Equality Act 2010 and Disability Committee, House of Lords

Evidence from the Law Centres Network

Summary

- The Equality Act 2010 has generally helped public understanding of anti-discrimination legislation by harmonising different provisions and removing some exceptions.
- Remaining problem areas include volunteers, reasonable adjustments in common parts of premises, air travel, codes of practice, questionnaires and tribunal recommendations
- Enforcement of the Act is key to its effectiveness.
- Compliance with the Act will be achieved when responsible claims for discrimination can be enforced in the same way - and to the same extent - as personal injury claims. That is not to encourage a culture of litigation but instead one where compliance with equality law is the norm rather than the exception.
- The current means of enforcement, however, is a long way off that point. To reach it requires not just legal enforcement but also legal education based on real examples of cases in the courts.
- The reduction in assistance through cuts in legal aid, abolition of advice through the EHRC's helpline, cuts to the EHRC's grant-making programme, abolition of mediation schemes, court closures, increases in court and tribunal fees and reductions in the Access to Work scheme have all had an adverse impact on enforcement.
- Enforcement could be improved by addressing any of the areas we describe in this submission but in particular through (a) funding of education and advice on the tested model we describe, and (b) amending the Civil Procedure Rules to rebalance costs risks.

Evidence in detail

1. The Law Centres Network is the membership body for Law Centres in England, Wales and Northern Ireland, each of which is a separate, not-for-profit legal practice providing legal services in civil law, with a particular focus on social welfare law. There are 43 Law Centres across the UK represented in the Network. Law Centres have practiced in these areas of law since their inception in 1970, and the Law Centres Network (trading name of the Law Centres Federation) has coordinated and represented them since 1978. Law Centres offer legal advice, casework and representation to individuals and groups. They highlight local trends and issues in the course of their work to bring about necessary policy changes and to prevent future problems. They also help build capacity within local communities by training and supporting local groups and educating people about the law and their rights.

Q1. Has the Equality Act 2010 achieved the aim of strengthening and harmonising disability discrimination law? What has been the effect of disability now being one of nine protected characteristics?

2. We find that the simplifying of discrimination law by harmonising the approach across various strands is good for individuals as well as for employers and service providers, who can more easily understand their obligations. A significant change was the removal of a number of exceptions (even though many remain). The greatest impact of the Equality Act was to restore the damaging position from the case of *Malcolm v Lewisham* to what most parties understood it to be.[1] The current position on discrimination arising from disability in section 15 of the Act is workable. In our experience, disability accounts for by far the greatest number of individual cases brought to enforcement, largely because of the reasonable adjustment duty, which does not apply to other strands.

Q2. Are there gaps in the law on disability and equality not covered by the Equality Act 2010 or other legislation?

Volunteers

3. Volunteers are almost completely excluded from protection against discrimination.[2] The policy aim of exempting volunteering from the protection of law may be ready for reconsideration, although there will no doubt be considerable practical issues to iron out. Volunteers are not exempt of course from the protection of the law on health and safety or data protection.

Air travel

4. For an area that gives rise to regular complaints of disability discrimination, there is considerable confusion in the area of travel by air and series in and around airports. At present, a disabled person who brings a successful claim for unlawful discrimination on board an aeroplane may receive no compensation. In *Stott v Thomas Cook*, the Supreme Court held this was the state of the law despite finding that "Mr and Mrs Stott have both been treated disgracefully by Thomas Cook and it is hardly less disgraceful that … the law gives them no redress against the airline."[3] However, other holiday-makers on package holidays may recover damages – for instance, see the cases of *Campbell v Thomas Cook*.[4]

5. The EHRC used to be the designated body for handling complaints about air travel until this power was removed to the Civil Aviation Authority. We have no experience of any reported outcomes of complaints put to the Civil Aviation Authority. Although the EHRC has produced useful guidance for travellers (*Your Rights to Fly*), this is an area where more detailed legal guidance – or inclusion in an up-to-date Code of Practice - is needed.

Reasonable adjustments in common parts of shared housing

6. This remains an area of difficulty since the reasonable adjustment provisions[5] have still not been brought into force, despite an original intention from Government to do so in April 2011.

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1 *London Borough of Lewisham v Malcolm* [2008] UKHL 43.

2 In *X v Mid Sussex Citizens Advice Bureau & Anor* [2012] UKSC 59, the Supreme Court held that the DDA could not be read as extending protection to volunteers.

3 *Stott v Thomas Cook Tour Operators Ltd* [2014] UKSC 15.

4 Evidence from Sheffield Law Centre; *Campbell v Thomas Cook Tour Operations Ltd* [2014] EWCA Civ 1668.

5 Equality Act 2010 s.36(1)(d)

Questionnaires

7. Questionnaires were a very useful method, in the appropriate case, to establish the facts of a case before starting court or tribunal proceedings. The Government abolished their statutory backing and this has led to confusion over the status of the voluntary alternative questionnaires.[6] In addition, it tends to push the contested issues of disclosure into a setting where court or tribunal proceedings have already commenced, this increasing litigation costs for both parties.

Recommendations by employment tribunals

8. It is not clear there is any benefit to the abolition of this power for employment tribunals to promote good practice. This is precisely the sort of provision that can lead to long-term practical improvements that reduce discrimination for a wide range of disabled people.

Reasonable adjustments

Q3. Are the reasonable adjustment duties known and understood by disabled people, employers, service providers and others who have duties under them? How does this apply in the specific cases of public transport, taxis, education and access to sports grounds?

9. There is a crucial difference between, on the one hand, awareness of the phrase 'reasonable adjustments' or the understanding that a duty exists and, on the other, an understanding of what the duty entails or how to comply with it in practice. This is particularly the case with the anticipatory duty in goods and services. Generally speaking, larger organisations, whether private or public, are more likely to have formulated policies or actions to address 'reasonable adjustments' specifically, but this does not always translate into effective adjustments being made in practice. In our experience, smaller organisations sometimes approach the reasonable adjustment duty more effectively simply because there is often better person-to-person engagement. For instance, a shopkeeper at premises with a small step may well provide a reasonable means of avoiding the physical feature and may have been doing so, unwittingly, for years because it makes good business sense and is good customer service.

10. One area of recurring difficulty is the willingness of service providers to provide information that is accessible to profoundly deaf users of British Sign Language (BSL), who are often the most excluded of all disability groups. BSL is a language in its own right which is regularly used by a significant number of people. It is a visual-gestural language with its own vocabulary, grammar and syntax.[7] Many older profoundly deaf people are almost completely illiterate in English, given the systemic exclusion from education. Section 20(6) of the Act provides that it is always reasonable to ensure that information is provided in an accessible format. However, where this amounts to a need to engage a BSL interpreter, service providers will often argue that the cost makes such an adjustment unreasonable. There have of course been few court cases on this topic, no doubt largely because of the extreme barriers facing profoundly deaf people who want to enforce their rights.

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[6] Equality Act 2010, s.138 was repealed by the Enterprise and Regulatory Reform Act 2013, s 66(1)

[7] As recognised by the court in *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191, para 2.

Q4. Should the law be more explicit on what constitutes a reasonable adjustment? If so, in what way?

11. The majority of cases brought by Law Centres involve the reasonable adjustment duty. The primary difficulty with the concept of reasonable adjustments is that it requires employers and service providers to do things differently for disabled people. In the minds of many people, this runs counter to established anti-discrimination practice, based on cases of race and sex discrimination, where the focus was far more on rigid systems to treat everyone the same, without exception. Actual cases in the tribunals and courts should be seen as 'worked examples' and, when done properly, can lead to a better understanding of what needs to be done in practice.

Codes of Practice

12. One of the difficulties facing service providers is that so few cases are publicised that there is little media awareness of the extent of the duty or the need for it. Guidance is available from EHRC but, while a diligent, progressive service provider can search it out, it is no longer well promoted. Moreover, statutory guidance and resources available from EHRC have been significantly watered down from the codes published by the Disability Rights Commission (DRC). In addition, the Codes need to be updated from time to time.

13. The statutory Codes of Practice are of great assistance to both parties in a dispute because their status is clearly identified as something a court or tribunal is required to take into account and because, in our experience, they are seen as authoritative and correct.[8] The practical and useful guidance in these codes sets out a helpful approach to inform service providers and employers as to what they have to do. The guidance helps narrow the focus of issues in any dispute, to the benefit of both parties. EHRC had originally planned to produce statutory codes of practice on the Public Sector Equality Duty (PSED) and for Schools and the Further and Higher Education (FEHE) sector. However, the Government decided not to lay the codes before Parliament, resulting in the Commission issuing the text as "technical guidance." This causes considerable uncertainty for claimants, service users, employers, courts and tribunals.

14. DRC had issued a Code of Practice on 'Provision and use of transport vehicles', which was particularly useful in an area where there are real difficulties, as evidenced by cases such as *Paulley v First Bus*. The experience of Law Centres is that complaints over transport, particularly bus transport, are still reasonably common. Another area where guidance would be welcome is the vexed issue of mobility scooters on buses, trams and trains. Transport providers generally accept the requirement to accommodate conventional wheelchairs, within varying degrees of success, within the definition of the 'reference wheelchair'.[9] However, this standard was devised before the proliferation of powered wheelchairs and scooters. This has led to transport providers having to address the issues individually, often in a laborious and inefficient way that still leads to unsatisfactory and unpredictable outcomes for disabled passengers. Still, the need remains for a statutory code: clarity would benefit the industry as well as disabled passengers.

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[8] Code of Practice on Services, Public Functions and Associations, Code of Practice on Employment and Code of Practice on Equal Pay, published by the EHRC, in force from April 2011

[9] The Public Service Vehicles Accessibility Regulations 2000, Schedule 1.

Q5. How effective has the public sector equality duty been in practice? How do you assess its contribution to the aims of the Equality Act 2010?

15. Despite early suggestions that PSED was too vague to be of use, it has proved, on occasion, to be very effective. By public law standards, PSED is remarkably clear, and can be a significant tool to shape understanding of the impact of discrimination on all protected groups. Effective compliance with PSED assists authorities to avoid future challenge on matters under Part 3 of the Act. A significant and useful body of case law has now built up around the PSED and is still evolving. The courts hearing PSED cases have frequently had to summarise the existing state of the law to date.[10] This is a helpful and developing approach because it refines and clarifies the law at each stage and therefore makes it more easily usable. As noted above, it would be helpful to have this distillation placed into an authoritative and statutory Code of Practice.

Q8. How effective has the Equality and Human Rights Commission been in exercising its regulation and enforcement powers, and what contribution has this made to the impact of the Equality Act 2010 on people with disabilities?

The Disability Rights Commission's legacy

16. At its creation, EHRC inherited a range of funding arrangements from the legacy Commissions and sought to meld these into an all-encompassing and significant funding of the voluntary sector. Previous funding had included the DRC funding of Law Centres for awareness-raising and casework in goods, facilities and services (GFS) cases. We believe the DRC model of funding was an effective use of resources. DRC was proactive in recognising by 2005 that, although the DDA had been passed ten years previously and was being reasonably well used in the employment tribunals, it had been used very little in the county court to enforce goods and services cases under Part 3 of the DDA.

17. Only 53 known services cases had been issued by 2001, compared with 8,908 employment cases and few more were brought in the following years.[11] This highlights the failure by the Courts Service to record and monitor numbers of different categories of cases, unlike the Employment Tribunal statistics which are published regularly. However, it was also clear that discrimination was not being addressed through the means of individual complaints provided by Parliament. Two major reasons were identified and addressed by the scheme. Firstly, there was still little awareness of the rights of disabled people or even the numbers of people who were protected. Secondly, those who became aware of their rights found it very difficult to bring cases because of the cost, formality and unfamiliarity of the court system, coupled with the almost complete lack of available legal advice. To address this, DRC's innovative scheme funded LCN to provide and co-ordinate a service across 15 Law Centres. These provided a pioneering service of awareness-raising in their local communities, coupled with a casework service for those disabled people who wanted to enforce their rights once they became aware of them.

[10] E.g. *Bracking & Ors v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at para 26; *JM & NT, R (on the application of) v Isle of Wight Council* [2011] EWHC 2911 at para 95.

[11] *Monitoring the Disability Discrimination Act 1995 (Phase 2)*, Disability Rights Commission, 2002.

Law Centre strategy

18. The service provided by Law Centres did not seek to bring test cases, just run-of-the-mill instances of discrimination intended to achieve practical results. Unlike with legal aid funding, work on positive publicity was part of the scheme. Out of this 'strategic litigation' approach, greater benefits arose: service providers began to realise they could be subject to enforcement action; publicity of such cases increased awareness and enhanced the status of the DDA; and a few cases did make it to the higher courts to establish case law.[12] Law Centres also contributed evidence and intelligence to EHRC's formal investigations and inquiries, leading to improvements in practice and policy. It is regrettable that more outcomes of investigations were not published. Whilst it was no secret that Law Centres were frustrated at the administrative burdens entailed in the EHRC funding scheme, we must acknowledge how important it is to have such a body in place to take a lead on the monitoring and enforcement of the Act.

19. Law Centres frequently have to advise clients there is no 'discrimination policeman' and that the burden of enforcement falls on the aggrieved individual. We recognise that EHRC's enforcement powers are limited by resources although many Law Centre advisers feel EHRC takes an over-rigid approach to its decision-making on case funding. In particular, whilst we understand EHRC's preference to fund cases at appeal, which will result in binding case law, we believe the right cases need to be properly prepared (and therefore funded) at first instance too, in order to provide a sound basis for any appeal on a point of law.

20. Government ended EHRC's power to fund its grants scheme from 2012. This, coupled with the removal of legal aid for discrimination cases from Law Centres, has led to a significant reduction in the ability to enforce the Equality Act. At the same time, EHRC also lost so much of its own resources and powers to promote the Act. Despite the positive outcomes from the DRC/LCN project and the significant raising of the profile and effectiveness of the DDA and EA, there is still much to be done. We would recommend this model as an effective way to invest resources available for promoting the Equality Act. It is important that any strategic litigation has resources for publicity to bring the message out to the public, in contrast to the limited funding from legal aid.

Q9. Could other regulatory bodies with a role in the effective implementation of the Equality Act 2010, such as inspectorates and ombudsmen, play a more significant part?

21. Given that we highlight the difficulties of enforcing unlawful discrimination in the courts, it would appear at first sight to be a positive step to ask Ombudsmen and regulators to play a role in enforcement. However attractive that appears, we believe there are fundamental drawbacks. There is also a difference in the roles between Ombudsmen handling individual complaints and regulators setting out compliance frameworks. In our experience, Ombudsmen have always fallen short of providing a satisfactory remedy in cases of disability discrimination. This is of course legally correct: section 114 of the EA gives exclusive jurisdiction to the county court. The higher courts have recognised that findings of discrimination can only be made by a court.[13] More fundamentally, Ombudsmen should not be expected to adjudicate on discrimination cases because the basis of all Ombudsman complaints is good administration or good practice, whether or

[12] E.g. *Royal Bank of Scotland Group Plc v Allen* [2009] EWCA Civ 1213.

[13] *Maxwell, R (on the application of) v The Office of the Independent Adjudicator for Higher Education* [2011] EWCA Civ 1236.

not actions are lawful. Law Centre advisers often find defendants arguing that a particular incident is merely a regrettable failure of customer service. We have to assert that discrimination is prohibited by law and should lead to a non-trivial award of damages or other remedy in court.

22. We believe regulators, however, could take a more robust approach to setting compliance frameworks. This would demonstrate the regulators' own compliance with PSED. One example of concern to note is the Independent Police Complaints Commission (IPCC) publication on 3rd September 2015 of a 100-page document "IPCC guidelines for handling allegations of discrimination."[14] Whilst it is a positive step to set a common framework for police forces, it is of concern that the document appears to contain a lengthy commentary on the workings of the Equality Act but only refers to the statutory Code of Practice on Part 3 - which is fundamental to the delivery of police services in a non-discriminatory way - in a footnote. We are concerned that complaints may be investigated against the framework of IPCC's guidance yet may not meet the requirements of the Equality Act. A Twitter debate on whether IPCC would accept the burden of proof provisions issue resulted in IPCC confirming that "This type of determination cannot be made under the police complaints system."[15]

Q10. Are the current enforcement mechanisms available to private individuals (through Employment Tribunals, County Courts and, in Scotland, Sheriff Courts) accessible and effective for people with disabilities, employers and providers of goods, facilities and services?

23. The DRC/LCN project above was set up because very few GFS cases reached court. However, individuals who want to bring employment cases now face substantial hurdles with the cuts to legal aid, abolition of advice through EHRC's helpline, cuts to the EHRC's grant-making programme, abolition of mediation schemes, court closures, increases in court and tribunal fees and reductions in the Access to Work scheme.

Barriers to enforcement

24. The most significant barriers are

- Awareness of what is unlawful and why;
- Access to free advice;
- In services cases in particular, access to competent advice even where paid for;
- Court and tribunal fees;
- In services cases in particular, lack of awareness or experience amongst the judiciary on equality cases;
- In county court cases (and to some extent in employment tribunals), the threat by defendants of enormous costs bills against low-income claimants.

Awareness

25. As noted above, the difficulty is not so much awareness of the existence of anti-discrimination legislation but of what service providers and employers must to do avoid it. There is also a lack of awareness amongst individuals about what they can do if they feel they have suffered discrimination, even though this is increasing. One difficulty is

[14] At http://www.stop-watch.org/news-comment/story/ipcc-releases-new-guidelines-for-handling-discrimination-complaints.

[15] www.twitter.com/IPCCNews/status/639053624325312512.

that increasing awareness leads to more instances in which individuals wrongly think they are protected. Law Centre advisers often have to advise clients that a complaint does not amount to unlawful discrimination. This advice can be particularly valuable to help future awareness as well as to head off long running and stressful challenges in a court or tribunal. One Law Centre recently advised a volunteer in a large, well-known and respectable national charity that she could not tackle discrimination by her managers under the Equality Act because volunteers remain unprotected. Whilst she was shocked to hear this, it helped her understanding of what the law could and could not do.

Access to advice

26. Apart from awareness-raising, access to good quality, early advice is the most significant barrier. We emphasise that it is advice and not just information that is needed. Lack of adequate advice affects cases down the line: employment advisers in Law Centres report an increase in inappropriate or badly-pleaded claims which consequently take up much of the tribunal's time.

Legal aid

27. Whilst legal aid is in theory still available for discrimination matters, it is only available through a mandatory telephone gateway: a call centre, where eligibility for legal aid is assessed. This channel in itself creates many additional barriers for disabled people. Once through the Gateway, the eligibility assessment is conducted again by the advice provider and, if passed, the service is still only available by telephone. The Gateway therefore excludes those who cannot communicate, effectively or at all, by telephone. There are only very limited exceptions permitting face-to-face advice.

28. The proof that the mandatory telephone gateway is not providing an adequate service advice is shown in the examination of MoJ statistics by the Legal Action Group.[16] LAG's research showed that, for cases still covered by legal aid, there had been a large fall in the take-up of legal aid by the public. This was worst for the discrimination category, where the shortfall in advice provision in the first 12 months of operation was 77% lower even than the low target anticipated by the Ministry of Justice. LAG indicated this was caused by a combination of factors, including the reduction in the number of solicitors firms and charities offering legal aid; a perception amongst the public they can no longer get help with any civil law problems; and government failure to adequately advertise the availability of services. LAG also suggested that legal aid providers were becoming increasingly risk-averse in committing to provide legal aid services due to the bureaucracy involved in making applications. As a result, legal aid is of negligible effect on the number of discrimination cases run in the courts. A case that merits legal representation would normally be run with the benefit of a legal aid certificate but in 2013-14, after cuts to civil legal aid, only four legal aid certificates were granted for discrimination cases in the whole country in a year.[17]

29. Law Centres and the not-for-profit advice sector generally were disproportionately hit by the civil legal aid reforms with 77% of not-for-profit providers' legal aid funding being

[16] See Legal Action Group's analysis at http://www.lag.org.uk/policy-campaigns/legal-aid-secret-service.aspx, accessed 30 August 2015.

[17] Ministry of Justice, *Legal Aid Statistics in England and Wales for 2013-2014*, published 24 June 2014.

lost.[18] We would support EHRC's recommendation that "the government commissions, at the earliest opportunity, a comprehensive and independent evaluation of the impact of the LASPO Act exclusions, including the potential impact on long term value for money and any evidence of costs-shifting to other areas of public expenditure."[19] In any case, even before LASPO, legal aid was often not available for discrimination cases, especially in employment. The time when many disabled people needed effective and prompt advice on a discrimination matter was when they were still in employment. Legal aid had a perverse incentive to provide advice to employees only once they had lost a job. It often did not provide advice that would sustain suitable employment. Even where a successful outcome is achieved, legal aid does not cover any of the work that would bring out the resulting added value, such as publicity or promotion of good practice and lessons learned.

Other potential sources of information: EHRC, EASS, ACAS

30. EHRC's power to provide advice, through an advice line, was removed by the Government at the same time it removed the EHRC's power to fund voluntary sector organisations and a mediation service. The replacement Equality Advisory and Support Service (EASS) line is limited to an information service: it cannot and does not offer 'legal' advice, or advice on the merits or value of an individual's case.[20] It has answered 94,459 enquiries in its 3-year history but does not replace or effectively strengthen enforcement.[21] It will sometimes contact a service provider but its action is limited to relying on that service provider's good will. Where a service provider refuses to engage or change a discriminatory action, there is nothing further EASS can do. This may have the effect of achieving compliance only by those service providers who are willing to do so but allowing worse service providers to continue discriminating.

31. The Advisory, Conciliation and Arbitration Service (ACAS) has a wide range of legal and practical information, and runs its conciliation services, for those who can use it but its refusal to give actual advice is a common complaint heard by Law Centre advisers. ACAS offers 'early conciliation' in employment cases, which is mandatory before a claimant is permitted to proceed to a tribunal. However, Law Centre advisers note that employers increasingly refuse to engage in conciliation where they think the claimant will not or cannot be able to pay the fees needed to start a tribunal claim. EHRC previously funded a specialist mediation service which helped achieve appropriate settlement and education in a number of cases which did not consequently have to go to court; but this power, too, has been removed from the Commission. There remains a limited mediation service available by telephone through the county court in small claims matters. However, advisers report that mediators rarely have any understanding of discrimination issues, usually resulting in unsuccessful mediation. Bad mediation may well be a negative experience for disabled claimants and for service providers.

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[18] Addendum to the Cumulative Equalities Impact Assessment on the impact of legal aid reform, Table N, http://webarchive.nationalarchives.gov.uk/20111121205348/http:/www.justice.gov.uk/consultations/legal-aid-reform.htm#equality, accessed on 3 September 2015.

[19] Response of Equality and Human Rights Commission to the National Audit Office Consultation, 21 July 2014.

[20] http://www.equalityadvisoryservice.com/app/legal_advice.

[21] Actual enquiries dealt with by EASS – From the 1st October 2012 to the 31st August 2015 – 94,459.

Court and tribunal fees

32. Employment tribunal fees have had an obvious impact on the ability to bring discrimination claims: the introduction of fees correlated with a 79% drop in claims to the ET.[22] For discrimination claims, the higher fee is charged: £250 to issue a claim and a further £950 if the case proceeds to hearing. Even where claimants may qualify for fee remission, our experience is that both courts and tribunals apply an unduly rigid and overbearing requirement for large amounts of documentation and many decisions are simply wrong. There is good reason to consider the abolition of employment tribunal fees, as is now proposed for Scotland: they do not prevent misconceived tribunal claims, just claims from lower income workers.[23]

33. The drive in the Court Service towards big increases in county court fees, especially fees for applications, has a disproportionate impact on individuals as opposed to large organisations, again making it harder for disabled people to enforce their rights. These are not just fees to issue claims but also to manage interim applications. For instance, an application to request 14 days extra time would have cost £80 before April 2013, is now £155 and government is proposing to increase the fee again to £255.[24] This is a fixed fee, whether for a low-paid individual in a small claim case or a corporation in a multi-million pound commercial dispute. Still, despite the significant deterrent caused by the introduction of employment tribunal fees, we believe the lack of timely and accurate advice is the greater barrier, particularly for those employees whose disability leads to further barriers in bringing a claim.

Lack of judicial awareness or experience on equality cases

34. As with all types of case, attitudes in the judiciary vary towards equality issues. Judges, especially district judges in the county court, have to deal with a wide variety of work in limited timescales. Exposure to well-presented Equality Act cases is an important way to increase the knowledge and skill of the judiciary in handling this type of case. This is particularly so because of the equality issues that occur in other types of proceedings, such as housing possession cases that district judges hear in large volumes.

Adverse costs risks

35. A significant barrier facing individual claimants is the risk of adverse costs if they lose. Law Centres face the difficulty of advising clients, as they are professionally required to do, of the risk of adverse costs if they bring cases in the court against a discriminator. In these cases the claimant is always an individual and the defendant is usually a large organisation or one backed with insurance. There is a great imbalance in resources in that service providers can usually choose whether or not to engage solicitors.

36. There is further imbalance in that many individual litigants report bullying and intimidating behaviour by Defendants' solicitors, with threats of legal costs and the ability to repossess an individual's home if a claim is proceeded with. Where litigants are in person, the threat of costs is unbalanced because a legally represented defendant is at no risk of adverse costs against an unrepresented individual, no matter how

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[22] MoJ Tribunals Statistics Quarterly October to December 2013, published 13 March 2014.

[23] A Stronger Scotland, the Scottish Government's programme for Scotland 2015-16, available at http://www.gov.scot/Resource/0048/00484439.pdf.

[24] MoJ document "The Government Response to Part 2 of the Consultation on Reform of Court Fees and Further Proposals for Consultation" Cm 8971, published January 2015

unreasonable their conduct in litigation. Some Defendants' solicitors will often use tactical advantages of costs to intimidate clients. The issue of costs is not just the eventual cost of the case after a final trial but the costs of interim applications, where legal costs may amount to as much as a claimant could hope to recover in compensation.

37. Serious costs risks arise if the case is not allocated to the small claims track. In our experience, the practice of courts in allocating cases to the small claims, fast track or multi track is variable and inconsistent. This is an added difficulty for any Law Centre adviser who needs to know at the outset which track a case is likely to be allocated too.

QOCS

38. Some advisers have raised the question of whether Qualified One-Way Costs Shifting (QOCS) applies to discrimination claims.[25] At present, there is considerable uncertainty in what is a potentially significant area. Since the Jackson reforms were introduced in April 2013 to reduce the overall cost of personal injury litigation, it has not been possible in effect for personal injury claimants to take out 'after the event' (ATE) insurance premiums. In turn, they are protected from the costs risks described above by the QOCS provisions in the Civil Procedure Rules. In short, even if a personal injury claimant loses, he or she cannot be ordered to pay a net amount in costs.[26] This allows a claimant to bring a personal injury claim without having to risk their family home.

39. If this applies to discrimination cases, it is potentially very significant for aggrieved claimants, as there would finally be an incentive for more solicitors to bring discrimination claims. Notwithstanding the view of some advisers that QOCS already applies to discrimination claims, an amendment to the civil procedure rules would put this beyond doubt. These changes do not require Parliamentary approval as changes to the rules are made via delegated legislation by the Civil Procedure Rule Committee.[27] Compliance with the Act will be achieved when responsible claims for discrimination can be enforced in the same way - and to the same extent - as personal injury claims. That is not to encourage a culture of litigation but rather one where compliance with equality law is the norm rather than the exception.

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4 September 2015

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[25] See Douglas Johnson and Louise Whitfield, "No access to legal advice means no access to goods and services," *Legal Action*, March 2015.

[26] There are appropriate protections for defendants against unreasonable or dishonest claimants.

[27] https://www.gov.uk/government/organisations/civil-procedure-rules-committee.

House of Lords Select Committee on the Equality Act 2010 and Disability

Suggested Recommendations proposed by the Discrimination Law Association and the Law Centres Network

Note: The suggested numbered recommendations listed below are linked to the questions posed by the Committee to our organisations during the oral evidence session on 8 September 2015

Questions 44 and 45: Enforcement of the EA non-discrimination provisions is not as effective as it could/should be primarily because of lack of access to skilled quality advice and barriers of employment tribunal fees and increased County Court fees and costs risks.

1. The Committee will have received evidence regarding the significant deterrent impact of employment tribunal fees and County Court fees/costs which, in effect, prevents effective operation of the right to redress under the Equality Act 2010; **the Committee should seek to ensure** that full weight is given to this evidence in the Ministry of Justice review and the inquiry by the Justice Committee and/or in the consideration of any resultant proposals from either or both.

2. Given the complexity of most discrimination claims, especially those involving aspects of disability, the current telephone-based arrangements for legal aid for discrimination are not adequate; **the Committee could recommend** that the Ministry of Justice re-tenders the discrimination legal aid contracts to incorporate face-to-face advice. This could widen access to skilled legal advice without increasing the number of 'matter starts' and therefore within the existing costs budget.

3. As the Committee will have heard from many witnesses, disabled people are far too often unaware of their rights and means of enforcement under the Equality Act; **the Committee could recommend** funding of projects involving local level education and enforcement along the lines of the Disability Rights Commission/Law Centres Federation project a few years ago.

4. To fill the gap created by the cuts to legal aid and the closure of law centres and advice centres, **the Committee could recommend** that the EHRC should review its policy of not supporting first instance cases.

5. To reassure discrimination claimants and their legal representatives/advisers, **the Committee could recommend** an amendment to the Civil Procedure Rules to confirm that Qualified One-Way Costs Shifting (QOCS) applies to discrimination claims. This would enable people to bring discrimination claims in the County Court

(for most non-employment cases of discrimination) without serious and disproportionate costs risks.

6. **The Committee could recommend** consideration of a requirement for uniform continuing professional development for any person who in any judicial capacity will be expected to determine Equality Act cases.

Questions 46, 47 and 50: It is not effective to rely solely on individuals to enforce equality law.

7. **The Committee could recommend that** the EHRC could take on a greater role in securing compliance with the Equality Act, making strategic use of its unique statutory enforcement powers -- investigations, unlawful act notices, action plans, binding agreements, injunctions – to bring about lasting organisational/institutional change.

8. **The Committee could recommend** consideration of the ways in which different, other regulatory bodies could be expected to incorporate compliance with the Equality Act 2010 within their mandates.

9. Claims of discrimination outside the field of employment are primarily brought in the County Court in England and Wales and the Sheriff Court in Scotland, however the number and nature of such claims and their outcomes are not consistently recorded and there appears to be no central collation of relevant data. **The Committee could recommend** that the Court Service be required to collect from all County and Sheriff Courts, and to make publicly available, basic data regarding claims brought under the Equality Act 2010.

Question 48: The Public Sector Equality Duty (PSED), a provision unique to UK equality legislation, with huge potential to achieve wider equality, is at risk of being devalued due not to the outcomes of litigation but to the lack of commitment and leadership from central government.

10.**The Committee could recommend** that its findings and specific recommendations regarding the PSED from all of the evidence presented to it should form the basis of the review of the PSED which the government is meant to carry out in 2016.

11. Noting the increasing privatisation of public functions, **the Committee could recommend** that all relevant public procurement procedures should ensure that private and voluntary sector organisations in carrying out public functions appreciate their statutory obligations under the PSED; like public authorities such organisations should be subject to enforcement measures by the EHRC and legal challenges by individuals or groups affected by their non-compliance.

12 Given the need for wider and deeper understanding of the requirements of the

PSED, **the Committee could recommend** that the EHRC should issue a statutory Code of Practice on PSED which would therefore need to be taken into account by the courts whenever relevant.

13. To secure more demonstrable progress towards equality by public authorities **the Committee could recommend** that consideration is given to an amendment which would include in the PSED an obligation to take proportionate steps toward achievement of the aims to which, under the PSED due regard must be given (elimination of discrimination, advancement of equality of opportunity, fostering good relations).

Question 51: As the Committee has recognised, it is essential that the law is clear, comprehensive and easily understood and that it enables effective protection and accessible legal redress.

14. Drawing on the evidence it has received regarding any definitions, obligations or prohibitions within the Equality Act relating to disability discrimination which appear to be unclear or unduly complex or which impose an undue evidential burden on the claimant, **the Committee could recommend** appropriate amendment of the Equality Act.

15. **The Committee could recommend** that the EHRC should be expected to up-date its existing statutory Codes of Practice on provisions of the Equality Act in particular to clarify provisions which case law has shown to be problematic (for example the definition of reasonable adjustment) and to issue statutory Codes of Practice for areas not covered by an Equality Act statutory Code, including education, housing and transport.

16. **The Committee is strongly urged to recommend** the reinstatement of the following provisions which initially formed part of the Equality Act 2010 but have been repealed:

- s. 138 obtaining information -- the statutory questionnaire procedure which had formed part of equality legislation since 1975;
- s.124(3)(b) remedies: general – the power of an employment tribunal after making a finding of discrimination, harassment etc., to make a recommendation that the respondent takes specified steps to obviate or reduce the adverse effect of any matter raised in the proceedings “on any other person”, ie not limited to a recommendation to protect only the claimant.

17. **The Committee could recommend** amendments to the Equality Act 2010 to increase its scope:

- to fill gaps which have become apparent through litigation, including protection against discrimination in air travel, and
- to bring into force provisions approved by Parliament which would improve the position of disabled people and others, including reasonable adjustments for common parts (s.36(1)(d)), dual discrimination (s.14) and public sector duty regarding socio- economic inequalities (s.1), and the taxi provisions (ss.160-165).

General

18. **The Committee could recommend** that the UK government incorporates the United Nations Convention on the Rights of Persons with Disabilities into domestic law. Not only would this be a significant indicator of the government's commitment to disability rights but also would greatly assist, by way of interpretation and exposition, any litigation to enforce the protections against disability discrimination under the Equality Act.

December 2015

Retendering for discrimination

The MoJ's first "discrimination" contracts were originally granted in 2010, with discrimination being one part of the "consumer" category of law. It was described as a "low volume" contract in that legal aid providers were typically granted only 15 matter starts each. The fixed fee for each matter start completed was £177. This allowed some provision of discrimination advice but maintained quality since those firms were required to have an experienced supervisor.

The tender was advertised publicly and was relatively simple compared to many legal aid tenders. This was because the description of "low volume" categories reflected the fact that relatively few providers would be both interested and qualifying to obtain a contract of relatively low commercial value. The tender was described as "non-competitive" in that those providers who met the criteria obtained contracts for the limited number of matter starts offered.

These contracts were for face-to-face advice and were of benefit to the clients of law centres in particular. Several law centres were able to extend their services to combat discrimination in their local areas through this method.

The MoJ re-tendered for contracts for the new discrimination category in 2012, with the stipulation that access to such advice would only be through the mandatory telephone gateway (which was itself not part of the tender) and the contract was to be provided on a national scale. Other tenders carried out at the same time included those for face-to-face advice in family, asylum, housing and debt.

Three firms were awarded contracts to provide the entirety of legal aid advice on discrimination, in employment, in services and in education, as well as in any other areas. These firms were Howells, Stephenson's and Merseyside Employment Law.

Recognising the disability access issues, the contracts were set up to provide for a limited amount of face-to-face advice and a number of local law centres subcontracted to help provide this. However, we do not know of any instances where a subcontracted organisation has actually been asked to provide face-to-face advice and the MoJ's own research was that such referrals were "negligible"[1]

Overall advice provision has been far lower even than the low predictions from the MoJ, which estimated that over the three year period of the contracts the likely volume of

[1] Civil Legal Advice mandatory gateway: Overarching research summary, MoJ, 2014

discrimination cases started would be 19,167[2]. However, in the first 30 months of this period, the actual matters started were just 4,709[3].

The contracts came into force on 1 April 2013 and last for 3 years. The contracts contain an option for extension for up a further 2 years, which would run to 31st March 2018, although the MoJ as not published any details of contract extensions. Providers should have expected a further tendering exercise in 2015 although no such exercise has taken place.

At whatever the point the MoJ retenders, which we understand must be 2017 at the latest, it should be possible to run a tender exercise on a "low volume" face-to-face basis.

Douglas Johnson
12 January 2016

[2] Para 1.26 Pre-Qualification Questionnaire: Information for Applicants

[3] Legal aid statistics quarterly: July to September 2015, table 5.1

QOCS and civil procedure rules

We fully accept that there is no authority on whether QOCS applies to discrimination cases. It is merely our view that a respectable argument exists that it does.

The question of whether a claim for damages for injured feelings in the EA amounts to a claim for damages for personal injuries in CPR 44.13(1) does indeed refer to rule CPR2.3. However, this rule does not contain an exhaustive definition of personal injuries but only states that the term "includes any disease and any impairment of a person's physical or mental condition." The implication is that there is the scope for something more than just physical or psychiatric injury.

Whilst there is a certain amount of authority to say what comes within the scope of personal injury there is little authority to say what is not. The rule that injury to feelings that falls short of a recognised psychiatric injury is not a head of loss is well-established but is one of public policy applying to conventional personal injury cases arising from negligence. This is presumably the reason why the EA is explicit in reversing this position by setting out unambiguously that damages may include those for injury to feelings.

Certainly one view is that with a literal reading of the words, an injury to feelings is clearly an 'injury' and, since only individuals (as opposed to corporate bodies) can experience emotions such as humiliation, anxiety and loss of dignity, such injuries are necessarily 'personal.'

Whilst this view is open to argument and interpretation, the present situation is a serious deterrent to redress for disabled people who have suffered discrimination. The fact remains that no court has yet addressed the issue. An explicit change to the CPR would put the matter beyond doubt and would therefore put EA cases on the same footing as other personal injury cases.

Douglas Johnson

12 January 2016