



**Equality and
Human Rights
Commission**

Our litigation and enforcement policy 2019-22

November 2019

Equality and Human Rights Commission

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Introduction

The Equality Act 2006 puts a duty on the Equality and Human Rights Commission to enforce the Equality Act 2010 and protect human rights. It gives us a range of powers to do this.¹

The **enforcement powers** given to us by the Equality Act 2006 include the power to:

- investigate an organisation or individual that we suspect is in breach of equality law, and
- enter into a formal, legally binding agreement with an organisation or individual.² This allows us to agree an action plan to prevent future discrimination.

[Annex A](#) talks about our enforcement powers in more detail.

The Equality Act 2006 also gives us **litigation powers**. These powers let us:

- provide legal assistance to individuals making claims under the Equality Act 2010, and
- take, or get involved in, cases that will strengthen equality and human rights laws.

We also use these powers to build up a critical mass of cases to show how a particular issue is affecting people's lives – see 'legal support projects' below. [Annex B](#) talks about our litigation powers in more detail.

¹ In Scotland our human rights work is undertaken with the agreement of the Scottish Human Rights Commission.

² To make things simple, we use the term 'organisation' throughout this policy to refer to both organisations and individuals.

In this policy:

- **‘Enforcement action’** means legal action using any of the powers listed in [Annex A](#).
- **‘Strategic litigation’** means legal action using any of the powers listed in [Annex B](#).
- **‘Legal powers’** means any of the enforcement and/or litigation powers listed in the annexes.

Our decision-making framework

In our role as a regulator, we will follow the [Regulators' Code](#) relating to all our relevant functions. In our role as a national human rights institution we will follow the United Nations Principles relating to the Status of National Institutions (the 'Paris Principles').

Our core aim and priority aims

We generally only use our legal powers to tackle issues that will advance our core aim or one of our five priority aims. These aims are described in detail in [our Strategic Plan 2019–22](#), which explains what we will work on over the next three years. In summary, we will use our legal powers to make sure that:

- The system of equality and human rights protection is upheld by strengthening the interpretation of equality and human rights laws (this means that we will always consider whether litigation will strengthen or protect the legal framework relevant to our mandate) and flagrant, systemic and serious breaches of those laws are successfully challenged. This is our **Core Aim**.
- Individuals have equal access to the labour market and are treated fairly at work. This is **Priority Aim 1**.
- Public transport supports the economic and social inclusion of disabled and older people. This is **Priority Aim 2**.
- Individuals can access redress when they are wronged and can have a fair trial in the criminal justice system. This is **Priority Aim 3**.
- The education system promotes good relations with others and respect of equality and human rights. This is **Priority Aim 4**.
- Rules and practices governing entry into, exit from and treatment in institutions respect equality and human rights standards. This is **Priority Aim 5**.

How we decide whether to use our legal powers

If an issue relates to our core aim or one of our priority aims, we will take into account the following factors when deciding whether to use our legal powers. We will take the same approach to using our legal powers under our core aim as under the five priority aims.

The scale of the problem

We will consider the scale of the problem including:

1. its size (the number of people affected by it)
2. its severity (the seriousness of its effect on an individual or a group, including whether it affects people in the most vulnerable situations)
3. its persistence (the length of time it has lasted), and
4. its prevalence (whether the same or similar issues are affecting individuals across a number of organisations or sectors).

The greater the scale of the problem, across any or all of these measures, the more likely we are to use our legal powers.

The impact we will have

We will consider the **impact** we will have by identifying:

1. the overall change we want to see
2. which of our powers we could use to achieve it
3. which of our powers will be the most effective and proportionate way to achieve it, and
4. the extent to which using our legal powers will achieve it, taking into account action that may be taken by others.

We will assess the potential impact of any issue we consider in England, in Wales and in Scotland. If an issue only has impact in one nation, that will not be a reason not to act. We will consider **scale** and **impact** in each nation and may decide to act in one nation but not the others.

The greater the impact our action will have, the more likely we are to use our legal powers.

The views of our external stakeholders

We will consider views and evidence from relevant stakeholders, for example, United Nations treaty bodies, parliamentary committees and civil society organisations in England, Wales and Scotland, when deciding whether to use our legal powers.

Our approach to using our legal powers

When deciding whether to use any of our legal powers we will consider:

- the extent to which a successful outcome will preserve or strengthen the interpretation or application of equality and human rights law, against the risk of setting an adverse precedent
- whether the scale of the problem and the likely impact we will have justifies the amount of resources we will need to achieve it
- whether there are more effective ways of achieving the desired outcome
- whether we are best-placed to act and, if so, whether we should do so in partnership with others (such as other regulators, inspectorates or civil society organisations) to achieve the desired outcome, and
- whether taking action would align with our proactive strategies in each aim, including our other work, to maximise impact.

We will always act proportionately, balancing the scale and seriousness of the problem against the size and resources of the organisation involved.

In addition, when considering using our **strategic litigation** powers, we will:

- carry out a robust assessment of the legal merit of the case and the probability of achieving the impact that we want
- use our power to intervene only if we are satisfied that we will add value to the proceedings and assist the court in its determination, and

- consider whether we are the most appropriate organisation to fund any case and whether there are alternative sources of funding available (for example, legal aid).

When we do use our legal powers, we will:

- promote the outcome of using our legal powers to encourage others to comply with equality and human rights law
- publish details of the results of using our legal powers when it is lawful and appropriate to do so
- not enter into confidentiality agreements with organisations or individuals, when a case comes to an end or a settlement has been reached, other than in exceptional circumstances.

Legal support projects

We will sometimes run projects offering legal support on an issue related to our core aim or one of our priority aims. This allows us to increase individuals' access to justice on that issue and to better understand it. This sort of **strategic litigation** is about building up a critical mass of cases to show how a particular issue is affecting people's lives and then using those cases to decide on the best way to tackle the issue.

[You can read about previous legal support projects on our website.](#)

Our approach to legal support projects

We may publish specific criteria for different projects but we will take the following general approach when deciding whether to assist with project cases. We will:

- assess the merit of the case and will not usually assist if chances of success are less than 50%
- usually, but not exclusively, offer assistance for first-instance cases
- do this to discover or identify the scale or existence of a particular issue
- gather information and intelligence on assisted cases to identify barriers to access to justice and the nature and extent of any unlawful discrimination, and
- consider enforcement action against organisations found to have unlawfully discriminated.

Requests for us to use our legal powers

Legal representatives and organisations can contact us directly to ask us to use our legal powers.

Requests can be emailed to legal.request@equalityhumanrights.com (for England and Wales) or legalrequestscotland@equalityhumanrights.com (for Scotland).

Your request will be reviewed by our Legal Intelligence and Impact team and we will get back to you as soon as possible with a decision and / or a request for further details.

To speed up the process, it will help if you provide the following information:

- Your name, organisation and contact details.
- What you are asking us to do, for example: fund strategic litigation, intervene in a case, bring proceedings in our own name, or investigate an unlawful act.
- Details of the issue, including a short summary of the facts and any important deadlines.
- Within which of our priority aims or core aim the issue sits.
- Why we should use our powers on this issue (taking into account the criteria in this litigation and enforcement policy).

We cannot directly advise individuals who are seeking our help on an issue. Instead, individuals should contact the Equality Advisory and Support Service (EASS).

EASS receives calls from individuals. The service provides information, assistance and support (but not legal advice or representation) about discrimination and human rights issues. If EASS thinks your issue may be of strategic interest to us, it will refer it to us for consideration.

The contact details for EASS are:

Phone: 0808 800 0082

Textphone: 0808 800 0084

Freepost: FREEPOST, EASS HELPLINE, FPN6521

You can email them using the [contact form on the EASS website](#).

British Sign Language (BSL) interpretation and web chat services are also available through the website.

Whistleblowing

If you are a worker concerned that your employer is committing breaches of equality and human rights law, you can report your concerns to us.

If the information you provide meets certain criteria, you may be protected by whistleblowing law. This means you should not be treated unfairly or lose your job because you reported it. The wrongdoing you disclose must be in the public interest. This means it must affect others, for example the general public.

We will deal with your disclosure in accordance with our [Whistleblowing Policy](#). The policy explains that when deciding whether to take any action, we will take into account our strategic plan, business plan and this Litigation and Enforcement Policy. The Whistleblowing Policy also explains how to contact us to make a disclosure.

Annex A: Enforcement powers

As the national equality regulator, responsible for enforcing the Equality Act 2010, our duties (as set out in the Equality Act 2006) include reducing inequality, eliminating discrimination and promoting and protecting human rights.

We have a range of enforcement powers, set out in the Equality Act 2006, which include:

- investigations (section 20)
- unlawful act notices (section 21)
- action plans (section 22)
- agreements (section 23)
- injunctions (in Scotland, interdicts) (section 24)
- public sector duty assessments (section 31)
- public sector duty compliance notices (section 32)

Section 20 investigations

If we suspect that an organisation has committed an unlawful act we can carry out an investigation. Section 20 and schedule 2 of the Equality Act 2006 explain that we have to:

- provide draft terms of reference for the investigation and allow the organisation, or their nominated legal representative, to make written representations about the drafts terms of reference
- consider any representations and aim to publish the final terms of reference
- gather and analyse any relevant evidence, including representations from third parties
- if we find that the organisation has committed an unlawful act, provide it with a draft report and allow it time to make representations on it, and

- consider any representations before publishing the final report.

In seeking to gather evidence, we might give an organisation notice under paragraph 9 schedule 2 of the Equality Act 2006. This means the organisation has to provide information and documents in its possession or to provide oral evidence. The organisation may apply to the county or sheriff court, under paragraph 11 schedule 2 of the Equality Act 2006, to have the notice set aside on the grounds that it is unnecessary or unreasonable.

We may apply to the court for an order requiring it to take the steps necessary to comply with the notice. The organisation will commit an offence if it does not comply with a notice or court order, falsifies anything provided in accordance with a notice or court order, or gives false oral evidence in response to a notice or court order and does not have a reasonable excuse for doing so. An organisation convicted of such an offence will be liable to a 'level 5' fine, which means that there is no maximum limit on the amount that it may be fined.

Section 23 agreements

If an organisation has breached the Equality Act 2010 we can, at any time, give it the opportunity to enter into an agreement under section 23 of the Equality Act 2006 in which it undertakes to comply with the relevant legislative provision it is in breach of. This can be done instead of a section 20 investigation or section 31 assessment, or as an alternative to continuing with either of those if they have already started.

If an organisation enters into a section 23 agreement, we monitor compliance and, if it has complied, no further enforcement action will be taken.

Section 24 injunctions / interdicts

If we think an organisation is likely to commit an unlawful act, or if an organisation enters a section 23 agreement but does not comply, we can apply for an order under section 24 to the county court in England and Wales, or the sheriff court in Scotland. A section 24 order would either restrain the organisation from committing the unlawful act, or, in the case of a section 23 agreement, would require the organisation to comply.

In cases of non-compliance with a section 23 agreement, we could decide not to seek a section 24 order and instead vary the agreement. However, this requires exceptional circumstances, and we would expect the organisation to anticipate its non-compliance and seek a variation with us in advance of any breach of the agreement.

Section 21 unlawful act notices and section 22 action plans

If we have carried out a section 20 investigation and decide that an organisation has committed an unlawful act we will issue an unlawful act notice in accordance with our power under section 21.

An unlawful act notice requires the organisation to prepare a draft action plan under section 22 setting out how it will remedy its continuing breach and prevent future breaches.

If we do not receive a draft action plan, we can apply to the county court in England and Wales or the sheriff court in Scotland for an order requiring the organisation to provide an action plan under section 22(6)(a) within a specified timeframe.

An organisation can appeal to the county court in England and Wales or the sheriff court in Scotland against the unlawful act notice within six weeks of the notice being issued. It may do so either on the basis that it denies it has committed an unlawful act or that it contends the requirement to prepare an action plan is unreasonable. On appeal, the court may affirm, annul or vary a notice or a requirement in the notice and make an order for costs or expenses.

If the notice has not been appealed and we have received a draft plan, we can either approve it or issue a further notice stating that the action plan is inadequate. Such a notice will require a further draft to be provided and may make recommendations about the content of a revised draft. If we do not ask for a revised draft, or have not applied to court for an order to require the organisation to provide a further revised draft plan, the draft action plan will come into force six weeks after we receive it. Action plans can be varied by agreement with us.

If an organisation does not comply with an action plan, we can apply to the county court in England and Wales or the sheriff court in Scotland for an order requiring it to comply with it under section 22(6)(c), unless circumstances mean it would not be appropriate to do so.

An organisation will commit an offence if it does not comply with an order made against it under section 22(6) and does not have a reasonable excuse for doing so. An organisation convicted of such an offence will be liable to a 'level 5' fine, which means that there is no maximum limit on the amount that it may be fined.

Section 31 public sector duty assessment and section 32 public sector duty compliance notice

The general duty

When we think that a public authority has not complied with section 149 of the Equality Act 2010 (the public sector equality duty), we can carry out an assessment of compliance in accordance with section 31.

A section 31 assessment will take the same format as a section 20 investigation, as set out above. This may include serving a notice under paragraph 9 schedule 2 of the Equality Act 2006, requiring the organisation to provide information and documents in their possession or to give oral evidence. An organisation may apply to the county court in England and Wales or sheriff court in Scotland under paragraph 11 schedule 2 to have the notice set aside on the grounds that it is unnecessary or unreasonable.

We can apply to the court for an order requiring the organisation to take the necessary steps to comply with the notice. An organisation will commit an offence if it fails to comply with a notice or court order, falsifies anything provided in accordance with a notice or court order, or gives false oral evidence in response to a notice or court order and does not have a reasonable excuse for doing so. An organisation convicted of such an offence will be liable to a 'level 5' fine, which means that there is no maximum limit on the amount that it may be fined

If the conclusion reached following assessment is that the organisation has failed to comply, we can issue a notice under section 32. The notice will require the organisation to comply with the duty to publish and to provide us, within 28 days of the notice, with written information of steps taken or proposed for the purpose of complying with the duty.

Where we think that an organisation has failed to comply with a notice given under section 32, we can apply to the High Court in England and Wales or the Court of Session in Scotland for an order requiring it to comply under section 32(8).

The specific duties

We can also issue a compliance notice where we think that an organisation has not complied with the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 or The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 as amended. We can do this without the need to conduct an assessment.

Where we think that an organisation has failed to comply with a notice given under section 32, we can apply to the County Court or the Sheriff Court in Scotland for an order requiring it to comply.

Annex B: Litigation powers

As the national equality regulator responsible for enforcing the Equality Act 2010, our duties (as set out in the Equality Act 2006) include reducing inequality, eliminating discrimination and promoting and protecting human rights.

We have a range of litigation powers which are set out in the Equality Act 2006:

- We can provide legal assistance (section 28).
- We can bring legal proceedings in our name (section 30).
- We can intervene in legal proceedings brought by others (section 30).

Section 28 assistance

We have the power to provide legal assistance for claims of discrimination made under the Equality Act 2010. This can include legal representation and can extend to discrimination cases with a human rights element. However, we cannot help people in cases that raise only human rights issues.

Section 30 'own name' proceedings

If we think that a public body has taken a decision, acted or failed to act in a way that breaches the Equality Act 2010 or the Human Rights Act 1998, we can issue proceedings in our own name for judicial review.

We may apply for a judicial review on any grounds, as long as the subject matter of the claim relates to one of our statutory functions. In human rights cases we do not need to be a ‘victim’ affected by the alleged violation – a requirement that otherwise applies to those wishing to bring judicial review proceedings under the Human Rights Act.

Section 30 interventions

We have the power to intervene in court proceedings in human rights and equality cases initiated by others.

An intervention allows us, with the court’s permission, to provide a legal analysis of one or more of the issues, provide input on international legal aspects or provide additional evidence. The purpose of our intervention is to help the court in its determination of the case.

Contacts

This publication and related equality and human rights resources are available from [our website](#).

Questions and comments regarding this publication may be addressed to: correspondence@equalityhumanrights.com. We welcome your feedback.

For information on accessing one of our publications in an alternative format, please contact: correspondence@equalityhumanrights.com.

[Keep up to date with our latest news, events and publications by signing up to our e-newsletter.](#)

EASS

For advice, information or guidance on equality, discrimination or human rights issues, please contact the [Equality Advisory and Support Service](#), a free and independent service.

Telephone: 0808 800 0082

Textphone: 0808 800 0084

Hours: 09:00 to 19:00 (Monday to Friday)

10:00 to 14:00 (Saturday)

Post: FREEPOST EASS HELPLINE FPN6521

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