

## FOR INFORMATION

### **EIS comments on the EHRC's proposed Litigation and Enforcement Policy 2019 to 2022**

In June 2019 the EIS Education and Equality Department had the opportunity to provide comments directly to the EHRC, which was holding a public consultation about its draft Litigation and Enforcement Policy 2019-2022<sup>1</sup>; and to the STUC, which was making a response informed by affiliates' comments.

We commented as follows:

1. We note that the aims in the policy derive from the EHRC strategic plan which runs from 2018-2021, and about which no further public consultation is possible. So while we would see some of the aims as overly narrow, e.g. the one about schools (we would prefer it to refer to all education settings and to mention the role of schools in teaching about discrimination and rights) we understand that they are the aims as agreed and thus that it makes sense for the priorities in the litigation policy to flow from them. That said, if there is any opportunity for the strategic litigation policy to take a more expansive approach, building on the core intent of the strategic plan, we would strongly welcome that.
2. Regarding the importance of upholding the system of equality and human rights protection by making sure that flagrant, systemic and serious breaches of those laws are successfully challenged, that is vital. We would argue that the EHRC should particularly seek to take on breaches that affect the most vulnerable, often voiceless people in our society, e.g. migrants, Black and Minority Ethnic people, or disabled people. We would especially welcome strategic litigation that supports people with multiple intersecting protected characteristics and whose characteristics intersect with economic disadvantage - poverty, in effect.
3. We would agree that there should be priority given to ensuring that individuals have equal access to the labour market and are treated fairly at work. There is strong evidence that people with certain protected characteristics e.g. BME women continue to experience serious labour market disadvantage (see recent Close the Gap research), arguably because there has been excessive focus on improving their employability and too little focus on structural solutions. Society needs to move away from a deficit-led model which treats BME people, disabled people and other structurally oppressed groups as deficient, and to make more concerted efforts to tackle unfair treatment at work which stems from discriminatory and prejudiced attitudes and behaviours.
4. Likewise, we welcome the emphasis on public transport that supports the economic and social inclusion of disabled and older people. Our disabled

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<sup>1</sup> <https://www.equalityhumanrights.com/en/publication-download/draft-litigation-and-enforcement-policy-2019-2022>

members have consistently shared negative experiences of using public transport. For example, someone who is registered blind can't book train travel online and must do so in person, which is not always suitable for someone in a rural or Island location where there are no booking offices/train stations. Another concern is that driver-only operated trains are a serious barrier to wheelchair users travelling independently; and that many trains lack suitable accessible toilets, which can lead to a loss of dignity for disabled train users. These issues have been raised many times at recent STUC Disabled Workers' conferences.

5. In summary we would welcome targeted litigation which upholds equality and human rights protection. Such litigation will be at its most effective if the outcomes of successful cases are well disseminated, so that employers or service providers beyond those immediately targeted realise that discrimination is completely unacceptable; and if widespread cultural change is supported. We welcome, therefore, the commitment not to enter into confidentiality agreements with organisations/individuals on the conclusion of a matter other than in exceptional circumstances. We would trust that 'exceptional circumstances' would occur only very rarely, if at all.

The EIS Organisation department also offered some comments, as follows:

1. The EIS supports the EHRC's core aim of ensuring that the "system of equality and human rights protection is upheld" for people, including all workers.
2. The EIS agrees with priority aims 1 to 5 inclusive. As a teachers' trade union, the foci of priority aim 1 (on workers) and priority aim 4 (on schools) are welcome, as indeed are the other priority aims that should ensure that all people and services have the right to expect equality. Equality has a key role in education and a failure to properly enforce it may have severe long-term consequences for society. The EHRC has significant powers and they should not be squandered.
3. The priority aim of schools is particularly welcome at a time when efforts are being made to close the poverty attainment gap in Scotland, i.e. to ensure that all pupils receive equal opportunities within their school education irrespective of their background. Priority aim 5 includes all institutions, including colleges and universities, and this may also assist to ensure that all young people receive equal opportunities in their education in order to allow them to flourish.
4. The draft policy states that "Our approach to these cases is the same as our approach to issues within the five priority aims (see the following section) but the threshold for using our legal powers under this element of our strategic plan is high." The EIS believes that the threshold for using the EHRC's legal powers is too high, and the wording should be amended

for there to be more flexibility in the policy wording around taking legal action.

5. The EIS notes the criteria proposed to effectively define the trigger for using legal powers defined in the core aim (i.e. flagrant, systemic and serious breaches of those laws):

- “1. its size (the number of people affected by it)
2. its severity (the seriousness of its effect on an individual or a group)
3. its persistence (the length of time it has lasted), and
4. its prevalence (similar issues 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.”

6. The EIS believes that the bar is set too high. The EIS would expect the EHRC to be involved in dealing with strategic threats to the system of equality and human rights protection. The EHRC should acknowledge that in some cases breaches may have been recent or of low prevalence, and that prompt action by the EHRC may avoid prevalent breaches from being established. The EHRC should have the flexibility of being able to deal with emerging threats to the system of equality and human rights protection, and not only to large established threats/breaches. In other words, the EHRC has a role to play to prevent breaches from becoming widespread by nipping some practices in the bud.
7. The EIS notes the draft policy’s mechanism for individuals/organisations to request that the EHRC use its legal powers. Whilst the mechanism looks reasonable, the high thresholds previously alluded to may make it unlikely that the EHRC actually accepts many requests. Consideration should also be given as to whether this role of the EHRC to work with other stakeholders should be made more prominent in the policy rather than being placed in Annex C.
8. Trade unions also have the aim of protecting the equality and human rights system, and we frequently act to protect and enforce the rights of individual workers and groups of workers. Trade unions and the EHRC have shared aims and should be able to work more closely than this policy envisages.

The final EHRC policy for 2019-2022 is awaited.