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SEX DISCRIMINATION LAW REVIEW

Executive Summary

January 2018

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About the panel and this report

We are grateful to the Panel for their invaluable contribution to this Report. Without their expertise and insights the Review would not have been possible.

Inevitably, not all panelists agree with or endorse each and every one of the final recommendations of the report and so this report should not be read as a representation of the views of any one member of the Panel or their organisations.

Panel Members



Dame Laura Cox DBE QC
Chair of the Sex Discrimination Law Review

Dame Laura Cox DBE served as a High Court Judge from 2002 to 2016. Previously, she was the Head of Chambers at Cloisters where she specialised, wrote and lectured in equality and employment law. She was appointed as Queen's Counsel in 1994 and appeared in many leading sex discrimination cases in both domestic and European courts. She also chaired the Bar Council Sex Discrimination Committee and, subsequently, the Equality Policy Committee overseeing the implementation of the Equality Code for the Bar. For 15 years Laura also served as the British member of the Committee of Independent Experts at the International Labour Organisation, monitoring ILO Member States' compliance with international labour and equality standards, with particular emphasis on the 1951 Equal Remuneration Convention. She was elected as the Vice President of the United Kingdom Association of Women Judges from 2013-2016 and is currently Honorary President of the Association of Women Barristers



Gay Moon
Secretariat of the Sex Discrimination Law Review

Gay Moon is the Special Legal Advisor to the Equality and Diversity Forum and a former Fellow of the Joseph Rowntree Charitable Trust from 2008 to 2013. Gay was the Head of the Equalities Project at JUSTICE for five years and worked for 20 years in the Camden Law Centre taking pathfinding discrimination cases to the European Court of Justice and House of Lords. She is a former Chair, and a current Director, of the Discrimination Law Association and was Chair of the UK Race in Europe Network from 2013 to 2017. Gay has written extensively on discrimination law including co-authoring several editions of the Legal Action Group's Discrimination Law Handbook, contributing to the IUS Commune, Common Law of Europe, Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, as well as editing the DLA's Briefings from 1999 to 2007.

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FOREWORD



Foreword from Dame Laura Cox DBE

My train journey into London takes me past the old Bryant & May match factory. Some may be surprised to learn that it was still in operation when I first began my professional life as a barrister, finally closing only in 1979. Like other such monuments to our industrial past, the factory has since been turned into a gated community (now known as Bow Quarter), but for me the building serves as a regular reminder that equality for women in this country has only come relatively recently in our long history. In 1888 women working in the factory famously went on strike over their low wages, as well as their working conditions, but it was nearly 90 years before sex discrimination and equal pay legislation finally arrived in this country in 1975, driven principally by our membership of the then “European Economic Community” but also, partly, by our obligations as members of the UN International Labour Organisation. In this special centenary year it is a sobering thought that it was only as recently as 1918 that women were first allowed even to vote, thanks to the efforts of Millicent Fawcett and others, and even then they had to be over 30 years old and meet a property qualification. And in 1975, women working at the Foreign Office were still forced to resign when they got married.

So what of the years since 1975? I would argue that when it comes to sex discrimination law, the UK’s national story has undoubtedly been one of considerable progress, but it is also true that in some areas that progress has been too slow or has stalled altogether. Our laws have been instrumental in changing attitudes and in improving life for many women, at work and in society generally. Yet, in some areas those laws have been shown to be inadequate, or to be beset by undue complexity and unacceptable delays for those women who have sought to use those laws in our courts and tribunals. As both a QC and later on as a judge, I was only too well aware of the difficulties in applying the laws in too many cases. And in 2018 the gender pay gap remains stubbornly in place, despite more than 40 years of equal pay legislation and litigation. It is also worth remembering that it was only 25 years ago, in 1992, that our highest court finally decided that rape within marriage was a crime.

So we should recognise the good progress made, but also recognise the law’s limitations. We have clearly led the way at some points, with the landmark Equality Act of 2010 going above and beyond the protection provided for women in a number of other nations. But we must constantly be vigilant and must beware of complacency. Important rights for women that we have hitherto regarded as firmly embedded and long established could so easily be diminished, or even lost. Some of our laws have been shown over time to need changing and improving. And, as the various forms of sex discrimination in our society continue to evolve or to change, the law also needs to adapt and improve to reflect those changes. It is now more than seven years since the Equality Act was passed. We are living in interesting times. With the political and social landscape now at such a pivotal moment, this is an ideal time to take stock of our current sex discrimination laws: to analyse what works well for women; to identify what needs to change; and to draw together diverse ideas to improve both the legislation and our system of justice, for those women who consider that they have been the victims of unlawful sex discrimination and who rightly want to complain about it.

For all these reasons I was delighted to support the Fawcett Society's Sex Discrimination Law Review and to accept their invitation to chair the advisory panel. Inevitably, the Review has involved a great deal of hard work and commitment, but the discussions have been wide-ranging, stimulating and hugely rewarding. Over the course of the past year I have been privileged to work with the team of formidable legal experts on the panel, with the lawyers and the team at the Fawcett Society, and, in particular, with the equality lawyer Gay Moon, who has co-ordinated the Review so ably and effectively.

The Review has taken a necessarily broad view of the various forms of sex discrimination in society. As readers would expect, the problems of sex discrimination at work and in wider life that the Equality Act is designed to prevent are obviously within its scope. But violence against women and girls is a fundamental driver and consequence of sex inequality, and so this Review also explores some of the gaps in the legislation and the improvements we regard as necessary in that area too. It also considers, with an eye to international practice, the extent to which there should be a greater onus on organisations to take steps to tackle sex discrimination themselves.

Continuation of the good progress made so far, on many fronts, is not inexorable. European Union law has provided both a backstop and a stimulus to developments in sex discrimination law in the UK; and the Brexit process could render our laws vulnerable to change without adequate scrutiny, to the disadvantage of everyone. But this Review was planned well before the referendum of 2016. There is, in any event, a need for a continuing focus on improving and updating the laws available in this country to protect women and prevent sex discrimination, and to ensure that those laws work properly and effectively as we approach the third decade of the twenty first century.

That is why I believe that the work of this Review has been so timely and important – and why I hope that everyone takes heed of our recommendations.

INTRODUCTION



Introduction from Sam Smethers, CEO of the Fawcett Society

When I joined the Fawcett Society as Chief Executive in 2015 I decided that I wanted us to carry out a review of our sex equality laws and protections. Despite the fact that there have been many advances and that we are often regarded as having some of the best legislation in the world, there are also a number of gaps in the law (many more as it turns out than I had realised when we started this review). But my bigger concern is that fundamentally, the law isn't working and change isn't happening fast enough. The discrimination, harassment, misogyny and violence that women experience on a daily basis shows no sign of abating. If anything, it feels like it's getting worse while at the same time, women's access to justice and redress has diminished.

The outcome of the referendum on the European Union has given this work an additional significance and timeliness. The risk that Brexit presents to women's rights is real and Fawcett has been actively working with over 20 women's and equalities organisations to highlight that through the passage of the EU Withdrawal Bill. At the same time, there is a renewed outrage at the discrimination that women experience, a recognition that we are all held back if we hold women back and a determination right across the political spectrum, in government and amongst employers to drive forward a progressive agenda for change.

The Fawcett Society could not have completed such an ambitious project without the generous contributions of our funders and supporters, our panel members who have given their time so generously, the hard work and professionalism of our staff team and the wisdom, expertise and patience of our Chair, Laura Cox and our expert adviser, Gay Moon. I want to extend my heartfelt thanks to them all.

Finally, I dedicate this report to every woman who has ever stood up against discrimination, harassment or violence and I appeal to those reading it, those who have the power to change things for the better to resolve to do so.

EXECUTIVE SUMMARY

Background and Context

In 2018, the centenary year of the first women's suffrage legislation, much progress has been made towards gender equality but much remains to be done. The gender pay gap remains stubborn, violence against women and girls is endemic, and access to justice is limited.

It is more than seven years since the landmark Equality Act 2010. Supported by the generosity of many private donations from members, supporters and organisations the Fawcett Society brought together a panel of legal and policy experts, following the Brexit referendum decision, to ask: is sex discrimination law in the UK fit for purpose?

Brexit

UK women have benefitted significantly from our membership of the European Union (EU), yet women are sorely underrepresented in the Brexit negotiating process. Given this under-representation, it is perhaps not a surprise that women have been missing from the Government's agenda on Brexit.

The EU has acted as a protective "backstop" on equality and human rights law in the UK, including a freestanding right to non-discrimination through Article 21 of the EU's Charter of Fundamental Rights. **We recommend that a new constitutional right to equality should be introduced to provide a similar level of protection.** Such a right would operate similarly to the rights protected by the Human Rights Act, providing a standard against which laws and state actions could be tested.

The European Union (Withdrawal) Bill has been introduced to Parliament with the stated aim of incorporating EU law into UK law so that our statute book continues to function. But **the current wording of the Bill leaves equality law, including the Equality Acts 2010 and 2006, open to significant changes** without substantial parliamentary scrutiny. This must be amended, with the acts excluded, as the Human Rights Act 1998 is currently.

Similarly, the Bill does not reflect the Prime Minister's commitment to "ensure that workers' rights are fully protected and maintained". Without the backstop of the EU, powers given by the Bill could curtail rights protected in the Working Time Directive, the Parental Leave Directive, and part-time and agency workers' rights. **We should limit the use of Ministerial powers conferred by the European Union (Withdrawal) Bill so that the powers cannot be used to substantively amend employment law in the UK.**

Brexit also provides **an opportunity to go beyond what is permitted by EU law** in order to further gender equality, including by permitting further positive action, and reforming procurement rules to enable more specialist women's services such as refuges to secure public contracts to deliver services.

Leaving the EU will impact legislation and policy on domestic abuse and violence against women and girls (VAWG). The Lisbon Treaty has harmonised police co-operation on issues like trafficking and EU membership has strengthened victims' rights. EU funding supports VAWG services and research in the UK. These must be safeguarded, through **unilaterally recognising European Protection Orders and prioritising cross-border VAWG protection, co-operation and funding** throughout negotiations.

Women in the Workplace

Pay

Women remain consistently disadvantaged in the workplace. The gender pay gap varies significantly across women's working lives and for women with different characteristics. Its causes are complex and varied, but the gap is stubbornly slow in closing.

By April 2018 all organisations employing over 250 people will have to report data on their gender pay gap for the first time. The new requirements are an important step forward, but proper enforcement is essential if the regulations are to have impact. **Civil penalties for non-compliance with gender pay gap reporting should be introduced** which could be issued without the need for extensive enforcement work in advance. The Equality and Human Rights Commission should be given the powers and resources to carry out enforcement activity which would have a more immediate impact on those who do not comply. Gender pay gap reporting law should be amended so that data is broken down by age, disability, ethnicity, LGBT and part-time status, with due consideration paid to privacy. **The threshold for reporting should also be progressively lowered** to workplaces with over 50 employees.

Alongside the gender pay gap, Equal Pay – the right to equal pay for work of equal value – has yet to be achieved across the board. The Panel identified three key challenges to the efficacy of the legal right to equal pay for work of equal value. First, securing women's access to pay information so that they are able to challenge unequal pay effectively is vital. **Equal Pay Questionnaires should be reintroduced with the Employment Tribunal entitled to draw adverse conclusions from refusals to answer them.** We heard that Tribunals rarely use their powers to order a full equal pay audit – they should be ordered as standard, conducted with transparency, and the law should be changed so that the Employment Tribunal has the power to order them at any stage, not just when they identify discrimination. More must also be done to enable real pay transparency. To that end we recommend **amending the Freedom of Information Act to include pay in the private sector** so that accurate information (anonymised if necessary) can enable claims to be brought.

Second, the responsibility of employers to regulate pay structures so as to reduce and avoid inequalities is key. To address this, we recommend **mandatory equal pay audits every three years, for employers of 250 people or more.**

Third, we need effective procedures for the resolution of claims once they are made. **The indicative timetable for equal value claims should be enforced by Employment Tribunals.** Consideration should be given to introducing a similar indicative timetable for equal pay claims. **Class actions should be developed for equal pay claims,** although

women should not lose their right to pursue individual claims. And when women win equal pay claims, the law should be changed to **automatically include pension contributions in equal pay awards**. To recognise how the emotional impact of pay discrimination can be humiliating, awards should also recognise injury to feelings.

Maternity, paternity and family friendly rights

Strong maternity, paternity, parental leave and flexible working rights are essential to enabling women with children to participate in the workforce, and to support fathers to care. An estimated 54,000 pregnant women and working mothers are made redundant or are pressured to leave their jobs each year, yet protection from dismissal due to pregnancy and maternity discrimination ends on the last day of maternity leave. **This protection must be extended to cover the 6 months after a mother returns to work.** To prevent new mothers being made redundant we recommend that employers could be required to consult with ACAS, with expanded resourcing and expertise, before making protected women redundant.

The current requirement for a discrimination claim related to pregnancy or maternity to be made within three months of an act of discrimination taking place is far too restrictive, especially when the implications of discriminatory decisions are often only felt many months down the line. **This limit should be extended to six months for all cases linked to pregnancy and maternity.** Given its extensive benefits to mother and baby, we should **introduce a right to reasonable time off and facilities for breastfeeding.** The law must be updated to recognise that there is a requirement for employers to carry out an **individual risk assessment for pregnant women, women who have given birth in the last six months or are breastfeeding.** 4% of pregnant women leave their jobs because of health and safety risks that have not been tackled. The Government should enact specifically that women are protected at work from discrimination on the grounds of breastfeeding in accordance with European caselaw.

Restrictions on entitlement to Statutory Maternity Pay (SMP) limit productivity and cause hardship. **SMP, Paternity Pay, and Shared Parental Pay should be day one rights.** Similarly, in an increasingly casual jobs market the requirement to have worked 26 weeks in the last 66 is not appropriate for women on Maternity Allowance (MA), and should be removed. The rates of all of these statutory payments are too low, at £140.98 for most of their duration. **The flat rate period for each should be raised to the equivalent of the Real Living Wage for 36 hours per week.**

The introduction of Shared Parental Leave has been an important step forward, but take-up appears to be low. A number of incentives and defaults preserve the status quo where women undertake the majority of unpaid care. **We recommend a comprehensive review of parental leave policy to ensure that it is structured to presume equal responsibility for the care of children.** As a first step, **paternity leave should be extended to six weeks, paid at 90% of earnings,** to be taken at any time in the first year after the birth.

Workplace harassment

Sexual harassment in the workplace creates misery for many women, leading to humiliation and intimidation. Recent coverage of the issue has raised awareness, but evidence of its prevalence is not new. TUC and Everyday Sexism Project research finds that 52% of women have experienced it in some form, and that 80% did not report it to their employer.

Perpetrators of sexual harassment in the workplace can be third parties, such as clients or customers. Section 40 of the Equality Act 2010 provided protection to employees in these cases, but it was repealed in 2013 – **we recommend that section 40 is reintroduced**, with an amendment so that it requires only a single prior incident of harassment. Pregnancy and maternity, as well as marriage and civil partnership status, should also be included as protected characteristics when it comes to prohibiting harassment.

Dress codes

Under the provisions of the Equality Act 2010, employers are permitted to impose a dress code on their employees, but will be acting in an unlawfully discriminatory way if they impose requirements which amount to less favourable treatment for women or for men. The law does not need to be changed but a Code of Practice is needed which is clear about the types of requirement placed on women which are unlikely to have an equivalent for men.

Violence against women and girls

Violence against women and girls (VAWG) is intimately linked with women's inequality, and its scale is endemic. Much can be done to prevent VAWG, with mandatory, age-appropriate relationships and sex education (RSE) a key component. When this is introduced it **must cover gendered violence, address consent from an early age, and limit opt-outs**. Programmes which work with perpetrators should also be expanded with additional funding.

Services for Women and Girls

Funding from local authorities for refuges fell by 23% from 2010/11 to 2016/17. Amid this pressure on local funding, **an Independent Violence against Women and Girls Commissioner should be established** with resources and expertise to intervene in litigation and scrutinise local implementation of the Home Office's National Statement of Expectations.

Independent Domestic Violence Advisors (IDVAs) and Independent Sexual Violence Advisers (ISVAs) enable women to access public services, and justice under the law. Both services are under-resourced, and the **Government should provide secure, long-term funding** so that women who report domestic or sexual violence can be supported for as long as they need it.

Domestic violence and the law

In 2016, there were over one million female victims of domestic violence in England and Wales, and two women a week were killed by a partner, ex-partner or close relative. We have seen some positive progress, with more crimes reported, more convictions, and a reduction in unsuccessful prosecutions between 2008/07 and 2016/17. But the criminal justice system and the law must change to tackle the full scale of the problem.

The police are more likely to close domestic abuse cases due to evidential difficulties compared with other violent offences. There is a need to **move away from solely relying on victim testimony** and take into account evidence from third parties, evidence collected at the scene and body-worn cameras. The Panel received evidence that a worrying number of domestic violence incidents are resolved using "street level" restorative justice, which can often be little more than an apology. Guidance must be strengthened to make clear that

“street level” restorative justice should not be used in cases of domestic abuse or sexual violence, and data should be collected to ensure that forces are held accountable.

The UK currently has extraterritorial jurisdiction, meaning UK laws can be applied to offences that took place outside the UK, for certain child sex offences, forced marriage and female genital mutilation offences. **Extraterritorial jurisdiction should be expanded to cover all sexual offences and incidents of domestic violence.** Transnational abandonment, where foreign national wives are abused and then deliberately abandoned by their British national husbands, **should be recognised in definitions of domestic violence, and changes to the immigration system and justice system are needed** to ensure it is treated appropriately.

Not all of the civil law remedies available to women who have suffered domestic violence result in a criminal offence if they are breached. This means that some, such as Domestic Violence Prevention Orders, are often viewed as meaningless by perpetrators. **Breaching any domestic abuse civil order should be made a criminal offence.** Another gap in the legislation was identified in relation to coercive control, which was introduced as an offence in 2015 but only where the victim continues to live with the perpetrator. **Coercive control should continue to be an offence where the parties have separated**, and there should be a comprehensive review of the ways in which perpetrators use the family justice system and child contact to continue their abuse.

The Panel received evidence that suggests that some Family Court Judges are not taking domestic violence seriously enough when making child contact arrangements, which can be hugely detrimental to both mother and child. The new Practice Direction 12J begins to address this issue, but **it must be accompanied by compulsory and ongoing training for the judiciary, and its impact must be reviewed.** A ban on perpetrators of domestic violence cross-examining victims in the Family Court, which was proposed in the Prisons and Courts Bill 2016/17 before it was dropped, is long overdue and must be reintroduced in the new Domestic Violence and Abuse Bill. Local authorities play an important role in tackling VAWG, but the Panel heard concerning examples of councils using “written agreements”, which place the onus on abused women to prevent future domestic violence or face fast-track care proceedings. **Written agreements should not be used unless the victim has access to advocacy support**, and their use should be reviewed.

Sexual violence and the law

Almost a fifth of women aged 16 or over have experienced sexual assault, and 3.2% in the last year. These crimes are part of an environment of misogynistic abuse and harassment.

We welcome the creation of new offences to cover what is commonly known as “revenge porn”. This term is inadequate to describe the harm caused by this crime. Submissions to the Review argued it should be called “image-based sexual abuse”. The law should be changed to encompass a wider range of offences than is currently included, such as the *creation* as well as distribution of private, sexual images through “**upskirting**”, which is illegal in Scotland but not England and Wales, and **pornographic photoshopping**. The law also requires prosecutors to prove “an intention to cause distress”, which should be amended to encompass a wider range of reasons for abuse including financial gain or amusement. **Victims of the current and any additional criminal offences should have the right to anonymity held by victims of other sexual offences.**

The law currently restricts the use of the complainant's sexual history as defence evidence in sexual offence cases, through a procedure outlined in section 41 of the Youth Justice and Criminal Evidence Act 1999. However, evidence from a survey of ISVAs finds that this procedure is often ignored, resulting in victims having their sexual history used in court without prior notice. To combat this, **victims should have a right to legal representation whenever an application to use section 41 is made; and the Government must review the law** – in particular, whether the use of sexual history evidence should be used at all for the purposes of establishing consent.

The prostitution trade and the trafficking of women into it, is driven by demand from a minority of men and the £130m annual worth of the trafficking trade to abusers in England and Wales. In line with the End Demand campaign, we support the introduction of the Nordic model, which criminalises the purchase of sex and decriminalises its sale.

Hate Crime and Misogyny

The law currently treats hate crimes relating to different protected characteristics differently. Crimes motivated by misogyny are not currently statutorily regarded as hate crimes.

Hate crime against women and girls is a cause and consequence of gender inequality and should be treated as unlawful. It is important that the hate crime in question is misogyny hate crime, not gender hate crime, recognising the direction of the power imbalance within society. This would be consistent with the one-directional nature of transgender or disability hate crime.

Some police forces, including Nottinghamshire and North Yorkshire, have already begun recording misogyny hate crime and hate incidents. **All police forces should be required to recognise misogyny as a hate crime for recording purposes** - and police computer systems should be developed to ensure that they are able to record intersectional experiences of hate crime, which they are currently unable to do. But this alone is not sufficient. Enhanced sentencing for offences motivated by hostility towards people based on other protected characteristics recognises that those offences are especially harmful to individuals and society. **This is certainly the case for misogyny, and so it should be introduced as a hate crime for enhanced sentencing purposes**, and included in decisions about the wider hate crime framework.

Intimidating behaviour outside abortion clinics represents an organised campaign of harassment targeted at a vulnerable group of women, falling outside the traditional limits of a protest. There is a limit to what police can do in these cases, and recent use by councils of Public Spaces Protection Orders may be open to legal challenge. Government failure to take action may constitute a breach of women's Article 8 rights under the Human Rights Act 1998 - **we recommend that Government legislate for the adoption of buffer zones**, as used around vivisection clinics and in a number of other countries.

Online abuse of women and girls is widespread, and has a very real censoring impact. Social media platforms must take action. The Panel also heard from a number of submissions that social media users are often unaware that their location is being tracked by apps as a result of them having geo-location "on" by default. This can leave women and girls vulnerable to abusive men. **Default-"on" geolocation is an unnecessary risk to women's safety, and should be changed by platforms or legislated for if necessary.**

Promoting Equality

The public sector equality duty (PSED) has the potential to be a very effective way of ensuring fairness and equality. However, currently those with protected characteristics often lose out as a result of policy choices or spending decisions. Women's Budget Group and Runnymede Trust's recent analysis of the impact of welfare reform and spending cuts illustrates this very clearly, showing that BAME (Black and Minority Ethnic) women have been disproportionately adversely affected.

The duty comprises a general duty which applies across Britain, and specific duties which vary in England, where they are more limited, Scotland, and Wales. The more extensive duties in Scotland and Wales include duties to develop and report on plans to meet equality objectives, to carry out impact assessments and consult with affected groups when making policy, and to ensure training and resources for those carrying out equality work. These are valued, and **we recommend that England adopt the same specific duties as Wales.**

The duty has had a positive impact on equality practice within public authorities, but its aim of bringing about a transformative approach to structural inequality has yet to be achieved. Bringing us closer to that aim will require much work including positive and visible leadership from elected leaders and managers; development of capacity in organisations; active engagement with service users and civil society; and greater openness and transparency.

Enforcement of the PSED is conducted by the EHRC, which has seen budget and remit cuts since 2010; and through Judicial Review (JR) actions brought after decisions are made. The latter have been effective, but new procedural rules including changes to costs rules, and changes to legal aid, have had a chilling effect on the availability of JR. **To enforce the PSED effectively these rules must be repealed, and the EHRC must be properly resourced.**

The Equality Act 2010 includes provisions in Section 1 for the duty to cover "socio-economic status" as well as other protected characteristics, but this was not implemented by the Coalition Government – **Section 1 should be commenced to ensure that the intersectional impact of economic inequality can be understood.** Equal political representation at local and national level is also key to achieving equality more widely, and the first step is understanding the makeup of our candidates and representatives - so **Section 106 of the Equality Act which requires parties to report on monitoring data should also be commenced.**

The public sector procures around £242bn worth of goods and services a year, and more must be done to harness this power to promote equality. **Employers with equal pay judgements against them in the last two years should be ineligible for public sector contracts** unless they have a high-quality action plan in place to address equal pay, and procurement processes should give weight to equality.

Promoting equality cannot solely be the responsibility of the public sector. Sexual harassment and sex discrimination are bad for business, and it is clear that their incidence is worryingly high. **Now is the time to introduce a new requirement on employers to take steps to prevent discrimination and harassment in their workplaces.** They should be required to set out what steps they are taking to address the risk of discrimination. Employment Tribunals should also regain the power to make wider recommendations to improve workplace practices in relation to discrimination claims.

Access to Justice

The pursuit of equality is significantly undermined by the lack of access to justice; legal rights that cannot be exercised become devalued, ignored and seen as merely theoretical. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) removed many areas of civil law from the scope of legal aid – they were meant to save £450 million per year but have saved almost twice that. This has led to those who cannot afford representation representing themselves. **Legal aid should be restored to cover family law, asylum support, clinical negligence, compensation from the Criminal Injuries Compensation Authority, debt, education, employment, housing, immigration and welfare benefits.**

LASPO excessively restricted access to legal aid for domestic abuse victims and survivors, although rules were widened in February 2017. However, major barriers persist, including the gap between those deemed financially ineligible for legal aid and those who can actually afford to pay, and the existence of “advice deserts”.

The Panel welcomes the Supreme Court judgement, in the case brought by the trade union UNISON, which ruled that the introduction of Employment Tribunal Fees in 2013 was inconsistent with the right of access to justice. Those fees had resulted in an 80% drop in sex discrimination claims. **No attempt must be made to reintroduce fees.**

There has been a drastic reduction in the number of sources of legal help available – the number of not-for-profit legal advice centres halved between 2005 and 2015. **New provision needs to be made urgently**, with the Civil Legal Assistance Offices set up by the Scottish Legal Aid Board providing a possible model.

Multiple Discrimination

We increasingly expect our multiple identities to be recognised in policy and practice, however the provisions of the Equality Act (2010) that have been brought into force only recognise discrimination on the basis of one characteristic at a time, not a combination.

Section 14 of that Act provides for protection from *dual* discrimination in some cases, on the basis of any two protected characteristics in combination, but this has not been implemented.

Other countries such as Canada, Germany, Austria and Poland have, to varying degrees, recognised multiple discrimination in their laws. **The law should be amended to include a multiple discrimination provision**, perhaps initially with a limit of three combined grounds, and with clarity that any justification must apply to each of the grounds engaged. Award amounts in relation to injury to feelings should be increased to reflect the number of grounds, if appropriate.

More research must be done across the public sector so that analysis of data takes account of multiple characteristics.

Sex Equality in Northern Ireland

Sex equality law which is a devolved matter, is significantly behind the rest of the UK – the Northern Ireland Assembly has not introduced parallel provisions to the Equality Act 2010. There is no reason in principle why women in Northern Ireland should enjoy different protection from discrimination depending on which part of the UK they find themselves in. Reflecting the submission from the Women’s Policy Group in Northern Ireland, **we recommend the introduction of a Single Equality Act to bring Northern Ireland in line with the rest of the UK.** Northern Ireland also urgently needs a new Gender Equality Strategy given theirs expired in 2016.

Because Northern Ireland’s equality law lags behind the Equality Act 2010, it is more reliant on EU equality law than the rest of the UK, and therefore potentially at even greater risk due to Brexit. Yet women’s rights in Northern Ireland are often marginalised because of the legacy of the sectarian divide – it is vital that they are made a political priority.

In Great Britain, the law is clear that pregnancy discrimination does not require reference to a male comparator – but this is not the case in Northern Ireland. The law should be clarified in this area.

Due to extreme restrictions in place, women in Northern Ireland are forced to travel to England or Wales for abortions, and women seeking an illegal abortion face a maximum punishment of life imprisonment. **The law must be changed, as a matter of urgency, to ensure that women across the UK have access to abortion on the same terms.**

SUMMARY OF RECOMMENDATIONS

Brexit

- ▶ Limit the use of Ministerial powers conferred by the European Union (Withdrawal) Bill so that the powers cannot be used to substantively amend employment law in the UK, which would disproportionately impact on women workers. This could be achieved through narrowing the scope of the powers to exclude substantive changes to employment law from the powers to amend legislation without substantial parliamentary scrutiny.
- ▶ Ensure Brexit does not result in the dilution of existing equality and human rights law in the UK, including via the introduction of new opt-outs for small businesses.
- ▶ After leaving the EU review sections 158 and 159 of the Equality Act (2010) to identify whether more can be done to encourage use of the existing provisions or whether it is necessary to extend the provisions to enable employers to tackle inequality more effectively.
- ▶ Reform procurement law to ensure it can be used to promote equality and positive action, and to simplify the process for quality small local providers.
- ▶ Continue to recognise all current and future European Protection Orders issued so that women fleeing violence from the EU to the UK continue to be protected.
- ▶ Prioritise the replication of cross-border VAWG protection, law and order activity and funding throughout the Brexit process.

Women in the workplace

Pay and Pensions

- ▶ Civil penalties for non-compliance with gender pay gap reporting should be introduced which could be issued without the need for extensive enforcement work in advance. The Equality and Human Rights Commission should be given the powers and resources to carry out enforcement activity which would have a more immediate impact on those who do not comply.
- ▶ Gender Pay Gap Reporting Regulations should be amended so that the gender pay gap is also broken down by age, disability, ethnicity, sexuality and part-time status. This must be done with due consideration to privacy where low representation of groups with particular characteristics could lead to their data being identified.
- ▶ Gender Pay Gap Reporting Regulations should be progressively amended, so that by 2020 the threshold is lowered to workplaces with over 50 employees.
- ▶ Employers should recognise and bargain with trade unions in the workplace and on equal pay.

- ▶ Employment Tribunals must enforce the timetable for equal value claims. Consideration should be given to introducing a similar indicative time limit for all equal pay claims.
- ▶ The procedures for obtaining equal pay should be reviewed and simplified and consideration given to the development of class actions to address unequal pay. Women who participate in class actions should not lose their right to pursue individual claims if they decide the class action does not best represent their interests.
- ▶ Equal Pay Questionnaires should be reintroduced. The Employment Tribunal should be entitled to draw adverse conclusions from an employer's failure to answer relevant questions.
- ▶ Amend the Freedom of Information Act to include pay in the private sector so that the accurate information needed to bring equal pay claims is more freely available.
- ▶ Where Employment Tribunals find cases of unequal pay or discrimination they should require a full equal pay audit as standard. These should be conducted with transparency and the data made publicly available.
- ▶ Employment Tribunals should have the power to order equal pay audits at any stage in a case where this will be in the interest of employees or the wider workforce.
- ▶ Mandatory equal pay audits should be required every three years. This should initially apply to employers of over 250 people. These must be conducted transparently and the data made publicly available.
- ▶ Awards following successful equal pay claims should include pensions contributions and reflect injury to feelings.

Maternity, paternity and family friendly rights

- ▶ The protection offered by Section 18 of the Equality Act should be extended to a period of six months after maternity or parental leave.
- ▶ Employers could be required to consult with ACAS prior to making protected women redundant. This would require an expansion of resourcing and expertise in this area.
- ▶ The time limit for all discrimination and harassment claims linked to pregnancy and maternity should be increased to six months.
- ▶ Introduce a statutory right to reasonable time off and facilities for breastfeeding.
- ▶ Recognise that there is a requirement for employers to carry out an individual risk assessment for pregnant women, women who have given birth in the last six months or are breastfeeding.
- ▶ Enact specifically that women are protected at work from discrimination on the grounds of breastfeeding in accordance with European caselaw.
- ▶ Introduce a statutory, paid period of carers' leave to enable carers, who are disproportionately women, to stay in touch with the labour market.
- ▶ The qualifying period for Statutory Maternity Pay should be removed. Statutory Maternity Pay, Shared Parental Pay and Paternity Pay should be a right for all employees from their first day of employment.
- ▶ The requirement to have worked 26 weeks in the 66 weeks before the baby is due to be eligible for Maternity Allowance should be removed. No parent should have to face raising a new baby without a decent source of income.

- ▶ The flat rate of Statutory Maternity Pay, Statutory Paternity Pay, Statutory Shared Parental Pay and Maternity Allowance should be paid at the equivalent of the Real Living Wage, as set by the Living Wage Foundation, for the equivalent of at least 36 hours a week.
- ▶ Extend paternity leave to 6 weeks, paid at 90% of earnings, to be taken any time in the year after the baby is born.
- ▶ The maternity, paternity and parental leave policy should be comprehensively reviewed to ensure that it is structured to presume equal responsibility for the care of children and ensures that both parents have leave entitlements in their own right. One parent's entitlement should not be dependent upon the other.
- ▶ Section 18 of the Equality Act should be amended to include those on Shared Parental Leave.

Workplace harassment and dress codes

- ▶ Reintroduce section 40 of the Equality Act to guarantee legal protection against harassment from third parties.
- ▶ Section 40 should be revised, requiring only one previous incident of third party harassment.
- ▶ Protection from harassment under section 26(5) should be extended to pregnancy and maternity as well as marriage and civil partnership status.
- ▶ The Government should bring forward guidance on dress codes at work which makes clear when a dress code is imposing a requirement on women where there is unlikely to be an equivalent requirement placed on men and women. It must also make clear that both policy and practice by employers in terms of dress codes must be non-discriminatory. This guidance must be well publicised and kept under review.

Violence Against Women and Girls

Preventing VAWG, and Services for Women and Girls

- ▶ The forthcoming guidelines for relationships and sex education (RSE) must cover gendered violence, address consent from an early age and limit opt-outs.
- ▶ Domestic violence perpetrator programmes should be expanded with additional, not reallocated, funding.
- ▶ We recommend the establishment of an Independent Violence against Women and Girls Commissioner to review existing law and practice. They must have the status and resources to drive forward change.
- ▶ The Government should provide secure, long-term funding so that women who report domestic or sexual violence can be supported by domestic violence advocates or an Independent Sexual Violence Advisor for as long as they need one.

Domestic Violence and the Law

- ▶ Police forces should move away from evidence based solely on victim testimony in domestic violence cases and maximise the evidence they collect at the scene of the crime.
- ▶ "Street level" restorative approaches should not be used in cases of domestic abuse or sexual violence; the College of Policing and National Police Chief Guidance needs to be strengthened with regard to this issue.

- ▶ There must be greater transparency about the use of restorative approaches in domestic abuse cases to enable police forces to develop best practice and share experiences – positive and negative. Data should be routinely collected and held centrally and forces should answer for any use of resolutions that are contra-indicated by College of Policing guidance.
- ▶ Restorative justice measures above street level should not be used in cases of domestic abuse until women’s organisations are confident that they are being delivered in a way which will not harm victims or survivors. Women’s organisations should be consulted in their future development.
- ▶ Training is needed for all parties within the family justice system to ensure transnational marriage abandonment is treated appropriately.
- ▶ Transnational marriage abandonment must be recognised in cross-governmental and immigration policy definitions of domestic violence and women who are abandoned in another country should be able to access the domestic violence route to indefinite leave to remain.
- ▶ The Government should extend its extraterritorial jurisdiction to include all sexual offences and incidents of domestic violence and abuse that take place abroad.
- ▶ A breach of any domestic abuse order, including a DVPO, should be made a criminal offence.
- ▶ The criminal offence of coercive control should apply in circumstances where the parties have separated and no longer live together.
- ▶ There should be a comprehensive review of the ways in which abusers use the family justice system and child contact arrangements to continue to abuse survivors and what can be done to address these issues.
- ▶ Judges should have compulsory and ongoing training on domestic violence and abuse in all its forms and on the new Practice Direction 12J. The impact of the new Practice Direction should be regularly reviewed.
- ▶ Government must legislate to ban cross-examination of a victim or alleged victim by the perpetrator in the Family Court.
- ▶ The use of written agreements by local authorities in child safeguarding cases where there is domestic violence should be reviewed. In the meantime, they should not be used unless the victim involved has access to advocacy support from a lawyer or qualified IDVA. They should never be used to make the victim responsible for a violent partner’s abuse.

Sexual Violence and the Law

- ▶ The law should be changed to provide for anonymity for all victims in cases of image-based sexual abuse. Without anonymity few will want to report cases to the Police.
- ▶ The current law on disclosing private sexual photographs or films should be amended to remove the requirement of an intention to cause distress or extended to cover reckless intention to cause distress.
- ▶ The law should be extended to cover threats to distribute private sexual images without consent.
- ▶ The creation and distribution of up skirt images and sexualised photoshopping, should be criminalised.

- ▶ In any case where a section 41 application to use sexual history evidence is made, the victim should have a right to legal representation.
- ▶ The Government must review the law on the use of sexual history evidence.
- ▶ The Government should introduce the Nordic Model and end demand for the sex trade.

Hate Crime and Misogyny

- ▶ Police forces should be required to recognise misogyny as a hate crime for recording purposes alongside the existing five grounds.
- ▶ Hate crime recording systems should be reviewed to ensure they can capture intersectional experiences of hate crime.
- ▶ Misogyny should be legally introduced as a hate crime; initially for enhanced sentencing purposes and potentially as an aggravated crime subject to decisions about the wider hate crime framework.
- ▶ Government should legislate for the adoption of buffer zones around the peripheries of abortion clinics.
- ▶ Social media platforms and apps should remove the automatic “on” setting for geo-location.

Promoting Equality

- ▶ England should adopt the same specific duties as Wales so that public bodies can understand what is needed to comply properly with the equality duty.

In order to make the Public Sector Equality Duty work:

- ▶ There must be positive and visible leadership from both elected leaders and those in management positions that focuses on goals that will advance equality of outcomes.
- ▶ Decision making must take robust but proportionate account of the likely impact of a decision on the three goals of the equality duty.
- ▶ Ensure organisations have the capacity to implement the equality duty effectively. This normally includes increasing staff understanding and awareness, the proliferation of up to date information to aid consideration of equality issues and policy and decision-making processes that enable equality implications to be considered before decisions are made.
- ▶ An organisation must commit itself to achieving clear equality outcomes and objectives that inform its business planning. These should reflect priorities that are based on evidence and community engagement.
- ▶ There must be active engagement with service users, residents and employees, particularly those from protected groups. This is likely to lead to better quality and more appropriate decision-making.
- ▶ Organisations must make active use of qualitative and quantitative evidence to inform understanding of the likely impact of policy, service and employment decisions. Collecting information is not an end in itself but must inform action. Although there are challenges involved in collecting evidence on certain issues (such as on the cumulative impact of a series of fiscal and spending decisions) much of the information that public bodies need should be routinely available to public bodies that understand and are in touch with their communities.

- ▶ Organisations must be open and transparent, including by making clear information about progress a public body is making towards the equality duty's three goals publicly available.
- ▶ Regulatory regimes that have equality and diversity embedded in their assessment criteria and should be assessed rigorously.
- ▶ The understanding and capacity of public bodies must be improved to meet the requirements of the equality duty.
- ▶ Civil society, including women's organisations, must be meaningfully engaged with during policy development.

Enforcement

- ▶ The new procedural rules in the Criminal Justice and Courts Act 2015 sections 84-89 must be repealed together with the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015.
- ▶ The EHRC must be properly resourced enabling it to meaningfully promote and enforce the public sector equality duty.

Socio-economic duty

- ▶ Commence section 1 of the Equality Act.

Political representation

- ▶ Commence section 106 of the Equality Act and amend it to include candidates who stand in devolved and local government elections.

Public procurement

- ▶ Harness the power of public procurement. Employers with equal pay judgements against them in the last two years should be ineligible for public sector contracts unless they have a high quality action plan in place to address equal pay.
- ▶ All public authorities should include relevant equality conditions in their procurement processes.

Preventing discrimination and harassment in the workplace

- ▶ The time is right to introduce a new requirement on large employers to take steps to prevent discrimination and harassment in their workplaces.
- ▶ The new duty should require organisations with 250 or more staff to publish a diversity and inclusion review of their workplace every three years. Organisations should also be required to report on their action plan to prevent discrimination and harassment and promote equality.
- ▶ Section 124 of the Equality Act should be reinstated in order to permit Employment Tribunals to make wider recommendations to employers to improve their work place practices.

Access to Justice

- ▶ Provision for legal advice must be made as a matter of urgency. The Civil Legal Assistance Offices set up by the Scottish Legal Aid Board could provide a model for the provision of legal advice and assistance.
- ▶ Legal aid should be restored to cover asylum support, clinical negligence, compensation from the Criminal Injuries Compensation Authority, debt, education, employment, family law, housing, immigration and welfare benefits.
- ▶ Fees for employment tribunals must not be reintroduced.

Multiple Discrimination

- ▶ The Equality Act should be amended to include a multiple discrimination provision in respect of direct and indirect discrimination, harassment and victimisation for all of the protected characteristics. It should be clear that any justification applying to one ground must apply to each of the grounds engaged and that in awarding damages for cases of multiple discrimination, the amount awarded in relation to injury to feelings may be increased to reflect the number of grounds in question if that is appropriate in the light of the facts.
- ▶ More research must be undertaken so that analysis of monitoring data, reporting and recording mechanisms and staff training consider the impact of having multiple protected characteristics.

Sex Equality in Northern Ireland

- ▶ The Northern Ireland Executive should ensure that women in Northern Ireland have the same rights as those in the rest of the UK and in line with wider recommendations in this report.
- ▶ Give women in Northern Ireland access to abortion services on the same terms as women in the rest of the UK.
- ▶ Introduce a Single Equality Act to bring Northern Ireland in line with the rest of the UK.
- ▶ Clarify the definition of direct sex discrimination to include discrimination on grounds of pregnancy.
- ▶ Prohibit discrimination and harassment by public bodies on grounds of sex when carrying out their public functions.
- ▶ Change the laws relating to private clubs and associations, to include discrimination on grounds of pregnancy, maternity and gender reassignment.
- ▶ Extend the scope of voluntary positive action that employers, service providers and public bodies can take in order to promote sex equality so that the sex equality legislation includes an exception that permits associations (including private clubs) to restrict their membership in certain circumstances to people of a certain gender (or gender identity).

- ▶ Provide greater protection for employees against harassment on grounds of sex by a third party such as a customer or client, when the employer ought to have been reasonably aware of the risk of harassment, current provisions are insufficient because it requires two or more occasions when the harassment has taken place.
- ▶ Prohibit “pay secrecy clauses”.
- ▶ Introduce measures to require large private and voluntary sector employers to publish gender pay information.
- ▶ Require tribunals to order a respondent found in breach of an equal pay provision to carry out an equal pay audit.
- ▶ Give powers to tribunals to make wide recommendations that benefit the whole workforce.
- ▶ Prohibit multiple or intersectional discrimination.
- ▶ Improve the remedies available under the current legislation.
- ▶ Introduce a new Gender Equality Strategy which should include targeted measures, action plans, a budget that is adequate to ensure effectiveness and a framework to assess the success of the strategy.
- ▶ Introduce coercive control legislation in line with the rest of the UK.
- ▶ Amend Section 75 of the Northern Ireland Act 1998 to improve data collection to address structural inequalities.

OUR SPONSORS

Action 4 Equality Scotland Ltd

Action4equality is the leading campaign organisation at fighting for equal pay for women in Scotland. Set up in 2005 by Stefan Cross QC and Mark Irvine they have unrivalled experience in that dealing with equal pay issues.

Mark was formerly head of local government for UNISON and Stefan has been fighting equal pay cases for over 30 years and has been involved in more than 60 and reported cases and litigation against more than 100 employers. Stefan is the son of a home help, has been a Home help himself, has been a trade union official, labour councillor, and trade union lawyer and litigator and tribunal judge. He commenced and won the equal pay litigation against Birmingham City Council and is currently involved in leading 10,000 claims against Glasgow City Council.



Cloisters Chambers is highly regarded for its expertise in all aspects of equality and discrimination law. Our barristers are at the heart of major equality and discrimination cases at the leading edge of UK and European law.

Our Work

Our team has a reputation for ground-breaking work on gender equality issues, ranging from multi-million pound equal pay litigation to precedent-setting pregnancy discrimination claims.

Cloisters barristers have acted in major test case litigation that has set the terms of equality law in the UK, including the end of the default retirement age, extending discrimination law to cover carers of disabled people, and obtaining the first injunction against a bank for failing to provide accessible services.

Cloisters' work extends internationally, advising and drafting submissions for European and international courts on equality and discrimination law issues.

Our People

Cloisters barristers play an important role in the development of equality and discrimination law and policy and are widely considered thought leaders in this area. They regularly advise and act on behalf of the Equality and Human Rights Commission and have published works including *Discrimination in Employment: a claims handbook* (LAG) and *Employment Law and Human Rights* (OUP). Members of the team have advised Parliamentary Select Committees on transgender issues and sexual harassment.

This award winning team is simply the 'go-to' set for all aspects of employment, discrimination and Equality Act cases. Cloisters have a powerful reputation for offering exceptional legal advice, client care and representation at all levels of call. **Legal 500 2017**

Farore Law was founded by Suzanne McKie QC, who spent 25 years as lawyer (qualified as a barrister and solicitor) practising in the fields of employment law, diversity law and partnership law. Her firm was founded in order to focus on client rights she and her team feel passionately about and to give clients a highly specialised and unique service.

The firm provides advice, legal representation, advocacy, mediations service and counselling for clients who have complaints related to gender discrimination, sexual harassment, sexual abuse and equal pay issues, and who have suffered related mental health issues. The firm also deals with complaints arising from a client's sexuality and handles historical child abuse cases and adult sexual assault cases. It deals with claims in the High Court and employment tribunals as well as representing clients before regulatory bodies. The firm does not just act for those whose complaints arise in the employment sphere but deals with grievances and civil claims arising in any sphere, including in academic/training institutions and public bodies, sex discrimination by regulatory bodies, sex discrimination/harassment within client or self-employed work-related relationships, partnerships and elsewhere. The firm actively seeks to give clients access to ongoing therapy, counselling and psychiatric assistance throughout the internal or litigation process, from a selected group of experts.

Farore Law has offices in London and Guildford. The website provides details about the specific areas of law covered and all the services provided – www.farorelaw.co.uk.

The firm can be contacted at info@farorelaw.co.uk or sm@faorelaw.co.uk or ln@farorelaw.co.uk.

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The Fawcett Society is the UK's leading campaign for equality between women and men. We trace our roots back to 1866, when Millicent Fawcett began her lifetime's work leading the peaceful campaign for women's votes. Today we remain the most authoritative, independent advocate for women's rights in the UK.

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