

Women and Equalities Select Committee Inquiry into Enforcement of the Equality Act

Response from the UK Women's Budget Group

October 2018

About the Women's Budget Group

The Women's Budget Group (WBG) is a network of leading academic researchers, policy analysts and activists set up in 1989 to analyse UK government economic policy for its impact on women and to promote policies that will increase gender equality.

Our vision is of a gender equal society.

Our mission is to promote greater gender equality in policy making and raise awareness of feminist approaches to economics.

We do this by producing well-respected, academically robust analysis of the gender impact of economic policy in order to influence policy discussions and promote gender-equal policy outcomes

1. The Equality Act 2010 – rights and enforcement

The Equality Act is a comprehensive legal instrument which protects against discrimination, harassment, victimisation and promotes good relations between social groups. It brings together previous separate strands of equality legislation and gathers rights and protected characteristics into one document, which makes it easier to understand.

However, changes to the Act in recent years have reduced its potential to promote equality in the UK. This includes non-implementation of the dual discrimination provision and of the socio-economic duty, and the weakening of the Public Sector Equality Duty. External policy changes have made it harder for the rights within the Equality Act to be enforced. These include cuts and changes to the role and budget of the Equality and Human Rights Commission, changes to Employment Tribunals and cuts to Legal Aid.

Changes to the Equality Act

Dual discrimination

Section 14 of the Equality Act allows for discrimination cases to be taken under more than one protected characteristic. This would enable, for example, a black woman to take legal action on discrimination without having to decide on which basis she was discriminated – race or sex. It also recognises the cumulative impact of protected characteristics on inequality. This section has not been enacted.

The Government should enact the provision for dual discrimination, under Section 14 of the Equality Act 2010.

Socio-economic duty

The socio-economic duty contained in Section 1 of the Equality Act requires public bodies to have due regard to the need to reduce inequality that results from socio-economic disadvantage. However, the socio-economic duty has not been enacted meaning that public authorities do not need to consider the impact of their policies on socio-economic inequality.

Some local councils are including socio-economic status among the characteristics they consider in their equality impact assessments. Scotland adopted the socio-economic duty on 1 April 2018, calling it the 'Fairer Scotland Duty'.

The introduction of this duty across the UK would help the UK to meet the Sustainable Development Goal No. 10, to reduce inequality.

A systematic assessment of the cumulative impact of political decisions and policy changes is crucial. For this to be possible, data on residents' standard of living and wellbeing must be available. These assessments should influence spending and revenue priorities in local areas.

Government should commence the socio-economic duty to ensure inequality of outcome based on socio-economic background is reduced.

External changes

Employment tribunals

Individuals can get legal redress from discrimination through Employment Tribunals or County Courts. The fees introduced in 2013 for Employment Tribunals severely reduced the capacity of many people to pursue legal action on cases of employment discrimination. Their abolition in 2017 after the R (UNISON) v Lord Chancellor judgement saw the number of cases increase again. However, because service was reduced to reflect the decrease in number of claims, there is now a considerable backlog of cases waiting to be heard and consequent delays in people getting their cases resolved.

Raising public awareness about these cases would be an effective way of both informing people about their rights to seek redress in case of discrimination and of acting as a deterrent for employers. However, it is not always beneficial for the victims to make their ordeal public.

Raising the fines paid by companies sentenced for discrimination and publicising them would act as a deterrent. Firms with recurring cases of discrimination should be named and shamed, also to act as a deterrent.

Employer Tribunals should also be able to make recommendations to an employer who is found to have discriminated unlawfully, a power initially inscribed in the Equality Act but retracted through the Deregulation Act 2015.

Changes to Legal Aid

Cuts to legal aid, in scope and eligibility criteria, have severely restricted low-income people from challenging discrimination and breaches to their human rights.

Legal aid is still in place for discrimination cases. However, cuts to its scope in the areas of asylum, debt, education, employment, family law, housing, immigration and welfare benefits may prevent people who have been discriminated against in these areas to access it. This is for two reasons:

- Individuals with a legal problem relating to an issue such as housing or welfare benefits may also have a claim for discrimination. However, if they cannot access legal advice for their primary problem because legal aid is no longer available, they may be unaware that they might have a case for discrimination.
- The cuts to legal aid have forced one in six law centres to close.¹ The first point of contact for many people who have suffered discrimination will be their local law centre or Citizens' Advice Bureau; the closure of many law centres removed the first point of contact for individuals trying to pursue legal action, even for cases still within legal aid scope. With no local law centre, people have less opportunities to exercise their rights.

There have been funding cuts by the Ministry of Justice to the Advicenow website, a key first-stop for people seeking information on legal aid.² This raises concerns about the public's access to information about their rights and how to seek legal redress when they are breached.

Moreover, the introduction of a telephone gateway as the first stop in accessing legal aid has meant fewer cases going through: since 2015 the number of discrimination cases referred to specialist advisers has fallen from 3,558 to 2,608 in 2016/17. Disabled people and people with limited English language skills face significant challenges accessing legal aid through the telephone gateway.³

According to the Government's own impact assessment, women are disproportionately hit by cuts to (civil) legal aid as they were more likely to use it (62.2% in 2010).⁴ BME people are also disproportionately affected as more likely to claim legal aid.⁵

The Government should ensure that the current legal aid system is not preventing people from accessing justice and seek redress from discrimination.

2. Public Sector Equality Duty – structural approach to discrimination and inequality

New approach to inequality

¹ Justice Select Committee (2015) *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (<http://bit.ly/2DePKkv>)

² Ibid, p 47

³ EHRC (2018) *New inquiry to determine whether discrimination victims on lower incomes are being denied justice* (<http://bit.ly/2y79L6E>)

⁴ Justice Select Committee (2015) *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (<http://bit.ly/2DePKkv>)

⁵ WBG and Runnymede Trust (2017) *Intersecting inequalities: The impact of austerity on Black and Minority Ethnic women in the UK* (<http://bit.ly/2iLave5>) p 37

The Equality Act 2010 also introduced the Public Sector Equality Duty (PSED), which requires public authorities to have due regard to how their policies or decisions affect people who have a 'protected characteristic' under the Equality Act.

The introduction of PSED was a recognition that giving individuals the right to challenge discrimination in court was not sufficient to bring about equality. Focusing on individual acts of discrimination:

- places the burden on those who suffer discrimination to bring action to court, which costs time and energy;
- many cases are not addressed and offenders go unchallenged, as many people are unable to take claims;
- women and other disadvantaged groups are seen as needing additional support to adapt to existing structures, rather than changing the structures themselves;
- focus is on addressing discrimination retrospectively, instead of preventing it from happening.

The PSED approach is about making sure that equality is one of the goals of policy, and that discrimination is prevented in the first place by reformulating the structures that currently enable it.

Weaknesses and challenges of PSED

The PSED has the greatest potential to effect wide change where inequality and discrimination are concerned. Its structural approach is more effective than individual litigation, as explained above.

However, the PSED suffers from a series of weaknesses and challenges to its implementation.

The duty as set out in the Equality Act sets out that public authorities should have 'due regard' to equality in their policies and decisions. However, it does not specify what 'due regard' means.

Further detail on what public bodies should do in order to meet their obligation to have due regard is set out in Specific Duties. There are separate specific duties for England, Scotland and Wales. For England the specific duties are limited to:

- publish information to demonstrate compliance with the general equality duty annually;
- prepare and publish one or more equality objective that the body thinks it should achieve.

However, there is no duty to set out steps to meet equality objectives, no duty to consult or involve, no duty to publish specific information on the pay gap and no duty to consider equality in procurement.

In practice it is difficult to see how these two duties help to hold public bodies to account since all these bodies need to do is publish a single equality objective (not set out how it was reached or develop a plan to deliver it) and some equality information. The removal of the duty to consult or engage makes it less likely that the public will be able to hold public bodies to account. The previous specific duties covering race, gender and disability all included a requirement to consult or consult and involve. The Gender Equality Duty also included a specific duty to address the gender pay gap.

Public bodies do not have to set objectives for every equality group. As a result, there has been a reduced focus on gender equality since the PSED replaced the Gender Equality Duty. Only a quarter of local authorities have an objective relating to gender equality, for exampleⁱ. Under the previous

Gender Equality Duty all public bodies had to develop a Gender Equality Scheme and there was a specific duty to address the gender pay gap.

The weakness of the specific duties means that the only way in which public bodies can be held to account under the PSED is through judicial review of a failure to meet the general duty (mainly a failure to consider equality impact at all). There have been some important victories in judicial review cases, but judicial review is expensive and time consuming.

The EHRC, due to curtailing of its powers and budget, (see below) has not been able to promote the PSED on the scale necessary for public authorities to effectively and properly implement it. There is widespread confusion, even among local equality officers, about what is expected of them. As a consequence, equality impact assessments, a tool of crucial importance to operationalise the PSED, are often not conducted or conducted very poorly, as tick-box exercises only.⁶

Finally, dismissive comments by members of Government about the PSED have signalled to public bodies that it is not a priority.

If the PSED is to fulfil its potential, there is a need for:

- Stronger specific duties for England including duties relating to gender equality and a duty to carry out equality impact assessments;
- Strengthening the capacity of the EHRC to share best practice, monitor and enforce implementation of the PSED;
- Commitment at a senior level of Government;
- Improvement in the understanding and capacity of public bodies to meet the requirements of the PSED;
- Restore the socio-economic duty;
- Meaningful engagement with civil society including women's organisations during policy development.

3. The effectiveness of the Equality and Human Rights Commission

Curtailment of powers and funding

The Equality and Human Rights Commission (EHRC) is the organisation best placed to enforce the Equality Act and make sure people are aware of their rights under it. However, it has had both its budget and remit cut since 2010.

The 2011 Public Bodies Act gave the Government the power to modify the 'constitutional arrangements' of a range of public bodies (including the EHRC) without the need to consult Parliament. The Government also gained the power to amend the funding arrangements for a number of public bodies (again including the EHRC) and to modify their functions.

Powers and funding of EHRC were significantly curtailed after the 2011 Public Bodies Act. They include:

- EHRC's duty to promote 'good relations' between members of different social groups;
- its power to provide grants;

⁶ MA Stephenson, J Harrison (2013) 'Assessing the Impact of the Public Spending Cuts: Taking Human Rights and Equality Seriously', in Nolan, O'Connell and Harvey, *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*.

- advertising and public information campaigns were restricted to where the EHRC has a legal duty to provide people with information or where it is critical to the effective running of the EHRC;
- its helpline providing individuals with legal support was removed;
- It was prevented from producing statutory guidance on the Public Sector Equality Duty.

In addition, the EHRC budget has been reduced from £70 million when it was launched to £18.1 million in 2017/18.⁷

Taken together these cuts to budget and changes to its role significantly reduce the power of the EHRC.

Enforcement of PSED

The reduction in the role of the EHRC has resulted in an information and enforcement gap around the PSED and so governmental policies are often not being properly assessed for their impact on equality. The fact that the Government can now make significant changes to the EHRC's role through secondary legislation may make the organisation wary of public challenges to Government policy.

Deterring discrimination and enforcing equality

Moreover, the removal of the 'good relations' function and the limitations on advertising and public information spending restrict the ability of the EHRC to run campaigns to members of the public. Severe cuts to its budget meant regional EHRC offices had to close and the removal of its grant-making power significantly reduced its reach into local and regional communities.

In this context, it is difficult for the organisation to raise its profile as an enforcer of the Equality Act and deter discrimination.

Legal guidance and strategic litigation

As a result of government cuts to resources, the EHRC can now achieve far less contact with victims of discrimination and is unable to pursue strategic litigation as it (and its predecessor commissions) did so successfully in the past.

When in operation, the EHRC helpline took over 40,000 calls a year and provided individuals with the opportunity to access help and guidance from the EHRC. The helpline was also a valuable way in which the EHRC could identify strategic litigation. Reinstatement of the helpline would improve the system of identifying legal cases to support and along with adequate resources, enable the EHRC to once again spearhead ground-breaking equalities litigation.

Recommendations

The EHRC's ability to act as a deterrent of discrimination and enforcer of equality has been severely reduced by slashes in its budget and powers.

⁷ EHRC (2018) *Annual Report and Accounts* (<http://bit.ly/2zP43s4>)

The EHRC should be properly funded and staffed to be able to fulfil its enforcement powers, including conducting investigations, applications to court, provide legal assistance, and monitoring compliance with the PSED.

Active enforcement action by the EHRC, including adopting strategic litigation, has great potential to achieve wide scale change.

Reinstating its helpline would improve the EHRC's capacity to identify legal cases to support and lead equalities litigation.

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UK Women's Budget Group, October 2018.

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ⁱ EHRC (2013) *Assessment of the publication of equality objectives by English public authorities* (<http://bit.ly/2O2yxQ1>)