

Professor Sir David Metcalf CBE
Director of Labour Market Enforcement
10 Victoria Street
London, SW1H 0NB

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Women and Equalities Committee
House of Commons,
London,
SW1A 0AA

Dear Women and Equalities Committee,

Thank you for the invitation to speak to the Committee on 27th March 2019. As I said in my evidence, the enforcement of equalities duties is not within my remit, and the discussion we had raised some interesting and important questions that may be relevant to my work going forward. Similarly, there are certainly lessons from what I have seen in the enforcement of other areas of the labour market which could be applied to some of the issues that you are considering and equally, something that we can learn from considering non-compliance through the lens of equality and protected groups.

Following the evidence session, my team and I have met with both the Equalities and Human Rights Commission (EHRC) and the Government Equalities Office (GEO). These meetings have provided us with additional background information about the enforcement of equalities as well as useful new contacts. We have agreed that my office will meet regularly with the EHRC to discuss issues within my remit, and will share research and intelligence as appropriate.

At the end of the evidence session in March, you asked me to come back with further thoughts on the following questions:

What role do you think there might be for the enforcement of the Equalities Act for the new organisation [i.e. the potential single enforcement body]? What are the areas of overlap?

I have considered these questions and set out my thoughts below.

The first thing to state is that we do not know what the single enforcement body will look like, or indeed if the decision will be made to proceed with it. Currently the Government has stated that it intends to consult on the issue, but the consultation has yet to be published. Therefore, all discussions on what a single enforcement body should include are theoretical at this stage.

When the consultation document is published, my office will respond. One of the main areas that this response will cover is to consider what would be the characteristics of an effective enforcement system. This will draw on the knowledge and insight from three years as the Director of Labour Market Enforcement, working

closely with the three enforcement bodies (GLAA, HMRC NMW and EAS) and other partners.

We will also of course consider the potential remit of the single body - the new enforcement body could potentially cover the same, a larger, or indeed smaller remit than the current remit of the three enforcement bodies. Your question is whether that remit could or should include any of elements of enforcement of the Equalities Act.

As the organisation has yet to be designed, of course it could be set up to include any number of issues to enforce, however I do not believe there is a strong case of synergy or increased efficiency or effectiveness for issues of equalities to be included within the single enforcement body.

Areas of non-compliance currently covered by the three labour market enforcement bodies are very different from the majority of those covered by Equalities Act. The Equality Act 2010 legally protects people from discrimination in the workplace and in a range of other settings. This includes direct and indirect discrimination, harassment and victimisation.

The labour market enforcement bodies (HMRC NMW, GLAA and the EAS) are charged with ensuring:

- employers are paying national minimum wage;
- employment agencies are treating workers fairly and transparently;
- labour providers in certain high-risk sectors are licensed and compliant to the regulations; and
- that employers/ individuals are not exploiting people in conditions of modern slavery.

As discrimination and labour exploitation are both impacts that can happen to people in the workplace, it might seem sensible to have them being enforced by the same organisation, however, in my view, they are not necessarily aligned in terms of:

- the **employers** who are the target for enforcement;
- the **workers** who most likely to be victims; and
- the **mechanism** of enforcement.

Employers

The employers who discriminate (and particularly those against whom EHRC would want to pursue high profile cases which change the behaviour more widely across the labour market) are not necessarily the same as those who do not meet minimum employment standards.

There may well be some inter-relation between labour exploitation and discrimination due to poor practices of employers - but we do not have the evidence to understand this relationship in detail as it is not something that we have been tasked to examine. On the basis of what we do know currently, I am not convinced that the types of employers who are the targets of enforcement (or alternatively support and education) to prevent labour exploitation, are the same types of employers who the

Government needs to influence to change their practices to prevent discrimination in all its different guises.

Workers

The groups most likely to be exploited in the workplace overlap with groups of people sharing particular protected characteristics (with women, ethnic minorities, the young being over represented), but those at risk of discrimination are a larger group, the majority of whom are likely to be having their statutory employment standards met in terms of NMW and labour provision regulations. There may well be an element of discrimination when employers under-pay and exploit workers for their labour, however the state enforcement bodies and the legislation behind their enforcement powers, look at the issue in terms of meeting the minimum requirements rather than comparing treatment across worker groups.

This said, discrimination is explicitly prohibited under several labour market regulations (for example for employment agencies and licensed labour providers) therefore the enforcement bodies are already considering discrimination in that regard.

Mechanism of enforcement

The three bodies enforce minimum standards set out by the state and target the employer. They do not need an individual to make a complaint to take action against an employer who has exploited them in some way. In contrast, the Equality Act 2010 enforces individual rights, with cases of discrimination investigated and enforced at the individual level, requiring the worker to present their evidence to a tribunal to secure redress. This is a significant difference which impacts on the process of enforcement from end to end, and is fundamental to how the enforcement bodies are operate.

State bodies focus on employers meeting standards which are mostly clear cut – employers are either paying NMW or not, abiding by EAS regulations or breaking them, staying within the GLAA licensing regulations or not. Discrimination on the other hand is an area of nuance and assessment of proof (such as reasonableness or proportionately). The types of evidence and data required to prove the case against each type of behaviour are very different.

The powers and penalties used for enforcing the different non-compliance are also different. The penalties available for enforcement for the three bodies are fines to employers, backpay to employees, disbarring from certain business activities (i.e. withdrawing of a license), naming of employers found to breach NMW standards, the imposition of labour market enforcement undertakings or orders and potential custodial sentences for breaches, or custodial sentences/probation for modern slavery cases. For enforcement of equalities, the sanctions are compensation awards that go to the plaintiff via employment tribunals and court judgements.

These differences mean the existing workforce, powers and approach of the three enforcement bodies are not in line with what would be required to enforce any elements of the Equality Act 2010. Given this difficult fit with an already large remit,

there would need to be compelling arguments why elements of the Equalities Act should be included under the potential single enforcement body to do so. Having thought about it and discussed the matter with colleagues, I have not been convinced that there are large scale issues that meet this criteria.

Having said this, there may be one or two areas where the issue is that wages or benefits are unpaid which could be allocated to the remit of whichever body/organisation is charged with enforcing holiday pay. Maternity pay is one instance which was mentioned during the evidence session in March. However, as I understand it, the greater issue here is not the withholding of pay, but the discrimination against mothers (for it is mainly mothers and not fathers) making it difficult to remain or progress in the workplace, and the pay issue is probably subsidiary. While the enforcement body that is charged with enforcing holiday pay in future should be aware of the potential issue, and be able to refer cases on, it seems more appropriate to keep the issue of maternity pay and discrimination together.

Enforcing equalities goes beyond the labour market

Labour market discrimination is only one element of what the Equalities Act covers, therefore to argue that it should be covered by the single enforcement body ostensibly focussed on non-compliance within the labour market would need a justification for separating this from the wider areas of discrimination. If one included discrimination within the remit of the single enforcement body, would harassment and victimisation also be included? Why separate the enforcement of discrimination in the labour market from that related to goods and services?

Could the gender pay gap reporting be included within the single enforcement body? This could be done given the resource and remit, but again the principles (and process) that are being enforced/examined are very different and I do not see that there would be benefit to rolling it up into the single enforcement body.

My conclusion overall is that designing and implementing the single enforcement body will be a major task with significant time and resource implications. It will already potentially be taking on additional areas of regulation such as holiday pay and umbrella companies. These would both be a better fit than any elements of the Equality Act, but are both major areas which will require dedicated personnel and expertise. Expanding the remit of a potential single enforcement body further into the area of discrimination and consideration of equalities legislation would, to my mind, be an additional challenge for which a strong argument would have to be made.

I hope that my further thoughts are useful to the Committee.

Yours sincerely,



Professor Sir David Metcalf CBE

Director of Labour Market Enforcement