



## Liaison Committee

### Corrected oral evidence: Equality Act 2010 and Disability—follow-up

Thursday 17 June 2021

3 pm

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Liaison Committee—members present: Lord Gardiner of Kimble (The Chair); Lord Bradley; Lord Davies of Oldham; Lord Lang of Monkton; Lord Tyler; Baroness Walmsley.

Equality Act 2010 and Disability Committee—members present: Baroness Deech (former Chair); Baroness Browning (former member); Lord Faulkner of Worcester (former member); Baroness Thomas of Winchester (former member).

Evidence Session No. 2

Virtual Proceeding

Questions 7 - 11

#### Witness

I: Declan O’Dempsey, Barrister and Trustee, the Discrimination Law Association.

## Examination of witness

Declan O'Dempsey.

**The Chair:** Good afternoon and welcome to this meeting of the Liaison Committee. I particularly welcome our witness, Mr Declan O'Dempsey, from the Discrimination Law Association.

As this meeting is following up the recommendations of the former Equality Act 2010 and Disability Committee, I am delighted that we are joined by the former chair of that committee, Baroness Deech, and three of her colleagues. Baroness Deech and her colleagues will lead on the questioning.

Q7 **Baroness Deech:** Thank you, Chair. Mr O'Dempsey, thank you very much for coming. You are the only witness in this session, but we only have half an hour, so maybe it is just as well.

**Declan O'Dempsey:** Good afternoon, my Lady.

**Baroness Deech:** Good afternoon. I do not know if you heard the previous session, but the impression we got was that although the rights of disabled people are there on paper, either the Government have not brought them into force or, in many cases, people are unable to enforce them because of the situation, and in particular because of the legal costs and the risks they run.

My first question to you is: should the Government extend qualified one-way costs shifting to cover discrimination claims? If that happened, what impact would it have on disabled people and their rights? Is there any reason why the Government should not do that, no matter what they have said about it?

**Declan O'Dempsey:** Thank you very much, Lady Deech. The short answer to your first question is yes. There is not really much to add to that.

If qualified one-way costs shifting were applied, it would have the obvious effect that disabled people would be able to bring proceedings without facing a risk of costs. The experience of our membership is that that is a strong disincentive to people bringing claims in the county court for goods and services discrimination.

It would certainly have that effect. One barrister working and specialising in costs—I am not sure that he is even a member of the Discrimination Law Association—put it this way in a paper that he wrote. He said that the effect of the LASPO changes on this sort of claim since 2013 was that claims of this nature had dropped off a cliff. That is the experience of many of our members, necessarily on an anecdotal basis, but it is a common experience. When you talk to most barristers practising in the area, you get the same reply. QOCS would counteract that.

As to the reasons for not extending it, I listened to the last session. Catherine Casserley appeared for the intervenor in writing in the Leighton case that she mentioned to you. The DLA is preparing a short note, which may be of assistance to you, on the points that I am making this afternoon. We will give you further detail on what was argued in the Leighton case.

Essentially, the Government's response in that case, and their response to your committee's report, appeared to be, first, that legal aid remains available. You may be hearing something from the Equality and Human Rights Commission about that on the back of a report it did in 2017 on how useful that is. In the Leighton case, the rationale given for not making a decision to extend the protection was that the Government were still thinking about it. To give you an idea of what they were thinking about, around February 2019, they were thinking about having a pilot scheme for non-damages disability claims—applying QOCS to that type of case.

In the first place, that is quite a narrow bunch of cases to be trialled on, but, as far as we are aware, there has been no progress at all on even that limited venture. I hope that the committee will be able to get more information from those appearing on behalf of the Minister, or indeed from the Minister, later this afternoon as to what progress, if any, is being made, even on the limited basis that was outlined there.

There were various other stages of consideration. In May 2019, there was a formal submission to Ministers showing the issues relating to costs protection in discrimination cases. Again, there was consideration of a pilot scheme, and potentially consultation on extension. That led to the situation in June 2019 when there was an evaluation model. I can tell you about these things only because they are mentioned in the judgment in Leighton. We have not seen any of the documents, so we cannot comment further on the reasoning, or indeed on the methodology, that was being proposed for any of these matters, or even the extent to which the Government were properly scoping the size of the issue, which appears to have been one of the reasons why no action has been taken.

I am sorry to take time on this, but I would like to develop that point a bit because you will be talking to the relevant people later on. It should not be beyond the wit of the Civil Service to derive a scheme for getting information on the following things: the number of cases that were brought in the county court before the LASPO changes; the numbers issued since, to see whether that tells us anything about the numbers effect; and whether cases are being deterred from starting as a result of the current costs regime.

That will probably require the Government to do some qualitative as well as quantitative surveying among advice agencies, organisations of disabled persons and organisations for disabled persons. The rationale behind what I am saying is that the disabled person's journey from an act of discrimination needs to be gauged in some way. At each stage of it, the costs regime will deter people from having their cases explored.

I put it that way deliberately, because the underlying rationale behind the Equality Act generally is to eradicate the great social evil of discrimination, obviously, and to investigate cases properly, because there is a social value both in the cases that succeed but also where defendants have proper defences to cases.

The current costs regime impacts on all stages. As an example, on the Citizens Advice website, which gives advice on starting a claim in the county court, the first thing it says is, "These are difficult cases, and you may end up paying the costs if you lose". That is the first thing that somebody who is looking for advice will see. Citizens Advice is right to say that, but you can imagine without too much speculation what the impact of that will be. For anybody who does not have a lot of confidence, that is likely to deter them.

That leads to the next point in the rationale. I think that one of the reasons why the Government are fearful of extension is that it might give rise to a raft of unmeritorious cases. I suggest that that rationale does not really stand up to examination. We have seen what happened in the case of the abolition of employment tribunal fees. There is no real evidence that that has led to an upsurge in unmeritorious discrimination cases being brought, and there is no reason to suppose that the same would not happen in county court cases. In other words, what tends to happen is that cases that otherwise would not get explored get explored. That is part of the social policy underlying the Equality Act.

I am sorry, that was a long answer. Indeed, there is more that could be said on that point. Forgive me for taking up time with it.

**Q8** **Baroness Deech:** Very briefly, because we have to move on, you remind me of a Supreme Court ruling that employment tribunal fees as a deterrent undermine the operation of the rule of law. Is there any hope that one could apply human rights law or something like that to get relief for costs for disabled people facing discrimination?

**Declan O'Dempsey:** It is an interesting thought. If you look at the amount of work that needed to go into the UNISON case, it was heavily dependent on the statistics. One of the criticisms that I think can be made of the Government in this respect is that there simply has not been sufficient transparency about numbers and data. I have been trying to find signs of relevant statistics and asking the question of the membership. They are very hard to come by and it is very difficult to tell. The statistics must be there or could be generated. I think that if an inquiry is made into the impact of the current costs system, on the back of that there may well be a potential human rights argument.

In the Leighton case, the High Court judge hearing it finished his judgment by saying, "Well, I've found that there isn't a decision here, but that doesn't mean that if nothing happens at a later date we wouldn't find that a decision has de facto been made". That judgment was given at the start of last year. As time rolls on, we are getting closer and closer to the

point where there may well be another judicial review, based on the fact that there is in fact a decision not to extend.

**Baroness Deech:** As long as judicial review is allowed.

Q9 **Baroness Browning:** I believe that I have again to declare my interests as a vice-president of the National Autistic Society and an ambassador for the Alzheimer's Society.

Mr O'Dempsey, you heard the initial session. Could I bring you through to the public sector equality duty, which I asked about last time? Of course, we are concerned about the lack of outcome and action attached to these plans, but there have been plans. We are aware, for example, that the Business, Energy and Industrial Strategy Committee held an inquiry in 2018 on the gender pay gap. The Government's response both to our report on this issue, and in 2019 when the BEIS Committee took a look at it, seemed to be that publishing action plans but making them mandatory might result in a prescriptive format of little value.

Could I ask you as a lawyer—I am not a lawyer and I would like to understand this—what you think the Government mean when they say that they resist strengthening a law to make sure that these action plans are implemented in a statutory way because it simply produces something of little value?

**Declan O'Dempsey:** I am not apt or prone to speculate, so I am a bit diffident about trying to work out what goes on in the mind of someone who would say that. It seems to me that these action plans are a very important evidential tool. I am sure that the committee already thinks about this. It is not a technical legal point. It is about the influence that having to do an action plan can have, well before a public authority is ever looking down the barrel of a court case.

It is not so much a legal point, although I think the Government may feel that it is technical and that may be what they are on about; they do not want that degree of technicality. But, actually, the nature of the problem that is presented by not observing the public sector equality duty is a problem of not paying attention. One way you get a public authority to pay attention is to make them go through a procedure that requires them to look at certain things.

The action plan is a good way of strengthening the duty, as would be the suggestion of showing that the public authority has taken proportionate steps not so much to achieve Section 149, which is a duty just to have due regard, but to show what progress has been made to achieve the objectives set out in Section 149. I think that would focus the mind of public authorities very much more. I do not know if that answers your question.

**Baroness Browning:** When the Government responded to recommendation 12 of our report five years ago, on public sector equality duty, they actually said, and I find this most peculiar: "The Government is not in favour of publishing substantial quantities of additional statutory

material unless there is clear evidence that its availability in this form would ensure or facilitate compliance with the legislation". Where do you ever identify the evidence that it works if you never make it statutory? It is a real chicken and egg.

**Declan O'Dempsey:** It is not quite a chicken and egg. If you like, it is an egg that has certain weights attached to it. In other words, if I am a local authority, or a public authority—this should really apply to all public authorities—in the current circumstances, and I am not told that I have to look at an issue, there are all sorts of very important other issues storming around in my mind, such as trying to keep care home provision running; there is all that very important stuff going on.

People need a procedure to follow if you are to nudge those who make decisions away from the way they would just think about a situation without having proper regard to equality objectives. I have never been a fan of doing away with specific duties because of that point. Indeed, the history of the public sector equality duties, since their abolition, has borne out the detrimental effect of not having them. I hope that helps.

**Baroness Browning:** It does. I am just a cynical old politician, and I have a feeling it is something to do with the resources involved, as it often is.

**Declan O'Dempsey:** I think that speculation may be on the button.

**Baroness Deech:** We have to move on speedily, I am afraid. Thank you.

Q10 **Baroness Thomas of Winchester:** I declare an interest as a trustee of Muscular Dystrophy UK.

Mr O'Dempsey, we now come back to uncommenced provisions. We are talking about taxi provision and about common parts. What is your take on why we have these uncommenced provisions? Are there any legal or practical justifications for having further reviews or "testing" before commencing them?

**Declan O'Dempsey:** The short answer is that I listened to what Catherine Casserley succinctly had to say about this, and I do not have anything to add. I think she was spot on. I am equally puzzled and cannot see a reason. The answer to the second part of your question is no.

**Baroness Thomas of Winchester:** That is very concise. I think we can go to the next question.

Q11 **Lord Faulkner of Worcester:** Staying with uncommenced provisions, the United Nations Convention on the Rights of Persons with Disabilities—the CRPD—has been ratified by the United Kingdom but not incorporated, which means that it is still not directly applicable in our law. Has it ever provided any practical protection to disabled people in the UK or, indeed, elsewhere? Could you tell us what value it has had in other countries?

**Declan O'Dempsey:** Yes, it has provided some practical protection but not necessarily directly, because of course in this country we cannot rely on it directly in that way.

With your permission, I will give some more detail on the way it has provided protection in the note that I produce for you. In specific cases concerning procedural fairness in particular, it has been relied on to provide some procedural protection. Article 13 of the convention in particular has been relied on in a few cases. There has been a recent amendment to the Civil Procedure Rules to make special provision in relation to disabled persons. That again is inspired by the convention. It can also be taken into account in relation to employment law, where it acts as an interpretative device on the provisions of European law that will remain as retained law post Brexit.

It has been influential. One of the things we will provide for you is some material from Professor Anna Lawson that gives an analysis up to, I think, 2018 of how it was being used in the UK courts. In other countries, it may have been implemented with more direct effect, but in my experience its effect has generally been indirect in the way I have suggested. It provides some protection.

Our suggestion as to how it might provide more protection in the UK is, at this stage, a relatively modest one. The way the convention works is to allow disabled people access to all types of human rights, ensuring equal access for disabled persons to those human rights. One way in which it could be implemented in this country is to respect that ambit and to introduce a provision that would allow it to be relied on in all cases where the Human Rights Act can be relied on, again in order to ensure equal access for disabled persons to the rights guaranteed in domestic law under the 1998 Act. I hope that helps.

**Lord Faulkner of Worcester:** It does. You used the dreaded word Brexit in your answer. Has that made an impact in any way on any of this?

**Declan O'Dempsey:** In some ways, it is too early to tell. For the most part, in employment cases, as I say, it will still be possible to rely on the underlying European Union law and, consequently, to rely on the UNCRPD to interpret that law. That is either because the directives are still effective in broad terms, or because the right to equality of treatment is a fundamental principle of EU law and, on that basis, will form part of the retained law.

**Lord Faulkner of Worcester:** Do you have any view on why the CRPD has not been incorporated?

**Declan O'Dempsey:** There is a technical answer to that, which is that the UK runs what is called a dualist system, so once you have signed up to a convention you have to introduce a piece of legislation to say that it has direct effect in the country. That is the technical answer. Of course, the question then is: why has that not been done?

**Lord Faulkner of Worcester:** That was going to be my question.

**Declan O'Dempsey:** The answer is partly, I suspect, because of the way the convention works, which is to be a lens through which other human rights are viewed. It is necessary to have a piece of domestic legislation that deals in human rights—for example, the Human Rights Act—which the provisions of the convention can then modify so as to achieve equality for disabled persons. That might be the other reason. The alternative, which is simply to say, “Right, the provisions all have direct effect”, would be to go beyond what the convention itself says. Even if—

**Baroness Deech:** I am sorry. Unfortunately, we have to bring this to a close, as we have more witnesses to come.

**Lord Faulkner of Worcester:** Could I declare my interests, which I omitted to do at the beginning of my questions? I am vice-president of the Level Playing Field charity, chair of the Great Western Railway advisory board and president of the Heritage Railway Association. I do not want to be accused of not declaring those. Thank you for your answers, Mr O'Dempsey, which were excellent.

**Baroness Deech:** Thank you very much, Mr O'Dempsey. You have made a lot of complicated things very clear. I look forward to receiving your written submission. What I take away from this session is that we have a failure to collect the data and evidence that we need to promote the law further for disabled people, and possibly the Government are hiding behind lack of evidence. When it comes to the public sector equality duty, local authorities need to be prodded into looking at themselves by having some guidance.

I think that is what we take away from the last half hour. I am very grateful to you, and grateful in advance for the submission you will make to us. Thank you so much, and good afternoon.

**The Chair:** I reiterate from the Liaison Committee our thanks to Mr O'Dempsey. We are all most grateful.