Compliance and enforcement policy

Creating a fairer Britain
Compliance and enforcement policy

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Our values: fairness, dignity and respect
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Introduction

The Equality and Human Rights Commission (the Commission) is the equality regulator with responsibility for enforcing the Equality Act 2010 in accordance with its statutory duties as set out in the Equality Act 2006. It is also the National Human Rights Institution and its remit covers the whole of Great Britain (England, Wales and Scotland), though it shares its human rights remit in Scotland with the Scottish Commission for Human Rights. Its duties include reducing inequality, eliminating discrimination, promoting and protecting human rights.

The purpose of this policy is to publicly summarise the Commission’s intended approach to bring about compliance with regulatory requirements, our approach to enforcement and the general principles which we intend to follow. It also sets out the criteria that we will consider when deciding what is the most appropriate response to a breach of legislation.

As set out in our Strategic Plan, we see our regulatory role as helping organisations achieve what they should, not trying to catch them out if they fall short. It will always be necessary to identify and take action against those who are not even trying to comply. But legal action is our last resort, when nudge, persuasion and advice have not proved effective policy covers the whole of Great Britain.

What does this policy cover?

This policy covers the whole of Great Britain.

This policy applies to the use of the following statutory powers by the Commission under the Equality Act 2006 and 2010 (EA):

- Inquiries (s16 EA 2006)
- Investigations (s20 EA 2006)
- Unlawful Act Notices (s21 EA 2006)
- Action Plans (s22 EA 2006)
- Agreements (s23 EA 2006)
- Public Sector Duty Assessments (s31 EA 2006)
- Public Sector Duty Compliance Notices (s32 EA 2006)
- Pre-employment health questionnaires (s60 EA 2010)
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What falls outside this policy?

This policy does not apply to the use of any of the Commission’s litigation powers, such as: legal proceedings in relation to judicial review, injunctions or interventions, or any proceedings arising from the above powers. For information on how we will use our casework, litigation and intervention powers, please refer to our website.
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Principles underpinning the Commission’s enforcement policy

The Commission has a range of powers and tools at its disposal. We will always choose the ones that will best fulfil our duties and effect change in a particular circumstance, only resorting to our enforcement powers as the last resort.

The Commission will be a firm but fair regulator. We have developed our own regulatory principles to guide our work:

- we aim to lead society's understanding of equality and human rights, being mindful of the day-to-day challenges organisations – in particular small and medium sized enterprises – face.
- we are committed to openness, transparency and accountability.
- we help people comply with the law and aspire to best practice.
- we ensure our actions are evidence-based, proportionate and consistent.
- we use our resources in the most efficient and effective way, targeting them where they are most likely to have the greatest impact.

In the exercise of this policy, the Commission will also be mindful of the Hampton best practice principles in regulation and will have regard to the Regulators’ Compliance Code (the Code) and the provisions of the Legislative and Regulatory Reform Act 2006, as follows:

Proportionality – based on risk

All actions will be based on risk which we have assessed on the basis of evidence. Any action taken will be proportionate to the gravity and nature of the non-compliance, the risks to affected individuals and be in accordance with our criteria for taking enforcement action set out below.

Accountability – the Commission will explain its performance

The Commission is accountable to the public, for its decisions relating to compliance and enforcement.
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Consistency – the Commission will apply a similar approach

The width of the Commission’s remit and the extent of potential non-compliance mean that we will at times have to consider a wide range of instances of inequality or discrimination that may justify enforcement action. We will strive for a consistency of approach in targeting our enforcement action. This means that that we will take a similar, but not necessarily identical, approach to compliance and enforcement decisions within and across sectors. Each case will be evaluated on its own facts and circumstances and the assessed risks, including the devolved national context.

Decisions on specific enforcement action rely on professional judgement and we will therefore exercise our discretion in each case. All staff who make decisions about regulatory action will be required to follow this policy.

Transparency

This policy will be published and accessible. This transparency will help to ensure that organisations know what to expect from the Commission as a regulator. Where enforcement action is taken, the Commission will, where confidentiality permits, publish a record of its action.

Human Rights

The Commission will carry out our regulatory functions in accordance with the Human Rights Act and with due regard to the European Convention on Human Rights in dealing with all those with whom we come into contact. We will only interfere with those rights where there is lawful justification to do so and where it is necessary and proportionate.
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How will we achieve compliance?

‘Compliance’ is defined as compliance with the provisions of the Equality Act 2010 and associated legislation. We aim primarily to promote compliance without the need for enforcement.

Detailed explanations of the obligations arising under the Act can be found in our Codes of Practice. The Codes of Practice on Employment, Equal Pay and Services, Public Functions and Associations became law on 6 April 2011. Further guidance will be published in relation to Education and the Public Sector Equality Duty.

Our approach to promoting and ensuring compliance

Our regulatory functions stem from the Equality Act 2006 and include actions we take to enable and ensure that individuals and businesses comply with the law.

Range of activities to encourage compliance

We will promote and encourage compliance through a range of activities including:

Promoting awareness of equality legislation: so that employers, service providers, public bodies and others understand their rights and obligations. This will be achieved through the provision of information and advice, including our codes of practice and non-statutory guidance.

Education: including the encouragement of good practice; the raising of general public awareness and understanding of problems; assisting individuals with problems and targeted awareness-raising to enable and assist bodies to comply.

Monitoring compliance with equality legislation: with a view to holding Government and public bodies to account for their performance on equality, for example on their compliance with the new Public Sector Equality duty. Our monitoring includes: intelligence gathering, research and monitoring of trends and action to prevent non-compliance and unlawful acts.
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**Joint promotion and monitoring of compliance:** to make the most effective use of our resources, we will engage and co-operate with other bodies with a view to jointly promoting and facilitating compliance as appropriate including: other regulators, inspectorates, government departments and civil society organisation. To facilitate this, we will exchange relevant information with other law enforcement bodies and regulators where appropriate.

**Work with specific organisations or sectors**

Such work may include:

- providing specific advice or guidance to an organisation through discussion with senior managers and other staff
- making recommendations for remedial or preventative action and the timescales in which they should be taken.

Alternatively we may seek to address compliance on a sectoral basis, for example by undertaking specific thematic compliance work where it has identified a potential or actual risk across a particular sector. This may include issuing Codes of Practice or non-statutory guidance.
Purpose of taking enforcement action

We define ‘enforcement action’ as any use by the Commission of the range of statutory powers set out in Appendix 1, taking into account that agreement may be reached at any stage so as to preclude the need for continuation of the enforcement action. Informal action and cooperation are our preferred option and we will only take formal enforcement action where attempts to encourage compliance have failed. For example, it may be possible to agree informally to reach agreement on a schedule of remedial action.

The purpose of enforcement is to:

- ensure that the immediate risk of discrimination is eliminated or reduced. Change the behaviour of the organisation or sector in question to promote and achieve sustained compliance with equality law
- ensure that public and private sector organisations who breach equality laws may be held to account and deter non-compliance

The Commission may take enforcement action based on: complaints from individuals and civil society organisations, information received from our work with other regulators, research or other sources of intelligence.

Range of tools

In appropriate circumstances formal enforcement action will be the most effective method of ensuring legal compliance and deterring regulatory breaches. When we decide enforcement action is required in response to a breach of the Equality Act 2010, we will choose the most appropriate action from our range of powers.

In deciding which power to use, we will seek to bring about change by using the least intrusive method to achieve compliance, taking into account our resources and the desirability of achieving maximum positive impact.

Criteria for taking enforcement action

Decisions to use enforcement action will be taken on a case by case basis. The factors considered by the Commission in reaching a decision on legal enforcement action include, but are not limited to:
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- evidence of the extent and severity of breach of legislation and the reasons given for such a breach
- extent and severity of any departure from codes of practice and whether this was deliberate or reckless
- impact, likelihood and severity of impact on the affected group or individual
- the size and resources of the organisation involved
- the financial burden of enforcement action on an organisation
- likelihood of co-operation based on the outcome of any previous communication from us expressing our concerns
- steps taken or agreements made to remedy the breach and to reduce risks of recurrence
- any other relevant considerations

The weight given to each and any of these factors will be dependent on all the circumstances of the particular case.

In all cases we will take into account the wider public benefit of any action, including value for money, and whether such action would accord with the published priorities in our current annual Business Plan.
Appendix 1: Legal enforcement powers available to the Commission

This appendix gives further information about our enforcement powers, which are:

- inquiries
- investigations
- unlawful act notices
- agreements
- public sector duty assessments
- compliance notices

Inquiries

The Commission may conduct an Inquiry into any matter that relates to sections 8, 9 or 10 of the Equality Act 2006, namely equality and diversity, human rights or good relations between groups. No specific standard of evidence is needed to trigger an Inquiry. We do not need to suspect that there has been a breach of equality or human rights legislations in order to launch an inquiry.

An inquiry provides a means for us to find out more about equality, diversity or human rights, either within a particular organisation or across a wider sector.

The legal steps involved in the Inquiry process include:

- The Commission must publish the terms of reference (TORs)
- The Commission can give notice to organisations to require them to provide specific information in relation to the stated TORs. A person issued with this notice commits an offence if he or she fails to comply with a notice, falsifies any written evidence or makes a false statement while giving oral evidence. There is a right of appeal against the Commission in respect of any information sought.
- The Commission has the power to further question the information submitted.
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- If at any time during an Inquiry the Commission suspects that an unlawful act has been committed an Investigation must be considered. If a named person is to be investigated that part of the Inquiry must be suspended. An unlawful act is one that it contrary to a provision of the equality enactments. The Commission will specify the unlawful act(s) alleged.

- The Commission must publish a report of its findings. Before publishing the report it must notify any person or body about which the report will make adverse findings and provide a period of at least 28 days during which that person or body may make written representations. The Commission must consider but is not bound to accept the representations.

- A person to whom a recommendation in the report of an inquiry is addressed shall have regard to it. A court or tribunal may have regard to a finding of the report, although it shall not treat it as conclusive.

Investigations

The Commission can carry out an Investigation where it has evidence to suspect that an organisation has carried out or is carrying out an unlawful act.

The legal steps involved in undertaking an investigation include:

- Providing written details of why an action may be unlawful under the legal provisions relating to equalities and the terms of reference (TORs).

- Providing suitable opportunity for the named organisation to comment on the terms of reference and taking these into account.

- Publicising the final terms of reference.

- Deciding on use of the evidence collection powers as part of an investigation. The Commission may give notice requiring the provision of information, documents or oral evidence.

- If the Investigation finds that a specific individual has committed an unlawful act or failed to comply with a notice the Commission will provide those being investigated copy of the draft report before it is published. There will be a

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minimum period of 28 days in which written comments on the draft report can be made to the Commission.

- Considering any written representations before finalising and publishing the report of the findings of any Investigation.

- Making recommendations arising from the findings. A person to whom a recommendation is made in the report as a result of an Investigation is obliged to have regard to it. The Commission expects recommendations to be taken seriously and that firm positive action is taken as a result.

- Failure to act on recommendations can lead to the Commission issuing an unlawful act notice.

Unlawful act notices

An unlawful act notice may require the preparation of an action plan for the purpose of avoiding repeating or continuing the unlawful act. The Commission can also recommend that certain actions to be taken.

Agreements

The Commission can enter into a formal agreement with a person who it believes has committed an unlawful act. This will involve putting in place an action plan. In many instances an agreement will be entered into as an alternative to taking other formal enforcement action. Agreements can be entered into even where there has been no formal Investigation. Entering into an action plan is not taken as an admission that there has been an unlawful act.

Alternatively the Commission may suspend an Investigation on the basis of a section 23 agreement that the Commission will not investigate or issue unlawful act notice provided that the other party undertakes not to commit an unlawful act and takes specified actions.

Once the agreement and action plan is in place the Commission will keep in regular contact and require the organisation to report regularly on progress. During the monitoring phase of an agreement, we frequently build a close working relationship with the organisation in question, generating considerable cooperation and goodwill,
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and leading in some cases to those organisations becoming champions of best practice in equality and advocates for the work of the Commission.

However, if there is a failure to comply with an undertaking in the agreement or the Commission thinks that compliance is unlikely, the Commission can take further action through the Courts by applying to the relevant Court for an order requiring compliance.

Public sector duty assessments

This section only applies to those public bodies which are subject to the equality duties.

The Equality Duty requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations in the course of developing policies and delivering services.

We can undertake an assessment to evaluate compliance with one or more aspects of the public sector equality duties. An assessment enables the Commission to scrutinise compliance by particular public authorities with the duties on the basis of past and current performance. The new Equality Duty which came into force on 5 April 2011 replaces the three previous duties on race, disability and gender, bringing them together into a single duty, and extends it to cover age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment.

Assessments can be used to obtain evidence for further enforcement action to secure compliance, as well as identifying areas of best practice in the performance of the duties. The Commission does not have to suspect that there has been any breach of the public duty before carrying out an assessment. Once again the Commission has robust powers to request evidence and information in the course of an assessment.

Before conducting an Assessment the Commission will list the terms of reference (TORs). The Commission will ask for comments on the terms of reference and take these into account. Once the terms of reference are finalised they will be published. The Commission can also ask for evidence or representations from other interested parties, as well as the body under assessment. The Commission will also publish a report at the end of the Assessment.
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Compliance notices

Where the Commission thinks that a public authority has not complied with a public sector duty, the Commission has the power to serve a compliance notice. The notice may require compliance with the duty or provide an opportunity for the written proposal to show the steps that will be taken to ensure compliance. This written information must be produced to the Commission within 28 days of receipt of the compliance notice.

A notice may also require further information to be produced to the Commission for the purposes of assessing compliance.

A person who receives a compliance notice must comply with it. Failure to comply can result in the Commission applying to the relevant court for an order requiring compliance. Failure to comply with the Court order is a criminal offence.

Section 60: Equality Act 2010 – pre-employment questions

The Commission has the sole power to enforce this protection. An employer must not ask about a job applicant’s health until that person has been either offered a job or included in a pool of successful candidates, except in the following very limited circumstances:

- finding out whether a job applicant can participate in a recruitment assessment test and making reasonable adjustments to enable the disabled person to participate in the recruitment process

- finding out whether s/he would be able to undertake a function that is intrinsic to the job, assuming that reasonable adjustments were put in place

- monitoring diversity in applications for jobs

- supporting positive action in employment for disabled people

- (in situations where there is an occupational requirement for the jobholder to be disabled,) identifying suitable candidates.
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Further information

Further information on the compliance and enforcement work of the Commission can be found on our enforcement work web page.

Requesting a review of one of our regulatory decisions

When deciding to take regulatory steps or action the Commission makes every effort to comply with its Compliance and Enforcement policy and with the Regulators’ Code.

If your organisation is directly affected by one of our decisions relating to the use of our enforcement powers, and you think that we have got it wrong, you may ask us to carry out a review. The review procedure can be found at on our web page: How to request a review of a use of an enforcement power.

Complaints about operation of policy

The Commission will strive to ensure that this enforcement policy is applied fairly and consistently. Complaints about the operation of this policy should be firstly addressed to the Commission following our complaints procedure.

This policy will be reviewed regularly.