

SUBMISSION FROM WLADYLSAW MEJKA

I found the Official Record of this session [28 February 2013] to be highly informative if a tad depressing. My observations are an effort to assist the Committee cut through the considerable flummery and jargon [e.g. upskilling] in which the EHRC delegation couched their attempts at answers to Committee questions.

If we are to ensure that the people of Scotland are to have the best possible efforts being made on their behalf to identify and eliminate discrimination which acts as a barrier to all being able to access real equality of opportunity, then we must be absolutely clear about who is doing precisely what and how in order to ensure that people experience real measurable change in their daily lived experiences. It is not unreasonable to expect the EHRC in Scotland to play the lead role in that work and to have high visibility with and accessibility to the people it serves while it does that work.

On the basis of the evidence to the Committee the EHRC is not there by any number of measures. This is a matter of deep regret, for the life circumstances and experiences of too many people have been left unchanged as a result.

In order to keep the narrative of my commentary clear and relevant, I have dealt with the issues in the order they emerged during the evidence session. I have not commented on all of the areas which concern me and have tried to limit this commentary to those which are of compelling importance.

Helpline

In column 1070, the Committee is advised that the helpline advises only employees and service users, not employers. Clarity on this issue was not helped when the Scotland Director in comments immediately beforehand invited his colleague to clarify what the new helpline offered employers when in fact employers are not offered advice or guidance by the helpline.

The issue cropped up again in 1071 when a Committee member referred to the helpline being aimed at smaller employers. The EHRC delegates did not correct this confusion.

Recommendation

That the Committee invites the EHRC to be much clearer on what the helpline service offers and to whom. Confusion of this scale renders the service unfit for purpose and leaves people who need access to a high quality service with confused messages from the key regulator in the area of equalities.

That the Committee, on the basis that the helpline is only for employees and service users, calls on Scottish government to consider providing an advice/help line for employers and for service providers. The absence of a structured and focused help/advice line for this constituency will have an adverse impact at the rate at which equality is delivered in employment and in service provision.

References to the Helpline and its flaws crop up throughout the evidence session with the EHRC conveying an impression that it is a somehow well-intentioned bystander in the unfolding disarray and that somehow if it was all back in their hands/direct control, the sun would shine more often and the helpline would provide more information to more people. The EHRC has somehow omitted to share with the Committee that it sits on a reference

group established to oversee the operation of the new Helpline and that a meeting of that reference group took place the week before the Committee session with the EHRC. Two EHRC staff were present at that Helpline reference group and did not raise any of these concerns with the operators of the Helpline nor with the staff from Government Equalities Office staff who were also present.

Recommendation

That the Committee invites the EHRC to clarify the relationship it currently has with the operator of the new Helpline and its sponsor the GEO and to share details of which of the concerns it has shared in evidence with the Committee have also been shared with the Helpline operator and the extent to which these have been remedied or not as the case may be.

EHRC resourcing/capacity

References to the capacity [budgets and staffing] of the EHRC started in 1071 of the Official Record when the National Director remarked 'we have been trying to address some of the reduction in our capacity'. What follows and resurfaces throughout the evidence session is a complete lack of clarity of what capacity in Scotland was, what it is and what it will be. This lack of clarity makes it difficult to construct a meaningful dialogue with the EHRC on what work it should be doing and with what priority and on what evidence base. It also makes it difficult for the Committee to explore and construct alternative approaches to delivering equalities in Scotland.

Recommendation

That the Committee invites the EHRC to provide:

- the detailed chronology of the resourcing of the EHRC in Scotland be made clear and public and that this clarity be expressed in a number of ways, including what capacity or expertise has been dropped/lost to Scotland and what work will not be done in future as a direct result. It may also be helpful in illustrating the actual changes which will impact on people outwith the EHRC if the illustration was to also include what could be done with resources added back in to what were there in the EHRC in Scotland at its peak.

In addition, that the Committee seek additional, wider context for this information to enable relevant compare and contrast and a thorough exploration of the future options for the EHRC in Scotland and its impact on Scotland's communities:

- With 142 staff employed [2011-12] in the Equality Commission for Northern Ireland, the ECNI is almost 10 times the size of the ECHR in Scotland. The Committee should invite ECNI to submit a briefing which explains key areas of function, responsibility, how they are resourced and outcomes of all their areas of work and function in terms of changes in the life experience of people from the protected characteristics.

Equalities Standard/Kitemark

This work is revealed by the EHRC COO in column 1071 of the Official Record, when he says "we are working with some fairly big FTSE 350 employers on an equalities standard we believe will promote fairness in the workplace". What the EHRC does not share with the Committee is just what 'promote fairness in the workplace' actually means. A

standard such as this could resemble the Stonewall Workplace Equality Index. While offering some advantages, it also has weaknesses. For instance, a top ten company in a recent year's results of the Stonewall Index was taken to an Employment Tribunal by an employee to answer charges of racism. Nothing in these Indices, Standards or Kitemarks will assure the absence of discrimination for all the protected characteristics and, critically, are not mainstreaming tools in that they will not ensure the elimination of discrimination in the services these companies provide to people not on the payroll but who use services provided by the company. Given the prominence of mainstreaming in Scotland's specific equality duties it is disappointing to find the EHRC pondering the use of an approach which does not mainstream.

Recommendation

That the Committee seek more detail from the EHRC on:

- the kitemark product
- how 'fairness in the workplace' sits alongside elimination of discrimination, given that a 'fair' workplace could still contain discrimination
- how many of the FTSE 350 are Scottish-based companies
- why any kitemark product is not using mainstream principles and checking not only that discrimination is being eliminated in the workplace but also that discrimination is being eliminated in the services of that company being accessed and experienced by the public

Audit & Inspection

In column 1072, the National Director in his various revelations of the EHRC in Scotland's workplan, referred to work with audit and inspection bodies and how the EHRC in Scotland "will look at how regulation can positively promote equality through the services that those bodies regulate". While this concept may hold some initial attraction, a more considered ponder reveals some potential flaws. Part of this is in the language. The phrase "positively promote equality" has in actual fact little real meaning and is prone to all manner of interpretations. Is it possible to promote equality in any way that is not positive? Does 'promoting equality' mean that the culture created is one where those on the receiving end of the promotion are to feel able to take or leave what is on offer – delivering equality? It is an object lesson in the need for clear, unambiguous language.

In addition and given the lack of clarity around what is actually meant, this area of work raises fundamental issues around legal responsibilities of all the bodies involved and the potential for very real confusion, both between the EHRC and the audit/regulator/inspector bodies, as well as with and by those bodies who are in turn currently audited, regulated and inspected. Given it is not clear what "positively promote equality" actually means, it is not clear just who does what in deciding such as whether the performance of a public body on delivering equal pay for women is satisfactory, to use but one of scores of practical examples. What standards will the inspector etc. use to judge satisfactory or otherwise? Will these simply be passed on by the EHRC to the inspector, agreed in partnership, agreed in partnership and with input from organisations representing women in the workplace, or what? Will the performance monitoring be made public – by whom? Will this contain ranking in terms of compliance and/or satisfactory performance? If performance is below standards set, then what? Who will enforce? The inspector on behalf of the EHRC? The EHRC once notified by the inspector? Where do individual people go when they have concerns around their employer on areas such as this – to the EHRC or to the Inspector? How will individual people know where to go?

What quality assurance will be in place to ensure that all auditors, inspectors and regulators are doing what should be done and to the required quality and delivering the required measurable outcomes, all expressed in terms of how it changes the life experiences of people with protected characteristics?

Recommendation

That the Committee requires the EHRC to set out in detail and in plain language the clear division of all responsibilities in this concept of working through others; how its effectiveness will be monitored in terms of changing the life experiences of people with protected characteristics, and how people from the protected characteristics will power-share in the delivery and monitoring effectiveness of any of these new approaches.

Single Strand Working

This issue does not appear in the evidence session, either as part of what the EHRC delegation offered voluntarily or what emerged as a result of questions from the Committee. My own hook on this was provided when I came across the numerous, almost obsessive comments offered by the EHRC on what it called the 'resource pool concept'. This is clearly an attempt to maximise the use made of skills and experience of the workforce, sometimes even where the individuals have not been employed to use some of those specific skills and experience. The Committee obviously shared some very real concerns over the EHRC's approach to this and I look forward to reading the further submission to be made by the EHRC on this.

My concern here is deeper, and has its roots in the history of what the EHRC COO refers to inappropriately as the "shotgun marriage" in 2007 of the three predecessor equality commissions. This and other factors led to the deliberate and conscious shift away from what is known as single-strand working, and the adoption of cross-strand working. Those who were previously expert and skilled in race equality, in disability equality and in gender equality, have had to become skilled in working across all 6 strands initially and then take in the further protected characteristics listed by the Equality Act 2010. This has not just been the EHRC. The NHS in Scotland's considerable resource on equalities work, based in NHS Health Scotland, also adopted this style of working, and many of the staff leading on equalities across Scotland's public sector have had to follow suit.

I do not propose to exhaustively set out the growing body of opinion from across the UK that this approach has failed people with protected characteristics and that there is a need to return to single-strand working. I do however want to point out to the Committee that this fundamental issue has not been addressed by the EHRC in evidence.

I would also draw to the attention of the Committee that reputable figures in such as race equality work across the UK, most notably Dr Richard Stone, have recently gone on record with the view that progress with race equality has stopped and is now slipping backwards. Dr Richard Stone was a pivotal figure in the work which helped Macpherson produce his report. Richard's views are backed up by the mother of the young man, Stephen Lawrence, whose life and death is at the heart of Macpherson, Doreen Lawrence.

Recommendation

That the Committee invites the EHRC to:

- explain why cross-strand working is being retained in the face of growing opinion and demands from organisations of people representing the views and experiences of protected characteristics that it has failed people from the protected characteristics, particularly in race and disability
- share with the Committee details of any dialogue and engagement the EHRC has had with BME or disability organisations across the UK over the effectiveness of cross-strand working in delivering progress on race and disability equality and the potential for reverting to single-strand working on race and disability equality

In addition, that the Committee:

- considers inviting Richard Stone and Doreen Lawrence to engage with the Committee on concerns over race equality going backwards and how this can be avoided in Scotland.

Language & culture of the EHRC

In column 1073, the National Director explains “we now have the funding that we require to enable us to deliver in a slightly different way our core functions in Scotland.” This is but one of all too many examples of managerial jargon which plagues the evidence from the EHRC, alongside a strong tendency to favour speaking about management systems and processes rather than people. Given the central role of the EHRC, the absence of references to people and how their lives and life experiences need to be changed and will be changed by their work is astonishing and in some respects deeply worrying.

Recommendation

That the Committee invites the EHRC to undertake a language and culture change to ensure that plain and accessible language informs its discourse on equalities and that the focus on systems and process be dropped in favour of a focus on people and how the discrimination they face will be eliminated and evidenced through measurable data as a direct result of the EHRC’s work programme.

It is also noted that the Committee extended considerable opportunity to the EHRC delegation to affirm that meaningful dialogue and consultation would take place with the trade unions over the ‘resource pool’ concept. The EHRC expended considerable energy in avoiding a direct answer to the question. In this context the Committee will want to be aware that the EHRC lost a case at an Employment Tribunal last year on trade union victimisation of a member of EHRC staff. The reluctance of the EHRC to embrace partnership working with the trade unions and to even extend credit to the trade union lobbying for the funding secured from government late last year [see EHRC COO remarks at end of column 1073] must be a cause for concern.

Recommendation

That the Committee obtains reassurances from the EHRC that industrial relations in the EHRC will be improved and that the trade unions will be treated as equal partners in deliberations on how any changes to the EHRC’s workload and working practices will be delivered.

EHRC Workplan/Business Plan

Mentions of this are made throughout the evidence session. At column 1078 the National Director offers more detail on what is under active development. Any reading of this suggests a random clutch of pieces of work which again are not couched in person-centred terms nor explicit in how they will make major contributions to eliminating identified and evidenced discrimination.

Recommendation

That the EHRC be invited to follow the principles of the specific equality duties on public bodies in setting equality outcomes and:

- make clear what work is to be done
- what the evidence base is for doing this work
- what engagement with communities took place over the identification of this work
- how it will change the life experiences of people from a protected characteristic and how this will be measured and monitored
- why these pieces of work are being prioritised
- why work in eliminating discrimination faced by people from other protected characteristics is not being done by the EHRC

Further on in this section of evidence, the National Director refers to working with the Scottish Human Rights Commission. Part of this apparently includes work on human rights and equality impact assessments [EQIAs]. This is an area with which I have more than a passing familiarity and it is of more than passing concern. There is an inherent presumption in this work that the quality of work on equality impact assessments across the public sector is of an acceptable standard. This being so I could see the attraction of extending the principle of the approach to embrace human rights. It is however far from simple and requires a knowledge base [on human rights] which I would argue is simply not there, either in terms of staff or in terms of corporate understanding.

I am currently in the middle of research into the use of EQIAs by public bodies. Initial indications are that the quality of these is in too many cases poor or very poor and that using this as a basis for extending the principle of EQIA to also check human rights at the same time would be imprudent and probably cause the approach to collapse.

Recommendation

That the Committee invites the EHRC to provide the evidence base for this piece of work and which demonstrates that current performance on use of EQIAs for embedding and mainstreaming equalities is good and robust enough to allow the add-on of human rights analysis.

Consultant researchers

In various places of the evidence session reference is made to the EHRC using consultant researchers to do work and the National Director [in column 1085] makes it clear that the EHRC intends to use this approach to monitor compliance with the public sector equality duty and the specific equality duties. Some Committee members may recall that in the government's original attempt to get approval in March 2011 of the then draft specific

duties, evidence was heard that the analysis of the consultation carried out for Scottish government's Equality Unit over the then draft specific duties could be considered somewhat rigged in favour of the sheer number of responses submitted by the public bodies who would be required to comply with the specific duties. It was put to the Committee in March 2011 that the analysis presented to them in favour of adopting the draft regulations was less than balanced. The Committee accepted this argument and was one of a number of reasons why the draft regulations were voted down.

Recommendation

That the EHRC be invited to share with the Committee its arrangements for quality assuring the product delivered by consultants and researchers and so avoid the imbalanced analysis and conclusions which could emerge and be used to inform the EHRC's work programme or policy recommendations to government.

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