fairer?" where we identify some of the key challenges, the gender pay gap being one. We would want to see organisations across the public sector focusing on driving change on those issues.

Q382 **Philip Davies:** So you want to see the duties strengthened, and you think that would do the trick at such organisations.

Melanie Field: I don't think that anything provides a complete answer. We would like to see a culture of compliance with the standards that society has set through the Equality Act. The most effective way of tackling discrimination is for people to comply with the law. Unfortunately, people do not comply with the law, be it through ignorance or by design. That is why we need to have strong enforcement. As you say, the public sector equality duty is ideally a lever to try to prevent discrimination from happening in the first place. It could be a more effective lever; I am not saying that it could ever be a complete answer.



Q383 **Philip Davies:** So you would like to see stronger enforcement measures as well.

Melanie Field: We have stronger enforcement measures in relation to the specific duties, so we can conduct assessments and issue compliance notices. The problem we have is that the specific duties as they stand do not really give us anything substantive to bite on. If we had stronger duties, it would mean that when we do that enforcement, it would be more meaningful in terms of actually tackling the inequalities that we see across society.

Q384 **Philip Davies:** In previous inquiries, we have looked at enforcement through specific protected characteristics—pregnancy, maternity, age discrimination and things like that. Do the same enforcement issues tend to occur across all protected characteristics, or do they tend to be specific to each one?

Stephen Lodge: The nature of discrimination tends to vary across different protected characteristics. I am a little unclear about whether we are talking about it being a problem with different kinds of discrimination, or a problem with different kinds of enforcement. The enforcement mechanisms are common across all protected characteristics.

Melanie Field: I guess disability discrimination is an obvious example where the requirements are slightly different. There is a positive duty to make reasonable adjustments, and a failure to do that constitutes discrimination. That is different in nature from simply treating someone less favourably.

Q385 **Philip Davies:** Are some easier to identify and clearly see that something is an issue? Are some easier to identify or mask? Is it easier to identify across all of them and therefore put them right, or, in sum, is it more difficult to put them right because it is difficult to get a grip of the issue?

Stephen Lodge: There is an intelligence issue in terms of us as an organisation getting information about different protected characteristics—for example, we had age discrimination as a priority aim, but despite our best endeavours, we were not able to get any significant casework, because we were not able to identify cases.

Q386 **Philip Davies:** Is that because they are difficult to prove?

Stephen Lodge: I think it was literally because we could not find the cases. We were not getting the intelligence about individuals who were affected.

Q387 **Philip Davies:** What did you put that down to? Did you put it down to the fact that it was not occurring to the extent that you had thought, or was there another reason why there was resistance from people to come forward?

Stephen Lodge: I did not personally work on that area, so I do not have individual knowledge about. It feeds into this point about the helpline: it is essential to us that we have good intelligence coming through from the



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helpline. Perhaps if we were running the helpline, it would be easier for us to identify our priority areas and to find cases to take.

Q388 Philip Davies: Do you not need better joined-up thinking at EHRC, so that you know all this information? Should you not all be sharing this kind of information rather than working in silos? “We don’t know because we don’t run the helpline.” Somebody there must do. Surely you must be able to get the information out of these people?

Melanie Field: The helpline is commissioned by the Government. We sit on a project steering board that seeks to ensure that we get the information we need, but the contract is actually managed by the Government Equalities Office. Because it is run by a third-party contractor, and although they are very willing to give us information, it means that we need to anticipate the information that we are going to need and then ask them for that specific information, rather than them understanding our business and being able to anticipate what will be of interest to us. It is a slightly arm’s length relationship.

Q389 Chair: When you ran the helpline, was it all rosy in the garden? Was it an amazing organisation that had its tentacles in everything? From what Stephen has just said, that was not the case. The helpline was with EHRC from 2012, and the things you are talking about, by definition—age discrimination cases—will have predated that. Why do you think going back to having the helpline in-house will solve all the problems EHRC faces?

Melanie Field: I think we would just like a closer relationship with the helpline so that that intelligence is more readily available.

Q390 Chair: With respect, we had the helpline in front of us for an entire session of our Committee, to sit down with your bosses and to resolve this. If we hear that it is still not resolved, that will be quite disappointing.

Melanie Field: We have been in dialogue with the helpline, and we are entering into different arrangements whereby we get raw data from them that we can analyse ourselves, which we think will be an improvement. I do not pretend that when we ran the helpline everything in the garden was rosy. That is clearly why there were concerns about the efficiency of it and why the decision was taken to move to a different arrangement. We are in a different place now, and we think that there is an opportunity to have that close relationship and to capitalise on the information that is there to inform what we want to do—more enforcement—and that will support our wish to do that.

Q391 Philip Davies: Are you saying that you seek information from them and they do not provide the information that you seek?

Melanie Field: I think what I am saying is that they are responsive to requests for information, but if we cannot anticipate the nature of the information that we will want—because we don’t know what is coming in—there is always a kind of time lag until we know what we will be interested in, because of what is happening on the ground. It is just about that



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slightly detached relationship, which I think imposes a bit of a barrier in the flow of information.

Q392 **Chair:** In these times of real-time information on telephone calls—many retailers in this country use telephone lines operated by other organisations to conduct their business, which is sometimes quite sensitive—have you examined how you might have a management information system in place, to ensure that you get that real-time intelligence from the call system? I think this is quite basic in many contracts. Mr Davies, I think you have experience of retail organisations; I do too. This is quite basic information that you would get.

Melanie Field: Certainly when GEO was drawing up the specification, we were able to feed into that, but the specification was within the Government's gift at the end of the day. They are obviously concerned about costs, therefore we did not necessarily get everything that we wanted in that specification. We have constructive dialogue with GEO and the helpline and are trying to make the best of the situation that we have.

Eddie Hughes: Is it possible to design a system of enforcement for equality rights that does not place the burden for enforcement on individuals?

Stephen Lodge: Yes. For example, there is the American system. It relies on a claimant bringing a complaint to the American administrative body, but once they do that the American body—I am afraid I do not have its name at the tip of my fingers—

Q393 **Eddie Hughes:** For example, should an organisation that advocates collectively for a group or on behalf of others be able to do that?

Melanie Field: I think it comes down to what solution you are trying to seek. We would certainly support the idea of matters being conciliated. If somebody has an employment complaint, we would want the employer to seek to resolve that complaint. We think things such as statutory questionnaires that used to exist supported that process. They brought the information out into the open and gave a basis for that discussion. Where that is not possible, matters go to ACAS and there is an attempt to conciliate them there. If they cannot be resolved, they could end up in the employment tribunal, which is obviously undesirable. You could have a system where a body went through that process and tried to resolve the dispute and come to a judgment—as Steve said, that is a quasi-judicial decision, and you would then need to consider whether it was binding or advisory and could be appealed in the courts.

Q394 **Eddie Hughes:** Sorry, I think I am losing the thread of the answer to the question. Is it possible to design a system that removes the burden on individuals? Stephen referred to America. I am thinking about the idea of class actions—

Melanie Field: I see what you mean. Certainly, yes, there are systems where you can have representative and class actions, and where bodies



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such as the Equality and Human Rights Commission, trade unions, or interest groups could bring that.

Q395 **Eddie Hughes:** And does the idea of class action work for the enforcement of equality rights?

Melanie Field: It is not available in the jurisdiction at the moment. It is something that was considered when the Equality Act 2010 was drawn up, and the Government decided not to make that provision.

Q396 **Eddie Hughes:** Do you know why, or is that a step too far?

Melanie Field: There were concerns that it could promote a litigation culture. There are different types of system. You can bring a claim on behalf of a group of unnamed individuals in a particular category, or you can bring a claim on behalf of a group of named individuals who have experienced discrimination.

Q397 **Eddie Hughes:** So you can under the current system?

Melanie Field: No, I am saying that, in theory, you could develop a system that would permit that. We think it would be worth considering that issue again—it would be a way of removing that burden on individuals.

Q398 **Chair:** Could you do a pilot where you took an individual issue where you knew there were significant problems? Your research has identified that maternity discrimination is a significant problem in this country, but we know very few people take cases through the tribunals, either because they are unaware of them, or because their employer buys them off. Would you be able to pilot a system where you could take a group case through?

Melanie Field: I think you would need legislative provision, to court rules at least.

Stephen Lodge: Yes, I think you would—definitely. With those actions you have to have a single defendant. You might have multiple claimants but you cannot have a class action against multiple defendants. It doesn't quite work.

Q399 **Chair:** So you'd have to either have a very large employer that had a systemic problem with maternity discrimination, or it wouldn't really work. You'd have to have a systemic problem with one particular company. For instance—let's pluck something out of the air—the BBC and equal pay.

Melanie Field: Yes, equal pay claims are a good example because quite often they are about structural or systemic issues. The Asda case is probably an example of that. What tends to happen in case management terms is that a lead case is identified and the others follow on, but they are not dealt with as a group action as such.

Q400 **Chair:** But you could do that if you had a legislative hook to hang it on?

Melanie Field: Yes.

Q401 **Eddie Hughes:** What are the obligations of other regulators or inspectorates and ombudsmen to ensure compliance with the Equality Act 2010?

Melanie Field: We are the body with the statutory remit to enforce the Equality Act, but obviously other regulators come across equality issues in their work. The public sector regulators are subject to the public sector equality duty, so they have their own duties in relation to having regard to the need to eliminate discrimination.

Q402 **Eddie Hughes:** So they have an obligation to ensure compliance?

Melanie Field: They have an obligation in carrying out their functions. For example, Ofsted, when inspecting schools, has a duty to consider the need to eliminate discrimination. *[Interruption.]* Sorry, Steve is just—

Q403 **Eddie Hughes:** Being helpful.

Melanie Field: Yes. They have recently consulted on their new inspection framework that proposes that inspectors should make a judgment on the effectiveness of leadership and management by evaluating the extent to which those responsible for governance ensure that the provider fulfils its statutory duties, for example under the Equality Act. Yes, they will look at whether schools are complying with their Equality Act obligations. What we would like to see is through the public sector equality duty. A big issue is the attainment gap for certain ethnic minority groups in schools. We would like all schools under the equality duty to set themselves an objective to close that gap, unless it is not appropriate for them, and we would like Ofsted to be going in and as part of their inspection, looking at the extent to which schools are meeting those objectives.

Q404 **Eddie Hughes:** That is a very specific example. Do you think that generally there should be clarification with regard to those obligations and do you think their duties could be strengthened? You are suggesting this piece of clarification with Ofsted.

Melanie Field: We would like the public sector equality duty to be much more focused and strategic, and that would feed through to the role of inspectors in terms of driving improved performance across the public sector.

Q405 **Eddie Hughes:** How do we achieve that?

Melanie Field: By new specific duties, through secondary legislation. At the moment, in England, the duties are simply to set some objectives and publish some information, and we would like those objectives to be determined according to the evidence of the issues that are relevant to that sector.

Q406 **Eddie Hughes:** What is the formal mechanism through which that actually becomes a reality? You collectively as an organisation make suggestions to the Secretary of State, then it is determined from there as to whether it proceeds?

Melanie Field: Yes.

Q407 **Eddie Hughes:** And that has been done, is being done, is ongoing? Is that an ongoing thing?

Melanie Field: There is an ongoing process of seeking to influence the Government on that. I am actually going after this to Equally Ours where I will be talking to equality lobby organisations and seeking to get their support for this approach.

Q408 **Eddie Hughes:** Would the result then be that those mainstream enforcement bodies have specific obligations to secure compliance under the Act?

Melanie Field: It is not about us offloading our job of securing compliance under the Act. It is about focusing—

Q409 **Eddie Hughes:** Surely an understanding of their obligation would result in the same thing.

Melanie Field: Yes, absolutely. We have a forum for regulators, inspectorates and ombudsmen where we seek to bring them together to engage them on equality and human rights issues. Under our new strategic plan, that is going to be a very strong focus of our work in this area.

Q410 **Chair:** What is the demeanour of that forum for regulators? What does it think about the world to do with equality? Presumably, you have all the main regulators that we have been talking to sitting on that forum. Do they think the world is doing quite a good job at equality or do they think there is room for improvement?

Melanie Field: I think they think there is progress but room for improvement, as I think everybody does.

Q411 **Chair:** How often do you meet?

Melanie Field: We met towards the end of last year.

Q412 **Chair:** Was that the first time?

Melanie Field: I would say that we have not been as assiduous in using that forum as we could have been.

Q413 **Chair:** When was the forum set up?

Melanie Field: I believe it was set up when the commission was set up back in the early days—maybe 2008.

Q414 **Chair:** Why do you think it has not been seen as a priority to get other regulators deciding who is fit and proper to manage money and people to implement the laws of our lands? Why has it not been a priority to ensure that regulators understand the importance of critical equality issues as part of their day-to-day business? Wouldn't that be pretty important?

Melanie Field: I think the use of the forum has evolved over the commission's life. In more recent years, it has been used as a mechanism

for driving forward on specific issues. I think we are now moving into a phase where we are going to be using it much more proactively and strategically, in the way that I have described. I think that is a really positive development.

Q415 **Chair:** I agree with you. It just feels strange that that wasn't seen as a priority before this point. To what extent is the work of the forum transparent so that an organisation such as this Select Committee on Women and Equalities, can monitor the sort of issues that have been raised and how they are being tackled?

Melanie Field: I would just say that our relationships with regulators have always been seen as important but we are talking about using that in a slightly different way now. In terms of transparency, I would need to check what information is now on our website about the work of that forum, but I agree that it would be useful to ensure that that is part of the information we provide.

Q416 **Chair:** Could I ask you to write to me following your next meeting? When is the next meeting of the forum?

Melanie Field: I don't know the date off the top of my head, I'm afraid.

Q417 **Chair:** Would it be in the next year or so?

Melanie Field: Oh, definitely.

Q418 **Chair:** Could I ask you to write to me after that to explain why you wouldn't be in a position to share the minutes of that meeting with our Committee on a regular basis? We have had numerous regulators in front of us who seem to have had very varying degrees of understanding of their public sector equality duties and, indeed, some have no knowledge of it at all. It would be very useful for us to know what you are covering within that forum and how regularly you are meeting.

Melanie Field: Yes.

Q419 **Chair:** It would aid our Committee immeasurably, I think. Thank you.

I want to move on to remedies and the aims of a court or tribunal in terms of supporting claimants in seeing that it is worth their while to make a claim. It was very striking in the evidence that you gave to the Committee that 60% of people—two in three—who suffer a discrimination are not aware that it is against the law or is something that they can take action about. I believe that was in your evidence to the Committee. That is particularly telling, I think, given that one of the objectives of the EHRC was to increase awareness of people's rights.

That is the backdrop to this set of questions, because when we look at people's motivation to bring a case, it seems very low. What are your feelings about how the court and tribunal system works in terms of simply putting the claimant back in the position in which they would have been had the discrimination never happened? Is that part of the problem in people not really being motivated to bring cases, or is that entirely the right approach? Could there be a different approach? Simply putting



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people back into that same place but with lots of potential liabilities in terms of costs doesn't seem a motivating situation for potential claimants to be in—or am I wrong?

Stephen Lodge: I think the starting point is to recognise that that is the measure of damages in tort—sex discrimination is a tort—so it is not as straightforward as to say that a completely new regime should be worked out for discrimination compensation. There is already the power to award aggravated damages, which is used occasionally. There is also the potential for an aggravated penalty award by the tribunal if there is a situation of deliberate or particularly malicious conduct by an employer.

Q420 **Chair:** Remind me: if you were to get the maximum damages in a tribunal or court, what is the maximum you could ever have?

Stephen Lodge: There is not a statutory maximum for discrimination, unlike for unfair dismissal—

Q421 **Chair:** Within a tribunal, with aggravated factors. I thought there was a maximum.

Stephen Lodge: There are guidelines. The Vento guidelines are level with damages for injury to feelings. The highest award—

Q422 **Chair:** It is about £40,000, isn't it?

Stephen Lodge: I think it is a bit more than that. We could write to you with that.

Q423 **Chair:** No, I've got it—I think it is about £40,000. So you are asking claimants to bring a case to tribunal, with all the risks and costs of legal representation, simply to see their income being recompensed and a maximum of £40,000. Do you think that holds some people back from taking a case forward?

Stephen Lodge: I do not personally think it is by any means the most significant factor. There are many more significant factors to do with problems in terms of accessing justice, particularly for poorer people, that create much more significant barriers than the level of compensation.

Q424 **Chair:** Do you not think that if we had a different system, you might see things evolve as they have in the States, with a no win, no fee approach—if that was possible—where you have got more lawyers interested in these cases? At the moment, these cases do not attract that because the levels of compensation are relatively low. I know in absolute terms it is a huge amount of money, but given legal costs—you don't seem to think that is a deterrent.

Stephen Lodge: Again, I would say there are other factors. For example, the Jackson reforms on costs had a really significant impact. Solicitors used to do a lot of CFA work, particularly for disability discrimination claims—I can unpack that if you like—but it became uneconomic to do that, and that has had a significant impact.

Q425 **Chair:** Were the Jackson reforms to do with insurance and the ability to



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recoup the insurance premium?

Stephen Lodge: Yes, exactly.

Q426 **Chair:** So you think that was material in stopping people bringing cases forward.

Stephen Lodge: I do think it was. Some very good evidence was submitted by Unity Law on that—not to this Committee. I could either write to you about that or tell you now, but I thought they gave a very striking example.

Q427 **Chair:** So the ability to reduce the risk of the potential claimant is material in terms of their willingness to bring cases forward. What have you been doing to try to lobby the Government on changing those reforms back, or monitoring what the impact of the reforms is?

Stephen Lodge: The LASPO part 2 review was on those issues, and we made a submission to that review process. We suggested that the QOCS—qualified one-way costs shifting—regime, which would resolve that issue, should apply to discrimination cases. At the moment, it applies only to personal injury. The review did not take up that recommendation, and at the moment we are funding a judicial review of that decision.

Q428 **Chair:** Remind me: that regime change was the ability to—

Stephen Lodge: It was a substitute for the after-the-event insurance. Because it meant that the claimant would not be liable for costs, the claimant would not need to take out after-the-event insurance. That works in personal injury, but it does not apply to discrimination cases.

Q429 **Chair:** So the claimant is not liable for the costs of the other party but are still liable for their own costs?

Stephen Lodge: That's right.

Q430 **Chair:** When you are looking at a net gain of a maximum of your salary plus £40,000, and your legal costs might be a huge slice of that, it is still a relatively risky thing to do.

Stephen Lodge: It is, yes.

Q431 **Chair:** Okay. Are there remedies besides compensation already within the UK system, or could they be brought in, that would have a greater impact on the levels of compliance with the Equality Act by companies? Are there any other things that you think we should be looking at to try to get companies to be more compliant?

Obviously you are right in saying that we need to attack both ends at the same time. We have to motivate people to be aware of their rights, and the ability to enforce those rights, but we also have to look at whether there are remedies besides compensation that might help companies and organisations to be better at compliance. Are there any things that you would like to bring to the Committee's attention that might be useful for us to look at?



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Melanie Field: A couple of things spring to mind. First, increased transparency to drive action by companies to address things before they become a discrimination problem. The gender pay gap regulations are a good example of that, and the Government are currently looking at extending that approach to ethnicity and, potentially, disability. We would support greater transparency to focus employers on addressing the issues that arise for those groups.

Another thing that we think is really important is that when a case does get to tribunal and someone makes that investment of emotion and money in bringing an employer to account, the learning from that is not lost. Therefore we were very disappointed that the power for tribunals to make wider recommendations was repealed. We would like to see that reinstated.

Q432 **Chair:** You talk about transparency, which is a really useful tool—I talked about it with regard to the forum—for everybody to see what is going on in reality, but it also has to have teeth doesn't it? Naming and shaming goes only so far. With something like gender pay gap reporting, where there isn't even a requirement to say what you are going to do to resolve it, it has shock value for only so long doesn't it?

Melanie Field: Yes. Again, we argued that the regulations should include a requirement to provide a narrative explaining the factors contributing to gaps, and an action plan so that employers would be required to set out the steps that they are going to take to address gaps. That is really important. We have also talked about our own enforcement. We secured 100% enforcement during the first year of the new requirements, but Steve was talking about the fact that—

Q433 **Chair:** One hundred per cent enforcement of revealing the figures, which show that the gender pay gap is—

Melanie Field: Well, 100% compliance was achieved. Sorry—I misspoke. Steve was talking about process requirements, so it is a black or white issue: has somebody published on the quarter or have they not? So I think there is scope to consider whether a quicker and sharper way of imposing a penalty for not complying would be useful—whether there should be a fine, for example.

Q434 **Eddie Hughes:** Your submission identifies a lack of reasonable adjustments within the court system as a barrier for claimants in discrimination claims. What needs to change to improve the availability and consistency of reasonable adjustments in courts and tribunals?

Melanie Field: I think there needs to be a bit of a focus by the Courts and Tribunals Service on this issue. We are currently doing some focused work around reasonable adjustments in the criminal justice system, but we are also talking to the MOJ about issues in the civil justice system, and we found them to be willing to discuss those issues and open to making progress. We are quite encouraged by their response, but there needs to be a focus to ensure that whichever court somebody goes to, they can be

assured of the standard of service that is going to be provided for them, and that their needs are going to be met.

Q435 Eddie Hughes: I am still no clearer in my understanding. What needs to change in order to ensure that consistency?

Melanie Field: The people who work in courts, who come into contact with people who need reasonable adjustments, need to understand how to provide those and what they should be doing. It is a training issue, but it is also about a leadership and focus issue.

Q436 Eddie Hughes: Let's jump to the next question, and then I think it might inform where you're going. In your submission, you proposed that the Courts and Tribunals Service collect comprehensive equality data and conduct an assessment of the efficiency and accessibility of courts in dealing with equality claims. What types of changes do you expect as a result of that assessment?

Melanie Field: Better data would help in two ways. First of all, it would ensure that the courts are providing the service that they should be providing for all claimants; at the moment, we do not have any information about that. Secondly, it would help us if there was better information available about the types of discrimination claims being brought, which we don't currently have. We think it would have dual benefits to have better information about court users and about discrimination.

Q437 Eddie Hughes: Sorry, so you don't have details of the discrimination cases being brought? I don't understand what you just said.

Melanie Field: The courts service is different from the employment tribunals service, which does provide better data. It does not publish information about discrimination cases brought to it. There is a requirement on claimants to notify us when they issue the case; that is not well understood by many claimants, and is not necessarily drawn to their attention by the court. What should happen is that when someone lodges a claim, we should know about it, and that does not happen in practice, so that is something we would like to see improve.

Q438 Eddie Hughes: It feels like an odd responsibility to place on the claimant. I appreciate that you are all very different departments—this is going back to Philip's point about silos. It feels like people have the information that another organisation or department would benefit from, and yet we rely on the claimant to share that. That seems nuts.

Melanie Field: I agree, and I think it is worth considering that obligation falling on the court, rather than the claimant.

Q439 Chair: What is your hunch as to what the problems are that courts face in supporting people bringing Equality Act claims? Is this about the attitude of staff? Is this about the physicality of the courts? I am not really clear. After 10 years, you must have got some ideas of the types of lack of reasonable adjustments within the system that people are facing.



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Is it that they cannot get representation? Is it that they cannot get somebody who can lip-read? We have had all sorts of evidence that would suggest there are some physical problems with using the courts. Is that the main thing, or is it more the courts themselves—that people cannot get representation, or there is a lack of access to legal aid? I mean, do you have any hunches about where the problems lie?

Melanie Field: Do you want to talk about the legal aid point? I think the lack of representation is a key factor.

Q440 **Chair:** We are going to come on to talk about legal aid in a lot of detail in a moment, but I just wondered, on a general level, where you felt the problems were. We have had individuals give us evidence, but obviously they will always give you an individual point of view, whereas you have that oversight.

Melanie Field: There is an issue about court building accessibility—that is arguably something to do with the court estate, but there was a recent parliamentary answer suggesting that 31 of the 56 court and tribunal buildings in greater London are inaccessible.

Q441 **Chair:** As an organisation, if you are aware of that information, do you not have an obligation to call into question court and tribunal adherence to the public sector equality duty, and do you not then do an intervention on them?

Stephen Lodge: That has been referred through our system for consideration. It only came in last week.

Q442 **Chair:** Presumably that is long standing. Did you initiate that, or did somebody else initiate it?

Melanie Field: I don't know.

Stephen Lodge: We received that as intelligence.

Q443 **Chair:** Do you have a systemic way of monitoring those sorts of things? The courts are pretty fundamental aren't they? Whether it is employment tribunals or mainstream courts, they are pretty fundamental tools for people to use to access the Equality Act. Given that your role is to ensure that the Equality Act is something people are aware of and are using, do you have a systemic way of monitoring accessibility at all points in time, whether that is accessibility of the tribunals system, of the magistrates courts, of the county courts or of all the legal avenues? Do you have a way of monitoring that through "Is Britain Fairer?" or something like that?

Melanie Field: In that, we will look at the data available. We do not have any powers to go in and inspect premises, so we rely on reports from other inspectorates or academics to try to gather that information. Then we will look at what that amounts to and determine which of the issues exposed in "Is Britain Fairer?" we should prioritise. As you know, we have been asked through the Taylor review to focus on fewer priorities, and therefore we cannot prioritise everything. That is why we want the public



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sector equality duty to be stronger, so that it places a greater obligation on all the public bodies that provide essential public services to focus on those key equality issues that arise.

Chair: That is helpful, thank you.

Q444 **Vicky Ford:** My questions were getting on to the whole issue of legal aid in a little more detail. Is your evidence what we have seen from the legal aid statistics? Legal aid statistics suggest that the numbers receiving legal help, especially those receiving legal representation for discrimination claims, is really low. Is that what you have seen? What sort of statistics have you seen?

Stephen Lodge: Yes, that is right. The number who receive representation is perhaps particularly striking. Representation is not available under legal aid funding in an employment tribunal, but in the courts system the statistics indicate that a maximum of nine funding certificates, which is what you need under legal aid to get representation, are issued a year in the discrimination category of law across England and Wales. We looked into that a bit further and only six of those involved issued court proceedings, so a maximum of six—

Q445 **Vicky Ford:** Why is it so low?

Stephen Lodge: There are real issues about the rules on funding for discrimination cases in the county court, which mainly relate to the point we touched on earlier: it is to do with the amount of compensation available. As has been said, there are rules on cost-benefits. To bring a case with up to 60% prospects, you have to show that the damages will outweigh the costs by a ratio of 4:1. Frankly, you could almost never show that in a discrimination case, because the costs may well be around £25,000, so you are talking about compensation of over £100,000 to get a legal aid certificate in that kind of case. We take the view that it would be helpful if some guidance was issued around that, because it is possible to reinterpret those regulations as saying that discrimination cases should not be seen as primarily about damages. From the perspective of the victim, often they are not; they are about vindicating their rights. It is possible that the legal aid agency could be asked to take that into account when they consider an application for funding for a discrimination case.

Q446 **Vicky Ford:** Who would issue that guidance?

Stephen Lodge: I think the Lord Chancellor has a power to issue guidance on legal aid.

Q447 **Vicky Ford:** We have heard that it is not just about the financial damages; it is about being able to reset your life.

Stephen Lodge: Certainly, yes.

Q448 **Vicky Ford:** And being able to be clear that this is why you had to leave that job and move on—it is much more than that. To clarify, has that number been higher in the past, or has it always been that low?



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Stephen Lodge: The statistics on LASPO have been available only since 2013, and it is pretty much even across that period.

Q449 **Vicky Ford:** Some witnesses, including yourselves, have identified the need to use the telephone gateway to access legal aid as a significant barrier, and the Government has committed to removing that requirement to use the gateway. Do you think that those issues with the gateway apply across the board, or do they affect some groups of people more than others?

Stephen Lodge: It does affect some groups in particular, because the gateway is a remote service and you can only use it remotely. That is particularly problematic for people with cognitive difficulties or a learning disability. Some people with mental health problems find it very difficult to use a service that is remote. There is some evidence that people with language difficulties also find it difficult, and they are much more comfortable with a face-to-face relationship. It definitely impacts on some groups in particular.

Q450 **Vicky Ford:** So there is an accessibility issue about who can actually get that through the gateway?

Stephen Lodge: Yes.

Q451 **Chair:** Can I ask a supplementary question? What reasonable adjustment has the Government made in requiring people to use a telephone gateway?

Stephen Lodge: Reasonable adjustments should be made under the contract. The ones that you might expect are available: the use of a translator or the use of sign language. Having a third party to help a disabled person is also a possibility.

Q452 **Chair:** How does that work in practice?

Stephen Lodge: We are conducting the inquiry into these issues, which we are due to publish in June. Without anticipating the exact detail of it, roughly around only 7% of disabled people get a reasonable adjustment through that system.

Q453 **Vicky Ford:** If you take away the requirement to use the gateway, will that resolve the low number of people who are seeking legal assistance? I think you are suggesting that it won't because the ratio is part of the problem as well.

Stephen Lodge: It would not address the problem of representation, but it would help a great deal in terms of the early advice position. The problem is that under the mandatory gateway, there are essentially only three providers that provide legal advice on discrimination. Under the old system—I do not have the figure—the number of employment contracts to provide employment and discrimination advice would have probably been in the hundreds. If that is replaced by a face-to-face-type contracting regime, it offers the potential for people to access.

Q454 **Vicky Ford:** Given that the telephone gateway, as the mandatory system,



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will be gone by next spring—less than 12 months' time—is there enough specialist advice available to meet the rise in demand that will occur for such advice and a face-to-face methodology once that mandatory gateway is gone?

Stephen Lodge: We share that concern and are in discussions with the Ministry of Justice.

Q455 **Vicky Ford:** I did not say that I was concerned; I was asking if you were concerned. Do you have a concern?

Stephen Lodge: Yes, we certainly do have that concern.

Vicky Ford: Thank you.

Q456 **Chair:** A number of the submissions that we have had have stated that some service providers are afraid to use the Equality Act exemption that allows them to exclude from single-sex services someone with the protected characteristic of gender reassignment. Do you think that is a widespread concern?

Melanie Field: It is certainly a concern that we are aware of. I think that there are concerns both from trans groups, which are concerned about trans people being incorrectly excluded from services, and from women's group, which are concerned about preserving women-only spaces.

Q457 **Chair:** Is that raised with you regularly or frequently?

Melanie Field: Recently, there has been a fair degree of concern raised with us, particularly around the time that the Government were consulting on potential reforms to the Gender Recognition Act 2004. We held a number of discussions with various groups and that issue came up quite regularly. It also comes up through correspondence from time to time.

Q458 **Chair:** Obviously, the law has been in place since—

Melanie Field: Since 2010, but there were some regulations on gender reassignment just before the Equality Act.

Q459 **Chair:** So it has been brought up with you more recently?

Melanie Field: Yes. There has been a heightened attention on those concerns.

Q460 **Chair:** Do you think that there is sufficient guidance, in case law or in any other way, for providers to be confident about what they can and cannot use the exception for, and how to conduct the kind of balanced assessment that the law very clearly sets out?

Melanie Field: There has not been any case law that we are aware of in terms of service provision. We have produced guidance. We have a code of practice and guidance for service providers, which was written when the Equality Act came in. More recently, as those concerns have been raised with us, we have published more information on our website, to try to provide more clarity. We said in our response to the Government's consultation on GRA reform that we felt that more guidance was needed.

Chair: We as politicians often hear conversations about concerns on competing rights.

Melanie Field: Yes.

Q461 **Chair:** Are you concerned about a lack of clarity on that or is it just a lack of understanding or competing priorities? Where do you think that the problem really lies? As you said, there has been a lack of case law, so on one level, one could say that that might mean that there has not been a case to be brought, or that people are just not aware that they should be doing that.

Melanie Field: Our concerns are about lack of understanding. The guidance out there was written in a slightly different climate, when attention on those issues was not as heightened, so there is a case for revisiting that and looking at it in the light of the real concerns that people raise.

The other concern is that those kinds of misconceptions, misunderstandings and genuine fears and concerns, do not promote a climate of tolerance and good relations between groups. That is why it is a good idea to provide clarity and try to shed some light on those issues. We think that the Equality Act provisions are fit for purpose. They allow inclusion and also allow exclusion when it is objectively justified and there is a good reason for it. I think people would welcome more information about how that plays out in practice.

Q462 **Chair:** When you talk to large providers, they are very clear on the law, which they have been dealing with for the best part of decade. From what I hear, they use an individual personalised risk assessment for everybody, regardless of whether they are male, female or a transgender man or woman. Those organisations seem to have clarity. Smaller organisations or individuals that might not have the resources to be able to get legal advice may find that less clear. Is there anything that you as an organisation could be doing to help provide more clarity on that? It does feel to me like it has become a very difficult situation.

Melanie Field: Obviously, we respond to the inquiries that we get as clearly as we can. As I said, we said in our response to the Government's consultation that we felt that more guidance would be helpful. We have not done anything about that because we thought that we would do it in the light of changes that the Government might decide to make following that consultation. I think, given the passage of time since the consultation took place, that we need to look again at whether we need to bring that forward.

Q463 **Chair:** You can understand why the idea of bringing a case could be really unattractive to either side of the argument, because the particular individual circumstances of that case might lead to an outcome that might not be helpful for either side of the debate. You can understand why people might be reticent to bring forward a legal case in that circumstance?



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Melanie Field: Yes, absolutely, but I think that it goes back to what I was saying in relation to the broader question. We do not want people to have to bring cases; we want people to understand what their obligations and rights are and for people to comply with the law. We have a role in helping them to do that.

Chair: Thank you very much. Those are all the questions that we had for today's session. Thank you for coming along and giving evidence to the Committee—it has been really helpful. We look forward to hearing more from the EHRC in a couple of weeks' time.