Response of the Equality and Human Rights Commission to the consultation:

Consultation details

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<th>Title: Employment Law Hearing Structures</th>
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<td>Source of consultation: Law Commission</td>
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<td>Date: 04 February 2019</td>
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For more information please contact

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Introduction

1. The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. We are committed to our vision of a modern Britain where everyone is treated with dignity and respect, and we all have an equal chance to succeed.

2. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited at UN level as an ‘A status’ National Human Rights Institution, in recognition of its independence, powers and performance.
3. The Commission welcomes the opportunity to respond to the Law Commission’s consultation on Employment Law Hearing Structures. In our response to this consultation we concentrate on questions relating to claims for discrimination.

4. We consider that the questions posed in this consultation highlight inconsistencies as to how various types of discrimination claims are heard. They also raise wider questions about our system of civil justice which require further discussion and consultation to ensure that all claimants have access to justice (please see our response to consultation question 4 onwards). We strongly recommend that the Law Commission calls for a review by Government to consider how complainants in all discrimination claims have access to appropriate advice and can be confident of an affordable, fair, and speedy hearing by skilled adjudicators with knowledge and understanding of equality legislation and the effects of discrimination.

Response to consultation questions

**Consultation Question 2.**

Should there be any extension of the primary time limit for making a complaint to employment tribunals, either generally or in specific types of case? If so, should the amended time limit be six months or some other period?

5. As the Law Commission recognised in its consultation paper¹, the short primary time limits for bringing an employment tribunal claim derives from the concept of tribunals as a forum for the speedy and informal resolution of employment disputes. However, this is often not the case for discrimination claims. Such claims are frequently complex, with disposals taking place a number of months (and in some cases, years, where there are multiple claims) after the claim was received by the employment tribunal.²

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² See average time to clearance for single and multiple discrimination claims for April to June 2018, found here: Tribunals and gender recognition certificate statistics quarterly: April to June 2018, Main Tables, Table T 3: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/763680/Tribunals_Main_Tables_Q1_201819.ods
6. The Commission has undertaken a number of projects into pregnancy and maternity discrimination at work and sexual harassment in the workplace where we have recommended that the employment tribunal time limit for discrimination and harassment cases should be extended from three to six months.

7. In 2016 the Department for Business, Innovation and Skills (BIS) and the Commission commissioned a programme of research to investigate the prevalence and nature of pregnancy discrimination and disadvantage in the workplace. Our research found that over three-quarters of the 3,254 mothers surveyed reported negative or possibly discriminatory experiences; however, just 18 (less than 1%) pursued a claim to an employment tribunal. Various reasons were given for not pursuing a claim. 12% of respondents said they were too busy with their baby or wanted to focus on pregnancy or maternity leave. Many mothers also mentioned health reasons and the addition of the pressures and stress of bringing a claim in circumstances where mothers are already dealing with the heightened demands, both physically and emotionally, of pregnancy and maternity. The health and welfare of pregnant and new mothers being key to that of their child. An extension of the time limit to bring a claim for pregnancy and maternity discrimination would help to alleviate these barriers to accessing justice.

8. In our recommendations to tackle pregnancy and maternity discrimination we recommended that the Government considers increasing the time limit for a woman to bring an employment tribunal claim in cases involving pregnancy and maternity discrimination from three to six months, in line with other employment claims such as redundancy and equal pay.

9. In 2018 the Commission gathered evidence from employees and employers about sexual harassment in the workplace and produced

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3 Pregnancy and maternity-related discrimination and disadvantage: experience of mothers

4 Pregnancy and maternity discrimination in the workplace: Recommendations for change
a report titled Turning the Tables: ending sexual harassment in the workplace.\(^5\)

10. Our findings found the time limit to bring an employment tribunal claim of three months from the act of harassment is a significant barrier to people bringing such claims. For many people, three months will not give them sufficient time to recover, consider what has happened to them, make a decision to pursue the claim, seek legal advice and start the legal process. Employees are also often faced with a choice of allowing the limitation period to expire while they pursue an internal grievance, or issuing a claim before they have exhausted internal procedures.

11. We recommended that the limitation period for harassment claims in an employment tribunal should be amended to six months from the latest of the date of:

   a. the act of harassment;
   b. the last in a series of incidents of harassment; or
   c. the exhaustion of any internal complaints procedure.

12. This recommendation was supported by the Women and Equalities Select Committee’s (WESC) report on sexual harassment in the workplace.\(^6\)

13. The WESC report stated that the three-month time limit for harassment claims is not long enough to allow employers and employees to pursue alternative means of resolving cases. The report stated that this places an unnecessary pressure on potential claimants to submit a claim before they know whether they want to go to tribunal and that it also hinders alternative approaches to resolution by requiring parties to consider early conciliation and to prepare for a tribunal hearing while internal grievance procedures may be ongoing. The WESC report also said that requiring victims of sexual harassment to gamble on judicial discretion to extend time limits is unfair and constitutes another barrier to making a claim.

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\(^5\) Turning the Tables: ending sexual discrimination in the workplace

\(^6\) Women & Equalities Committee Report: Sexual Harassment in the Workplace.
https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf
14. In the Government’s response to the WESC report it proposed - separately to the Law Commission’s consultation on Employment Law Hearing Structures - to consult specifically on extending employment tribunal time limits for Equality Act cases from three to six months.

15. Although our specific recommendations on time limits to date relate to pregnancy and maternity discrimination and sexual harassment, the rationale for the increasing the time limit for bringing a claim applies equally to all discrimination and harassment claims across all protected characteristics. For many people, the three month time limit will not give them sufficient time to recover, consider what has happened to them, make a decision to pursue the claim, seek legal advice and start the legal process. Such a short time limit also forces employees to choose litigation as the way to resolve the dispute.

16. Our view is that the time limit for all discrimination claims should be amended to six months from the latest date of:

   a. The act of discrimination/harassment;
   b. the last in a series of incidents of discrimination/harassment;
   or
   c. the exhaustion of any internal complaints procedure.

**Consultation Question 4.**
We provisionally propose that the county court should retain jurisdiction to hear non-employment discrimination claims. Do consultees agree?

17. In contrast to the employment tribunal, county court judgments are not routinely published. It is therefore difficult to assess the extent of any problem of inconsistent judicial approaches between the jurisdictions and whether *Malcolm* is indicative of a wider, ongoing, issue that needs to be solved.

18. Regardless of whether a problem of inconsistent judicial approaches does exist, we highlighted in our response to the Women and

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7 Government response to WESC report Sexual Harassment in the Workplace
[https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1801/1801.pdf](https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1801/1801.pdf)
Equalities Select Committee Inquiry ‘Enforcement of the Equality Act: the law and the role of the EHRC’

that we remain concerned about individuals’ abilities to access county courts.

19. Unlike employment tribunal claims, claims in the county courts continue to attract a fee. These fees vary depending upon the value of the claim, which disadvantages litigants in person who may find it difficult to provide a realistic estimate of the value of their claim, especially at the outset.

20. County court fees can also be considerable. A claim for a mid-Vento award of damages of £15,000 in the county court requires a fee of 5% of the claim, so £750. Claims for larger sums of money require proportionately larger fees. For example, if a higher education student brings a claim for discrimination that includes future loss of earnings, the issue fee can be considerable. A claim totalling £300,000 gives rise to an issue fee of £15,000. Further fees are also payable at other stages in proceedings. The current hearing fee for a multi-track claim is an additional £1,090. Such fees are likely to be prohibitive, especially in higher value claims. We consider that the impact of fees regarding access to justice in the county courts should be reviewed and consideration given to what steps can be taken to alleviate any barriers to access to justice.

21. Claims for discrimination in access to goods and services, which may involve a one-off discriminatory refusal to access a service, are often relatively low-value in terms of damages. That, mixed with the complexity of the process in the county court can deter people from asserting their rights.

22. The Commission’s power to arrange conciliation services in non-employment discrimination cases was repealed by the Enterprise and Regulatory Reform Act 2013 as a result of concerns about the cost effectiveness and utilisation of the service at the time; however, a well promoted service, arranged by the Commission, with a cost

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9 Schedule 1 of the Civil Proceedings Fees Order 2008/1053 (as amended).

10 For example, Mr Paulley, a wheelchair user, was initially awarded £5,500 in damages by Leeds County Court when he was not allowed to board a bus (an award for damages was not upheld on appeal): FirstGroup Plc v Paulley [2017] UKSC 4
effective supplier and robust contractual relationship, would be a valid tool for the Commission to assist complainants and could deliver good value for money. It would offer a proportionate alternative to court action for people seeking resolution of their dispute, for whom the current barriers mean they effectively do have not recourse to redress.

23. Therefore rather than simply asking whether the status quo should remain regarding the county court’s jurisdiction to hear non-employment discrimination claims, our view is that a more holistic approach should be taken. We strongly recommend that the Law Commission request a review to consider how complainants in all discrimination claims can have access to appropriate advice and can be confident of an affordable, fair, and speedy hearing by skilled adjudicators with knowledge and understanding of equality legislation and the effects of discrimination.

**Consultation Question 5.**
Should employment tribunals be given concurrent jurisdiction over non-employment discrimination claims?

24. We recognise that there could be benefits to the employment tribunals having jurisdiction to hear non-employment discrimination claims.

25. Employment judges’ experience in discrimination law mean that some cases may be dealt with more efficiently.

26. Having a single jurisdiction able to consider both employment and services discrimination claims could also lead to greater efficiency in certain “employment” cases where a claimant may currently wish to bring an employment tribunal claim and a county court claim (in the alternative) out of the same set of facts. This can occur in a “gig-economy” situation where there is dispute that the claimant is a worker for the purposes of Part 5 of the Equality Act 2010 (“EA2010”) and so the claimant may in the alternative seek to claim that the alleged employer is actually a service provider under Part 3 of the EA2010. Such split-forum claims are currently unusual, although they may become more common in the future.
27. The employment tribunal jurisdiction also provides certain inherent benefits to litigants: currently no tribunal fees are payable for pursuing a claim; the costs regime in the employment tribunal means that generally no costs are payable in the event of losing the case; and the court system is less formal than, at least, for multi-track claims in the county court.

28. Concerns about county court judges potentially having less discrimination law experience than employment judges could, however, be reduced through the provision of appropriate training (just as employment judges regularly receive), the use of suitably expert assessors with special skill and experience in relation to the protected characteristic discrimination in issue in the claim, and/or the flexible deployment of employment judges in the county court. (We explore the question of assessors further in response to question 9, below.)

29. However allowing non-employment discrimination claims to proceed in the employment tribunals could also lead to other issues. Legal aid is not currently available in employment tribunals, which may mean someone who becomes eligible for legal aid after issuing their claim will find themselves unable to benefit from legal aid. Also, employment tribunals are not able to award an injunction, which might only become relevant to a litigant after they have issued their claim.

30. As highlighted in our response to question 4, our view is that a more holistic approach should be taken. We consider that further discussion and consultation should be taken in light of the response to this consultation about how complainants in discrimination claims can have access to appropriate advice and can be confident of an affordable, fair, and speedy hearing by skilled adjudicators with knowledge and understanding of equality legislation and the effects of discrimination.
31. A power to transfer claims from one jurisdiction to another could help alleviate some of the issues we have mentioned above. However, transfers also raise questions about how the claimant stands regarding further fees (or having paid a fee to a court now not hearing the claim) or which costs regime is applied, when the costs regime or the (lack of) fees may have been a determining factor for the claimant when deciding where to issue their claim. Our view is that a claim should not be transferred against the wishes of the claimant for this reason. Consideration would need to be given to how claims are transferred fairly and in a non-discriminatory manner. Any triage system would also need to take account of the above.

32. Adding in additional steps of a triage system and/or a transfer of proceedings may lead to additional cost and delay in proceedings.

33. Again, as highlighted in our response to question 4, our view is that a more holistic approach should be taken when considering changes to the hearing structures for discrimination claims.
34. In principle we can see the benefit of having the discrimination law experience of employment judges in the county court. This could lead to non-employment discrimination claims being allocated to the most suitably experienced judge, especially where a significant element of the claim is an allegation of discrimination. If flexible deployment of employment judges is to take place, it should be done in tandem with the provision of appropriate discrimination law training to county court judges.

35. However, as highlighted in our response to question 4, we consider this should be taken into account as part of wider and more detailed discussion and consultation on changes to the hearing structures for discrimination claims.

36. Our view is that, should employment judges hear non-employment discrimination claims, then they should sit with assessors in the same way as required for county court judges. As we set out in our intervention into Cary v Commissioner of the Police for the Metropolis\textsuperscript{11}, we consider that assessors should have special skill and experience in relation to the protected characteristic discrimination in issue in any claim. This is because discrimination against groups sharing protected characteristics generally manifests itself differently. The majority of assessors are lay employment tribunal members with greater experience in more general employment law and practice. Therefore we consider that, without the requirement we suggest, the additional expertise and skill they may bring to non-employment discrimination claims being heard by an employment tribunal judge (rather than a county court judge) will be limited.

\textsuperscript{11} [2014] EWCA Civ 987
37. Regardless of the above, the EA2010 currently requires that a judge hearing a non-employment discrimination claim will normally have to appoint an assessor, unless there are good reasons for not doing so. The Commission’s “Services, public functions and associations: Statutory Code of Practice” states at paragraph 14 that it would not be a good reason that the court believes itself capable of hearing the issues in the case without an assessor or that having an assessor would lengthen proceedings. Without further primary legislation it is therefore likely that in any event an employment judge sitting in the county court would be required to sit with an assessor.

Consultation Question 32.
We provisionally propose that employment tribunals should retain exclusive jurisdiction over Equality Act discrimination claims which relate to references given or requested in respect of employees and workers and former employees and workers. Do consultees agree?

38. This could potentially lead to split-forum litigation if a former employee wished to claim for both discrimination and a common law cause of action in relation to the same reference. We do not have evidence suggesting whether there is a significant issue facing litigants justifying a change in the law. We consider that the question of jurisdiction for claims relating to references should form part of the wider discussion and consultation we have suggested previously.

Consultation Question 34.
Should employment tribunals and civil courts retain concurrent jurisdiction over equal pay claims?

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12 Section 114(7) Equality Act 2010
Consultation Question 35.
Should the time limit for bringing an equal pay claim in employment tribunals be extended so that it achieves parity with the time limit for bringing a claim in the civil courts?

39. The county court’s jurisdiction to hear equal pay claims arises because of its ability to hear contractual claims. Whilst most equal pay claims are brought in the employment tribunal, there are occasions where one or all parties may want to litigate in the civil courts for example to take advantage of the more generous time limit and the costs regime. However, this leads to an inconsistent position with discrimination in pay based on other protected characteristics, which must be pursued as discrimination claims in the employment tribunal. In order to ensure that there is no hierarchy in access to justice and redress as between the protected characteristics there should be consistency as to how similar claims across those protected characteristics are pursued. The system of redress for discrimination should not be inherently discriminatory.

40. Again this is a matter which should be considered as part of a wider discussion and consultation about the hearing structures for discrimination claims.

Consultation Question 36.
What other practical changes, if any, are desirable to improve the operation of employment tribunals’ and civil courts’ concurrent equal pay jurisdiction?

41. We consider that reintroduction of the statutory questionnaire procedure\(^{14}\) would benefit all parties in equal pay claims, as well as all other discrimination claims, including discrimination in pay based on other protected characteristics. The statutory questionnaire procedure allowed an employee who believed that they were not receiving equal pay to ask their employer to clarify the position. Its repeal has removed a mechanism which promoted early and cost-

\(^{14}\) Previously provided for by s138 of the Equality Act 2010. This enabled a potential claimant to put a list of questions to a potential defendant in order to obtain useful information as well as a pre-claim explanation concerning their treatment, and to understand whether they had a viable discrimination or equal pay claim. A court or tribunal could take into account a failure to respond or an unsatisfactory response in deciding whether discrimination had taken place.
effective resolution of issues preventing the need to proceed to a tribunal, or enabled the claimant to have greater clarity when entering into legal proceedings which may be quicker and less costly as a result. Furthermore, where a claim is unfounded or poorly articulated, the potentially lengthy process that ensues places an unnecessary burden on employers and employees alike.

42. As we stated in our briefing on the Westminster Hall Debate on proposals for a new Equal Pay Act\textsuperscript{15}, the vast majority of equal pay/equality of terms claims brought in the UK arise from systemic pay differences, often resulting from occupational segregation. The procedure that has to be followed, however, requires an individual claimant and comparator. Even if individual claimants succeed in their claims, there can be no guarantee that the terms of others in their position that have not brought proceedings will be changed. We consider that representative actions should be introduced in equal pay claims, as well as all other discrimination claims. The employment tribunal’s power to make wider recommendations (now repealed)\textsuperscript{16} was designed to deal with systemic issues. This should be reinstated.

43. In the absence of representative actions, employment tribunals have adopted procedures involving the use of ‘lead’ cases. Following the Employment Appeal Tribunal (“EAT”) judgment in \textit{Farmah v Birmingham City Council}\textsuperscript{17}, however, claimants still needed to submit individual claims to the employment tribunal even where the use of ‘lead’ cases was suitable, due to their claims being unlikely to be ‘based on the same set of facts’.\textsuperscript{18} This requirement created a large administrative burden for both claimant and respondent solicitors, as well as the employment tribunal, unnecessarily increasing costs for everyone. Following the Court of Appeal’s judgment in \textit{Brierley and others v Asda Stores Ltd}\textsuperscript{19} the requirement has been relaxed slightly, where claimants who do the same work will bring claims based on the same set of facts. However, the Court of Appeal still cautioned that it would be advisable in future for claimants’ solicitors to err on the side of caution, so it is to be seen what practical effect the judgment in \textit{Brierley} will have. We consider that the rule with regards

\textsuperscript{15} \url{https://www.equalityhumanrights.com/en/file/14391/download?token=7lX--HSA}

\textsuperscript{16} Previously contained in section 124(3) EA2010, repealed by the section 2 Deregulation Act 2015.

\textsuperscript{17} [2018] I.C.R. 921

\textsuperscript{18} As required by Rule 9 of the Employment Tribunals Rules of Procedure (see paragraph 9 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237)

\textsuperscript{19} [2019] EWCA 8
submitting multiple claims should be reversed to the pre-\textit{Farmah} position.

44. In our response to the European Commission’s questionnaire on the implementation of European equal pay law principles in domestic law we highlighted that one change introduced in 2004 to help tackle lengthy delays was the indicative time-table for equal value cases. This provided for a time to hearing of 25 weeks where there is no independent expert and 37 weeks where there is.\textsuperscript{20} As we noted in 2013, and as remains the case now, it seems that the indicative timetable bears little relation to the actual experience of many involved in equal value litigation. The average time to clearance for multiple equal pay claims is around seven years.\textsuperscript{21} We consider that the indicative timetable should be used for all equal value claims with consideration given to extending the timetable to all equal pay claims, including those progressed in the civil courts.

45. The employment tribunal has a power to order an employer who loses an equal pay case to conduct and publish an equal pay audit.\textsuperscript{22} However, the exceptions to when an equal pay audit must be ordered are such that audits are ordered only very rarely. Civil courts do not have the power to order an equal pay audit at all. We consider that the power to order equal pay audits should be available to all tribunals and courts hearing equal pay claims. Moreover, equal pay audits should be made a mandatory requirement upon losing an equal pay case.

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\textbf{Consultation Question 37.} & \\
\textbf{Should the current allocation of jurisdictions across employment tribunals and the civil courts regarding the non-discrimination rule applying to occupational pension schemes remain unchanged?} & \\
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46. Please refer to our response to questions 34 and 35.

\textsuperscript{20} This is now contained in Appendix 1 to Schedule 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237

\textsuperscript{21} We are not aware of statistics available specifically for equal value claims. Average time to clearance for multiple equal pay claims for April to June 2018 can be found here: Tribunals and gender recognition certificate statistics quarterly: April to June 2018, Main Tables, Table T 3: \url{https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/763680/Tribunals_Main_Tables_Q1_201819.ods}

\textsuperscript{22} Equality Act 2010 (Equal Pay Audits) Regulations 2014/2559
47. We intervened in the Supreme Court case of *Michalak v General Medical Council*[^23] to ensure the final decision removed or reduced barriers to accessing justice under equality law in this type of case. We remain of the view that the employment tribunal is better placed to provide effective protection of equality law rights, although members of trades or professions should still be able to challenge decisions on public law grounds in the High Court.

**Consultation Question 43.**
Should members of trades or professions who are aggrieved by the decisions of their qualifications bodies be able to challenge such decisions on public law grounds in the High Court and separately be able to claim unlawful discrimination in the employment tribunal? If not, please would consultees explain why and what changes they would make.

48. We intervened in the Supreme Court case of *P v Commissioner of the Police of the Metropolis*[^24] on the basis that police officers who have faced discriminatory dismissal should have an effective remedy before the employment tribunal. Our view remains that police officers who have experienced discrimination by a police misconduct panel should continue to be able to bring a claim in the employment tribunal.

**Consultation Question 45.**
Should a police officer who is aggrieved by the decision of a police misconduct panel be able to challenge that decision by way of statutory appeal to the Police Appeals Tribunal and separately to complain that the decision is discriminatory in an employment tribunal? If consultees take the view that the answer is “no”, what changes do they suggest?

**Consultation Question 47.**
Should employment tribunals have the power to apportion liability between co-respondents in discrimination cases, so that each is separately liable to the claimant for part of the compensation? If so, on what basis should tribunals apportion liability?

[^23]: [2017] UKSC 71
[^24]: [2017] UKSC 65
49. We consider that the position as to apportionment of liability between co-respondents in discrimination cases should remain as set out by the EAT in *Hackney London Borough Council v Sivanandan*. Namely, where a claimant has suffered the same indivisible harm by co-respondents, each respondent is liable for the whole of the award. Where harm is divisible, it is open to the employment tribunal to make separate awards against each respondent.

50. It would be unjust for a claimant who has suffered the same indivisible harm by co-respondents to be burdened with the risk of one of the respondents being unable to pay the part of the award which has been apportioned to them (be it due to insolvency or impecuniosity). As Underhill P highlighted in *Sivanandan*, if the purpose of apportionment would be to ensure that co-respondents share some of the cost of compensating the claimant, this could be achieved by way of section 2 of the Civil Liability (Contribution) Act 1978.

Consultation Question 50.
Should employment tribunals be given the jurisdiction to enforce their own orders for the payment of money? If so, what powers should be available to employment tribunals and what would be the advantages of giving those powers to tribunals instead of leaving enforcement to the civil courts?

51. Remedies and sanctions for unlawful discrimination and harassment must be effective, proportionate and dissuasive. If an award for damages cannot be easily enforced, its dissuasive power is reduced. As highlighted in the Commission’s response to the Women and Equalities Committee Inquiry ‘Enforcement of the Equality Act: the law and the role of the EHRC’ even when an individual manages to obtain a remedy, they can face obstacles to enforcing awards of compensation. Employment tribunals do not have the power to enforce awards and therefore the enforcement process requires the individual to take further court action and to pay a court fee.

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52. As recommended in the Taylor review, the enforcement process could be simplified to increase the number of awards which are successfully enforced.27

53. Our view is that employment tribunals should be given the jurisdiction to enforce their own orders for the payment of money. This would allow successful claimants to return to the same tribunal to enforce the award, instead of having to start a process in a different court, with the additional cost and time that takes. The employment tribunal should also have the power to impose interim measures such as freezing orders or deposits aimed at preventing companies shifting assets to avoid paying employment tribunal awards.28 Consideration should also be given to the proposal that in some circumstances, the directors of limited companies should be made personally liable for paying compensation where the company has failed to do so.

Consultation Question 51.
Should the EAT be given appellate jurisdiction over the CAC’s decisions in respect of trade union recognition and derecognition disputes? If such an appellate jurisdiction were created, do consultees agree that it should be limited to appeals on questions of law?

54. At present there is no right of appeal from Central Arbitration Committee decisions in respect of trade union recognition and derecognition disputes. Any challenge has to be by way of application for judicial review in the High Court. This is a costly and time-consuming process, with significant costs risks if the trade union is unsuccessful.

55. We consider that the EAT should be given appellate jurisdiction over such decisions. We agree with the provisional view that such jurisdiction should be confined to issues of law.


28 We argued for this as part of our intervention in the Scottish case of AA v The Secretary of State for Business, Energy and Industrial Strategy [2018] CSOH 54.