Written evidence from the Discrimination Law Association – EAF0001

1. The Discrimination Law Association is a registered charity, a membership organisation established to promote community relations by the advancement of education in the field of antidiscrimination law and practice.

2. It is a national association with a wide and diverse membership. The membership currently consists of some 250 members (individuals and organisations). Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, but not exclusively, persons concerned with discrimination law from a complainant perspective.

3. The observations we made in the paper provided for the Select Committee report in 2015 by and large remain the case, save that employment tribunal fees have been abolished. That is a matter that the Association believes should be taken into account when considering the impact of the costs regime on "meritless" cases as the evidence appears to be that there has not been an upsurge in meritless cases on the abolition of tribunal fees for disability discrimination cases before the employment tribunals.

4. In relation to this follow-up session the Discrimination Law Association consulted briefly with our membership on the Committee's questions. We received responses from lawyers and others working in private practice and those working for voluntary organisations and individuals. We also received responses from academics concerned in this field. In the light of those responses the DLA formulated the following responses to the question as indicated as possible questions for the follow-up session.

Should the government extend qualified one-way costs shifting (QOCS) to cover discrimination claims?

5. There was a unanimous view that **the government should extend QOCS** to cover discrimination cases in the County Court. In our original submission (paragraph 82) we pointed out the problems created by the failure to extend QOCS. We repeat the main thrust of the points made there.

If the government did extend QOCS what impact do you anticipate that this would have for disabled people?

6. The extension of QOCS cannot be the only reaction to the poor take-up of disability discrimination claims in the County Court. One very

immediate step that the government could take would be better guidance for those administering the Legal Aid fund.

7. QOCS **would enable disabled people to bring proceedings without the threat of liability for the defendant's costs which appears to be a strong disincentive**. In our comment on the case of **Leighton** (below) we deal with the difficulties people experience in bringing disability discrimination claims. We do not suggest that the extension of QOCS would be a cure all. However whilst there are other obstacles to claims being brought, that is no excuse for failure to tackle the impact of the costs regime in relation to an area of law which is notoriously difficult to prove in the first place[1].

Climbing the cliff face again

8. However the impact of the current costs regime has been, in the words of one costs specialist barrister[2],that applications for this type of discrimination claim have since 2013 "dropped off a cliff". This has been the experience of many, anecdotally. The impact of extending QOCS would be to start to reverse that sudden drop in cases brought.

Is the government's rationale for not extending qualified one-way costs shifting (QOCS) reasonable?

9. The UK has a duty under the UNCRPD to ensure that disabled persons are able to seek redress for disability discrimination.

10. In the UNCRPD Committee report "*Concluding Observations on the United Kingdom*", UN Doc. CRP D/C/UK/CO/1, 29 August 2017, at paragraph 32 (c) and 33 (c) the Committee recommended that disabled people bringing discrimination cases should not have to pay court fees and it expressed concerns about the barriers faced by persons with disabilities in accessing civil legal aid as a consequence of the 2012 LASPO Act. It recommended that the UK should provide free or affordable legal aid for persons with disabilities in all areas of law.

11. Government's response appears to be *that legal aid remains available* and that it was considering an extension under the post-implementation report. In its response to this Committee it stated, at page 27 of its response dealing with recommendation 39: "access to justice considerations, including whether QOCS should be extended to other categories of law, will be addressed as part of that review".

That Legal Aid remains available

[1] That is the reason why there are special rules relating to the shifting of the burden of proof in discrimination claims (see s 136 EA 2010).

[2] Andrew Hogan: https://costsbarrister.co.uk/access-to-justice/disability-discrimination-and-qocs/. Accessed 16 June 2021

12. The rationale that legal aid remains available is insufficient. Not only does it not deal with the threat of costs to those who are close to but fail the means test for Legal Aid but the guidance on the grant of Legal Aid has not been amended despite the points made by the Equality and Human Rights Commission in its report of 2017[3].

13. In the light of those points the DLA can see no reason why the Lord Chancellor cannot issue guidance to those dealing with the grant of legal aid which would ensure that those bringing disability discrimination claims in the county court will have proper importance accorded to the social aims of discrimination law, and clearer guidance leading to the granting of legal aid in such cases.

The evidence given in the Leighton case concerning the Minister's consideration of extending QOCS.

14. As at the date of the **Leighton[4]** case the government was saying that the question of extending QOCS was under active consideration "though it is likely to be some time before a decision is taken."

The rationale expressed in Leighton

15. The government's response to this Committee's report in July 2016 was that it would need to consider the arguments in favour of and against an extension. Since that time there was a document in June 2018 and there have been several documents which DLA has not seen but which are mentioned in the **Leighton** case summary of evidence.

Rationale 1: Little evidence (para 46 Leighton Judgment)

16. The consultation on the post-implementation report gave, the government said, relatively little evidence of the impact of the changes on discrimination claims. Although there were 155 substantive responses only four of these focused on discrimination claims and the civil servant giving the evidence to the court stated that there was not therefore a reliable evidence-led assessment of the current situation with discrimination claims.

17. **The DLA considers that a specific consultation on QOCS extension for discrimination cases should have been undertaken.**

Rationale 2: Ongoing process: pilot scheme and further consultation (para 54 Leighton Judgment)

---

[3] https://www.equalityhumanrights.com/en/publication-download/access-legal-aid-discrimination-cases Accessed 15 June 2021. This submission expands on this report below.

[4] R (ota Leighton) v Lord Chancellor (Inclusion London Intervening) [2020] EWHC 336 (Admin) Cavanagh J; Judgment 19 February 2020, before the court 28 January 2020.

18. In February 2019 there was an advisory note prepared within the civil service concerning "piloting a costs-protection regime for disability claims". However this appears to been in relation to the possibility of a pilot scheme for non-damages disability claims.

19. In the Discrimination Law Association's view such an extension would have little effect on the ability of many disabled people to bring claims in the County Court. It would have no effect where the incident of a failure to make an adjustment has now passed and the only remaining issue is whether there should be compensation for that failure.

20. Moreover we do not accept that where the financial value of the claim is low, a claimant should be deterred by costs from seeking a remedy (e.g. compensation for injured feelings) simply because his or her claim for a remedy includes a claim for compensation as well as a significant claim for an injunction to require a reasonable adjustment to be made.

21. The Minister's evidence in the Leighton case was that in May 2019 civil servants made a formal submission to ministers showing the issue of costs protection in discrimination claims was under consideration and again a potential pilot, amongst other forms of action, was being considered (para 55 Judgment).

22. The submission suggested that there could be a consultation exercise and then a pilot and said that a pilot "could be a useful way of testing the advantages and disadvantages of extending costs protection in this way. It could particularly be used to examine whether there are any significant increases in costs to government/defendants or in unmeritorious claims." That pilot would need to run for at least two years. However the submission also stated that there were limitations on the data that could be collected by a pilot scheme so that the feasibility of the pilot scheme would have to be considered carefully. This approach does not fill the Discrimination Law Association with much confidence as to whether any such pilot will be conducted.

23. It is the DLA's view that this approach to what data would be useful to determine whether QOCS should be extended is unduly restrictive. The Minister should be considering the impact of the current costs regime, which, it is said, deters complaints from being brought to court, so that in practical terms disabled persons are prevented from accessing justice. In order to measure that effect, the kind of qualitative as well as quantitative survey should be undertaken, the DLA suggests, amongst those organisations that are likely to have information on this point, namely the Advice Centres and disabled persons' organisations.

24. Finally on 29 June 2019 there was an evaluation model document as to how a potential pilot might work (para 56 Judgment).

25. At the time of the judicial review in Leighton no decision had been taken, it was said, on whether or not the extension should take place. It was on this basis that the government successfully defended the claim.

26. The Minister's position was that it was actively considering consulting on a two-year pilot to extend costs protection without costs capping for cases involving non-financial remedies.

27. Cavanagh J recorded that "whether this happens or not there is likely to be consultation and/or consideration of whether more evidence/data is required, before ministers take a decision whether to extend costs protection to discrimination claims." At the time of that hearing last year the civil servants were stating that

"If ministers decide to consult, the MOJ hopes that this would be in early 2020 (the witness statement was written in October 2019, so this may well have slipped). It would take 6-9 months before a pilot can begin, because the rules would first have to be agreed with the Civil Procedure Rules Committee."

28. So the evidence appears to suggest that the MOJ did not consider that it had sufficient information to take a decision about the extension of the scheme to discrimination cases at the time when the Part 2 Post-Implementation Report was published. As at 28 January 2020 the MOJ was apparently actively considering the issue with a view to taking a decision when more evidence had been gathered.

29. The judge found that the MOJ and Lord Chancellor had not made a decision which was capable of being judicially reviewed but added this…

"…having said this I do not exclude the possibility that the time may come, at some point in the future, when inaction on the part of the defendant might amount to a de facto decision that QOCS should not be extended to discrimination cases. No final decision has been taken by the defendant and the MOJ as to whether there should be a pilot scheme or a consultation exercise. If there is such a scheme and or such an exercise it will, probably, result in a decision. But if the MOJ decides instead to do nothing and, to use the old cliché, to kick the issue into the long grass, the point may be reached, in my judgement, when the practical reality would be that the defendant had taken a definite decision not to extend QOCS to discrimination cases. However that point has not been reached yet."

30. The DLA regrets the apparent decision to restrict that pilot scheme to cases involving non-financial remedies and suggests that the scheme should be piloted in all cases. The basis for the DLA's position is that

parliament has decided that damages in discrimination cases should include damages for injury to feelings as a means of measuring the insult to the individual's dignity by the act of discrimination. There is no concept of "moral damages" in the law of England and Wales which measures the insult to the status of the individual as a citizen, so the wrong done to the disabled person by the discrimination is to be compensated via an award of damages including injury to feelings as a result of the act of discrimination.

Why the Minister cannot continue to delay in making a decision

31. As the court noted, one aspect of rational decision-making on the part of the public decision-maker is that the decision-maker obtains sufficient information to be able to make a properly reasoned decision. The DLA endorses that view and points out to the Minister that the MOJ should have sought, in the light of that judgment, to obtain sufficient information to make a properly reasoned decision.

32. We consider that it is imperative that the government should take sufficient steps to obtain sufficient information on the basis of which it can make a properly reasoned decision. This is not only ordinary rational decision-making but accords with its duty under the Public Sector Equality Duty to obtain proper information on the needs of disabled people in this context.

33. The government's position as to whether it will extend is not clear. We have therefore sought to assist the Committee by dealing with some other potential reasons for not extending QOCS to discrimination cases.

Advantaging disabled claimants disadvantages defendants

34. The argument that if something works to the benefit of claimants, it may work to the disadvantage of defendants does not withstand momentary scrutiny in the context of the social aims of the Equality Act 2010 which creates the cause of action which parliament has said is to be enforced in the County Court. Defendants in disability discrimination cases are placed at a disproportionate advantage in relation to the defending of these claims by the current costs regime. An unmeritorious (or simply very poor) defence stands a greater prospect of avoiding challenge because of the costs risk. Simply by not cooperating and by emphasising the risks that the claimant will pay costs if they lose a defendant can see off a potential claimant.

35. The financial situation of many disabled people means that a risk of costs will be a far greater deterrent to them than it might be in the case of the more financially endowed.

Not achieving the Jackson reform aim of reducing litigation costs and rebalancing

36. The argument is that whilst extension to discrimination cases would ensure that parties with a valid case could still bring or defend the claim, this is only one aspect and it is not a given that such extension would achieve the aim of reducing the costs of civil litigation or rebalancing the costs liabilities between claimants and defendants.

37. Whilst the overall aim of the civil procedure reforms was to rebalance costs liabilities between claimants and defendants, the procedure relating to a cause of action should be its servant and not its master. The disparity in positions between disabled claimants and defendants acts as a gatekeeper to, and prevents access to justice for, disabled potential claimants. Secondly the rebalancing argument should also take into account the value that society places on the ability of parties to litigate over discrimination matters.[5] The argument from the social importance of dealing with allegations of discrimination applies whether one is considering disability discrimination or other types of discrimination. However in the case of persons with disabilities it is particularly acute. Society has not seen the interests and aspirations of the parties to this type of case simply in terms of the question of who wins and who loses the particular case. There is a social interest in ensuring that questions of discrimination can be properly explored and determined one way or the other. That is a distinction between this type of breach of statutory duty and other types. Unlike most cases of breach of statutory duty, a discrimination case very often involves the rights of a whole category of persons rather than simply whether a wrong has been done to an individual because of particular circumstances.

Increase in "unmeritorious" cases[6]

38. *Practical responses:* As pointed out by the claimant in Leighton, there is no evidence that the use of QOCS in the personal injury field had led to an increase in unmeritorious claims. The DLA agrees that there is no

[5] These are matters that the courts have consistently held go to the dignity of the individual and which society has determined are a great social evil, requiring primary legislation to eradicate.

[6] When one talks about unmeritorious claims it should be seen as a reference to reducing hopeless claims and/or claims that are advanced with an ulterior motive. It should never be viewed as the aim of reducing claims which have a realistic chance of success but which are not bound to succeed. This is an important point because in the context of discrimination claims it has long been recognised that the issues involved are highly fact-sensitive and may rely on the inferences that the court draws from secondary evidence. That is because it is very rare for there to be direct evidence of discrimination taking place. Thus it is important that the legislative regime and the procedural regime surrounding those types of cases should permit full and proper exploration of the facts of a case in most cases. That principle is an indicator of the social importance that is attached to the process of exploring whether discrimination has taken place or not.

reason to think that an increase in unmeritorious claims would happen if QOCS was introduced in discrimination cases.

39. QOCS in any event builds in safeguards against hopeless cases and cases involving fundamental dishonesty. If the case is struck out or if the claimant has behaved dishonestly then costs may be recovered from the claimant and there is no reason why a similar rule should not apply to the discrimination cases covered by an extension.

40. *More generally:* The problem with this argument is that it is simply speculative. What evidence there is suggests that the speculation is misguided. In order to reach a conclusion on this the government would need to look at pre-LASPO County Court claims for discrimination and see how many of those were struck out and make a comparison with the numbers after those reforms were introduced and determine how many of those were struck out.

41. The evidence from the increase in employment tribunal cases after the removal of the fees regime is that there has **not** been a substantial increase in unmeritorious discrimination cases. There is no reason to suppose that there would be an increase in unmeritorious claims in the County Court should QOCS be extended.

42. In any event the Discrimination Law Association suggests that the government should not start with an assumption that there would be an increase in unmeritorious cases.

43. Whilst the government may appear to be considering the aims of the 2013 civil procedure reforms they do not appear to be considering the social aims of the Equality Act 2010 in this context and indeed the social aims of all of the precursor antidiscrimination legislation including the Disability Discrimination Act 1995.

44. In terms of how data should be gathered the DLA notes first that it is not a rationale for failing to make a decision on whether to extend QOCS that data has not been gathered.

45. The government should undertake a proactive survey (including a qualitative aspect) questioning organisations that deal with disability at all stages. These should be Advice agencies but also organisations of and for disabled persons. This is because the journey of somebody who has experienced disability discrimination needs to be mapped in order to see how many instances are not reaching court due to funding difficulties. The chilling effect of funding problems cannot simply be gauged by asking whether there has been a rise or fall in "meritorious" cases.

46. The impact of the current funding regime needs to be examined by reference to its impact on the individual. The inherent difficulty of proving

disability discrimination and the disproportionate costs risk is very likely to affect all the types and numbers of cases being brought. Moreover the advice that organisations have to give in this context has of necessity to emphasise the risk of costs. Thus the Citizens Advice website emphasises the risk of costs in its initial advice on this type of case. The website states

"Taking County Court action can be a long and stressful process. It can also be expensive. It's important to keep in mind that if you lose the case in court, you may have to pay the legal costs of the other party."

47. This is one of the first things that Citizens Advice (rightly) says to people who are considering bringing a County Court case.

48. So the MOJ should be asked to be very clear about the timings of a pilot scheme and or a consultation exercise. We would hope that there would be a firm commitment to this Committee to a timetable for making a decision. The DLA recommends however that the evidence is pretty clear simply from a consideration of what advice agencies are saying and the likely impact on individuals of that advice.

49. Our members have given evidence of cases not being brought as a result of the cost environment of the County Court and the limited availability of legal aid for these cases. As a result the aims of the Equality Act are being frustrated in respect of disabled people.

The logic of the Jackson Review suggests that QOCS should be extended

50. It was always envisaged in the **Jackson Review** that there might be other categories of civil litigation besides personal injury cases where QOCS would be beneficial. These would be cases where protection should be targeted at people who "merit such protection on grounds of social policy". This would apply where the parties were in an asymmetric relationship. The **Leighton** judgment records that Jackson gave examples of persons in housing disrepair cases, claimants in actions against the police, claimants seeking judicial review and individuals making claims for defamation or breach of privacy against the media.

51. The DLA believes that discrimination cases plainly fall into similar categories of asymmetry in the relationship but this is particularly the case in disability discrimination cases. A service provider or public authority stands in a wholly asymmetric relationship with a person with a disability both in terms of choice and in most cases in terms of economic position.

52. The complexity of disability discrimination litigation needs to be taken into account alongside achieving the social objectives of the Equality Act 2010. Even a case where there is no application for an injunction may

(and in most cases will) be complex enough for the case to be removed from the small-claims track. If a case is transferred to the fast track or multitrack, the deterring cost risk exists. There is no guarantee that a case for compensation only will not be transferred in this way.

53. In most cases the costs of making a reasonable adjustment will be minimal or nil, as the adjustment might consist, for example in providing a note pad on which communication can be written down. Whilst it is true that in *some* cases the cost of making reasonable adjustments may be high, this is likely to be confined to cases where a defendant seeks to make adjustments across a chain of venues. However in many cases the service provider will not be a multiple site provider and will have one establishment.

54. Whilst a defendant may feel there are high reputational risks and devote substantial legal resources to defending the claim, the claimant also has a right to acknowledgment of the discrimination which may have occurred. The claimant is not in a position in most cases to devote substantial resources, legal or financial, to prosecuting the claim.

55. The DLA therefore believes that the arguments which were rehearsed in Leighton might have been sufficient to prevent a finding that the Lord Chancellor had acted irrationally (in the sense of reaching a decision which no reasonable decision maker could have reached) but they do not provide sound social policy arguments for failing to extend QOCS.

What would extending QOCS achieve?

56. The Discrimination Law Association believes that there is a public interest in enabling disability discrimination claims to be brought in the County Court. This is the mechanism that the government adopted in seeking to eradicate the very great social evil of disability discrimination. The gravity of the social evil of disability discrimination does not appear to have played a role in the government's consideration of what it is proportionate to do.

57. The impact of the failure to extend QOCS is that disabled people are left in situations which undermine the individual's dignity in many instances and about which, due to funding difficulties, only the rash or courageous will take legal action.

58. The extension of QOCS would solve or mitigate the following problems:

– Potential claimant may be deterred by fear of having to pay the defendant's costs which may be very substantial;

– after-the-event insurance is not likely to be affordable and may well not be available;

– there is an increasing difficulty in finding solicitors who are willing to take on these sorts of cases;

– the damages to costs risk ratio: damages for discrimination claims in terms of injury to feelings in the County Court are low and this means that in most cases there is a risk that the claimant put themselves at risk of stress in litigation with the attendant costs risk and in the knowledge that any financial returns by way of compensation will be low.

59. Whilst parliament has taken the decision that there should be a remedy for discrimination in relation to disability available in the County Court, at the same time the government has not willed the means whereby that aim can be achieved. This is something requiring the initial urgent step of clarification of the Legal Aid guidance to extend its reach whilst the process of QOCS extension is considered, and subsequently the extension of QOCS to disability discrimination cases in the County Court.

Did the outcomes from part two of the legal aid sentencing and punishment of offenders act 2012 (LASPO) go far enough in enabling disabled people to assert the rights afforded to them under the Equality Act 2010?

60. Our members responded to this question from the basis of having worked under the CLA contract or alongside that system. We refer to the EHRC's report *Civil Legal Advice: analysis of specialist provider data*[7]. More than half the matters taken on related to disability. There will be many cases where disability is a factor but where the person falls just outside the financial eligibility criteria.

61. The tenor of the member response was that the government failed probably to support the CLA service. Legal Help was available but in practice this did not allow for representation before a court or tribunal.

62. The feedback suggests that legal aid is, to all intents and purposes, unavailable for discrimination cases in the County Court. This means that they cannot be pursued in practice. One respondent told us of a case which was straightforward, but it took over six months from application for legal aid to be granted. It was granted after a referral to the ombudsman. During that six months the limitation period under the Equality Act 2010 (6 months) had passed and the firm of solicitors had

[7] June 2019: https://www.equalityhumanrights.com/en/legal-aid-victims-discrimination Accessed 21 June 2021.

had to act pro bono; it had to put the client at risk of costs by issuing the claim without public funding being in place.

63. The process of obtaining legal aid needs to be made much easier for these sorts of cases and should never take as long as the limitation period for this type of claim. As noted above this is something that could be done without legislative change. We develop that point here.

64. The Equality and Human Rights Commission has pointed out in its report "*Access to Legal Aid for Discrimination Cases*[8] (2019) that "the government should amend the Lord Chancellor's guidance for civil legal aid to:

– recognise the importance to the individual and society of challenging discrimination, and advise that, as a general rule, a discrimination claim that seeks other remedies in addition to damages should not be assumed to be "primarily claim for damages".

– highlight that County Court discrimination cases may, regardless of their value, be allocated to the fast track or multitrack as result of their complexity and that decision-makers should bear this in mind when determining funding applications".

65. It appears that this has not been done and the guidance issued in December 2020 by the Lord Chancellor does not address these points[9].

66. The Equality and Human Rights Commission also pointed out in its 2019 report (page 9) that the court service should publish data on discrimination claims in the County Court. We would add that historical data should also be made available to aid transparency and in order to inform government as to the impact of the LASPO reforms.

67. In summary therefore, as well the problems created by the absence of QOCS, the position on public funds for disability discrimination cases in the County Court is failing disabled persons.

---

[8] https://www.equalityhumanrights.com/en/publication-download/access-legal-aid-discrimination-cases Accessed 15 June 2021

[9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948451/UPDATE_lord-chancellors-guidance-under-section_4-laspo_Dec_2020.pdf Accessed 15 June 2021

What evidence is there that discrimination claims with a good chance of success are not being brought simply because claimants cannot afford the fee or cannot risk losing it? If sufficient evidence does not exist how might it be best gathered and who is best placed to do this.

68. The fee regime should be clarified in the County Court so that potential claimants can plan ahead better. There is fee relief but this is means-tested. The fee for a claim where the injury to feelings damages is £3000-5000 would be currently £205.

69. The major problem is the funding regime. One of our respondents gave us evidence that out of 12 goods and services discrimination claims that had been taken on in the past year the solicitor had not been able to issue any of them due to the lack of costs protection. In addition the impact of this is that defendants know that this is the case and there is a tendency for them to "brazen it out" in pre-action correspondence. This has the obvious effect of rendering the law ineffective. The impact of costs regime is that fewer practitioners look at these types of claims and therefore it becomes less likely that the claim will be brought.

70. One respondent reported that the Commission can be discouraged from supporting cases even where there is merit because the exposure to the risk of costs would be too high.

71. This Committee should ask the Commission to disclose how many cases for disability discrimination in the County Court have had funding refused due to the risk of costs and this should be compared with information provided by the Commission as to the number of cases of which it has been notified and which were not subsequently served and pursued.

72. As to how evidence might be obtained the MOJ should consult with Citizens Advice (particularly their local offices), non-governmental organisations of and for disabled people and other organisations such as schools, churches, local authority services for disabled people.

73. The form of that research should be both qualitative and quantitative in order to identify the points at which the costs regime is deterring claims from being brought.

Is reliance on individuals enforcing equality laws through courts and tribunals effective? Could or should the government be doing more to ensure that disabled people are able to access justice and to enforce their rights?

74. The provisions of CPR 19 could be amended to ensure that it was clear that where a case would affect a large group of people with the

same impairment, a group litigation order and/or a representative action could be brought. This might be appropriate for example where there is an allegation of indirect discrimination against a group of people defined by a particular disability or a reasonable adjustment case which will clearly affect a group with a common impairment.

75. The tenor of the responses from our members was that reliance on individuals enforcing equality law through the courts and tribunals is not as effective as it might be and, in the case of County Court cases, is ineffective.

76. The Discrimination Law Association believes that there is a place for representative bodies being allowed to litigate on behalf of individuals more easily.

A role for recommendations in individual cases

77. Though the government says that the power to make recommendations is not widely used in employment tribunals, this is because in many cases the employment relationship has ended and therefore a recommendation in the case of an individual which can only be made in order to alleviate the effect of discrimination on that individual is inappropriate as the relationship does not continue.

78. The ability of tribunals to make broader recommendations was never fully tested before that power was taken away from them.

79. However there is plainly a case for both tribunal judges and for County Court judges (who sit with experienced assessors) to have the ability in any case to make recommendations which would alleviate discrimination in relation to a group of people, for example defined by reference to an impairment.

80. The Discrimination Law Association sees the advantage of such recommendations as being that they are a good way of affecting the future behaviour of a service provider (or indeed an employer) in a case where discrimination in an individual case has been proven but there is some evidence of systemic failures which have led to that situation (such as the absence of staff training or failure to consider the anticipatory duty on a service provider etc). Such recommendations could have evidential value in subsequent cases (and would be a disclosable document in such cases). They would ensure that service providers (and employers) would be incentivised to address the problems highlighted without the need for an order. In the case of recommendations alleviating the effect of the discrimination on an existing employee, the current rules relating to failure to comply with the recommendation should remain.

81. Other respondents pointed out that the current system of individual enforcement requires the individual to pursue complex proceedings, very often against legally represented defendants and where the issue involved may be an adjustment and little or no financial compensation is sought. Other respondents pointed to the psychological impact of having to undertake this process in this way as being detrimental on the mental health of disabled persons in particular.

82. The chief failing of the government to ensure that disabled people have access to justice and the ability to enforce their rights is the question of costs and funding.

Strengthening the disability capacity and role of the Equality and Human Rights Commission

83. The DLA has noted the response of the government to the Committee's 2015 Report in this respect. Whilst the Commission remains and ought to remain independent of government, the capacities of the Commission are very much a function of the resources that are made available to it. We also believe that the Commission needs strengthening in respect of the rights of disabled persons. The government can strengthen the disability function of the Equality and Human Rights Commission so as to reflect the asymmetric nature of disability discrimination compared with other strands of discrimination under the Equality Act.

84. One aspect of strengthening would be to ensure that the Commission has responsibility for issuing statutory codes specifically concerning disability discrimination and in particular the duty to make reasonable adjustments (both in employment and non-employment matters).

Other steps the government could take to ensure that disabled persons have access to justice and the ability to enforce their rights

85. The ways in which the government could do more to ensure disabled people are able to access justice and enforce their rights include:

– introducing a workplace duty on employers to make assessments of (and consult upon) potential adjustments where a person is a disabled person. This will also have the effect of complying with the UNCRPD article 4 (3) right of disabled persons to be consulted on matters concerning them. It will also fill a lacuna in the existing Equality Act law created by the case of **Tarbuck v. Sainsbury Supermarkets Ltd**[10] whereby such an assessment does not itself constitute a reasonable adjustment.

[10] [2006] IRLR 664, [2006] UKEAT 0136/06

86. The DLA envisages that enforcement of this duty to make an assessment of adjustments and to consult the individual where a person is known or ought to be known to be a disabled person can be done along the lines that are adopted in relation to section 60 of the Equality Act 2010 which deals with questions asked at interview concerning disability.

87. The Commission would have a right to bring a claim against a defaulter for failure to observe the new section. In addition in an individual's case if there was no evidence of this type of assessment or consultation taking place with the disabled person over what adjustments would be appropriate, the burden of proof would be reversed so that the respondent would have to establish (on the balance of probabilities) that it had carried out all reasonable adjustments which such consultation would have revealed.

88. This would not create any new right for the individual but would incentivise consultation with the disabled person at the earliest stage at which the employer knows or ought to know that the person is disabled.

89. The second obvious way which the government could do more is to extend QOCS and to ensure that the above-mentioned problems with legal aid are eliminated.

90. Third the strengthening of the EHRC's disability function as discussed above.

91. Fourth the government should consider creating a disabled person's ombudsman as a mechanism by which a disabled employee could make representations in a less prescriptive and formal setting than a tribunal case. The government could learn lessons from the example of the Equality Tribunal in Ireland which engages with employers to seek early and easier resolution. The ombudsman would deal with cases where the main issue in employment is getting adjustments made but where the claimant is not seeking compensation of any size for injury to feelings or other financial loss. The existing ACAS model may be the appropriate model to follow in this respect and ACAS might be tasked with undertaking this type of ombudsman function.

92. Fifth, as discussed above, the creation of additional criteria for group litigation orders to facilitate claims brought by persons with the same impairment. Alternatively permitting representative actions to be brought by organisations of all for disabled persons with a common impairment.

93. Sixth, the Commission’s powers to bring cases to ensure that the anticipatory duty is observed should be considered. In addition, or alternatively, the Commission should be given the power to bring claims

where despite the absence of an individual claimant, it is plain that discrimination is taking place.

94. Seventh, the Equality Act should be amended so as to reintroduce the power to serve statutory questionnaires. The formality of this process at an early stage in proceedings can often bring claims to a halt because an explanation is provided for the treatment. In addition it can ensure that the tribunal or court hearing the case has material from which inferences, whether in favour of the claimant or against the claimant, can be drawn.

95. From the claimant's point of view, preparing discrimination claims is extremely difficult and the statutory questionnaire process was considered to be extremely useful to enable claimant to prepare the discrimination case without legal assistance.

96. Eighth, there were also calls for judges hearing disability discrimination cases in the County Court to have training on the anticipatory reasonable adjustments duty. Even if a judge has experience of doing employment tribunal cases the anticipatory duty (which does not apply in employment cases) may be unfamiliar to them. It is therefore important that the way in which that duty operates is the subject of training for this body of judges.

The Committee recommended that the government replace the Equality Act 2010 (Specific Duties) Regulations 2011 with provisions that require local authorities to develop and implement a plan of action setting out how they will meet the public sector equality duty. It also recommended that a new subsection should be added to section 149 requiring public authorities to take all proportionate steps to meet the public sector equality duty. The government has not to date made such plans of action a requirement. Should the government strengthen the public sector equality duty?

97. The Discrimination Law Association believes that the proposal to strengthen the PSE should apply **not just to local authorities but to all public authorities** including government ministers, central government departments and so forth.

98. Secondly the public sector equality duty is a **duty to have due regard**. Any plan of action would need to indicate, not simply the fact that the authority was going to have "due regard" to achieving the equality objectives set out in section 149, but should in our view indicate what concrete and practical actions are being taken to achieve those objectives. Setting out how the public authority will have due regard would otherwise either be at a very high level of generality or would simply reiterate the existing criteria for having due regard.

99. Any action plan should set out proportionate steps that are to be taken to have due regard to the equality objectives in section 149. Again these should be the concrete and specific steps that the authority will take to achieve having due regard but also to make progress to achieving the equality objectives identified in section 149.

100. Thus the government can exercise powers under section 153 Equality Act 2010 to introduce regulations requiring a public authority to formulate a two-yearly plan of action as to how the public authority is to progress towards achieving the equality objectives in section 149. This should be comprised of a requirement to show a record of

(a) progress towards achieving those objectives as opposed to achieving the objective of having due regard to those objectives and

(b) the mechanisms within the public authority whereby evidence of the process of having due regard to the need to achieve those aims is to be kept in relation to the defined functions of the public authority.

101. The aim of this would be to focus the minds of public authorities so that, where the public authority is concerned with something that may impact on the dignity of the individual disabled person, the scrutiny to be applied to achieving the equality objectives will be of a high standard. It should not simply be the case that the weight given to disability as a factor should be one consideration amongst others.

102. The details of such a regulation-based duty should be the subject of consultation but one way in which further progress could be achieved is by requiring the public authority in the process of giving due regard to the need to attain the equality objectives of section 149 to say why progress towards achieving the objectives would not be impaired by the course of action that it proposes to take or the exercise of the function in which it is engaged on that particular occasion. This would place the burden of showing compliance where it should be, namely on the public authority.

103. The DLA therefore recommends that the regulations contain a provision shifting the burden of proof to a public authority which cannot show documentary evidence of advance consideration of a process whereby it ensures due regard is being had in the field of decision-making involved in any case. In the absence of such evidence it should be a rebuttable presumption that the public authority has failed to have due regard.

What impact is the lack of action having on disabled people?

104. One respondent stated that the duty to have due regard to issues is meaningless if it does not prevent the issues of discrimination and equal opportunities and so forth from arising in the first place. The DLA takes

the view that the lack of action is preventing the public sector equality duty from being effective in practice. Theoretically there is a duty on individual decision makers to have due regard under section 149. However if the law does not impose any standard of information that needs to be provided to the decision maker (other than that set on a case-by-case basis), the individual decision maker will be less able to have due regard in the first place. The aim of section 149 is not to generate litigation but to ensure a standard of decision-making emphasising the importance of the equality aims in section 149. However in most decision-making environments in a public authority, the decision-maker is heavily reliant on officers to provide information. If the information-gathering of the officers is not focussed in the right places the decision is likely to be impoverished. Thus it is essential to have some direction for the officers as to where their focus should be. The abolition of the specific duties in England meant that officers are less able to obtain resources to ensure that proper information is before the decision-maker. It is important therefore that there should be regulation on the standard of information that should be presented to the decision-maker. The Committee's proposal would ensure that the officers' focus would rightly be on the equality aims in section 149 and what steps have been taken to achieve them. The DLA submits that the changes it suggests above ought to be undertaken in order to remedy the effects of the lack of action on the Committee's recommendation and identifies further detail that should be added to that proposal to remedy the effects of the inaction.

105. In short the lack of action on strengthening the public sector equality duty

(i) fails to ensure that conscious consideration of the section 149 duty is had by a public authority. This is particularly the case where the point that the authority ought to be considering is how the needs of disabled persons are different from the needs of persons without disability in the area of decision-making concerned;

(ii) leaves those within public authorities who seek to advocate for better decision making in relation to disabled persons without an important advocacy tool, which in turn can ensure the s149 duty is observed (and hence obviates the need for legal challenge of decisions); and hence

(iii) ensures that cases have to be fought on an individual basis and in circumstances of great uncertainty for the disabled person bringing the judicial review.

106. Public authorities are failing to recognise the impact on disabled persons of the exercise of the full range of their functions. Because of the way in which the public sector equality duty is currently structured, the spending cuts which have occurred over the past few years often result in a reduced capacity to meet the needs in particular of disabled people. The case law has indicated that the weight to be attributed by the decision-maker to the factor of disability is a matter for the decision-maker unless it is so unreasonable as to be irrational, in which case the court will intervene.

107. There was a feeling amongst the membership that the Commission has not used its powers to carry out assessments and serve compliance notices in relation to public authorities that adopt policies and practices that fail to meet their obligations under section 149 in relation to disability.

108. Therefore government should intervene in order to require some process of monitoring progress towards the objectives contained in section 149. Without this the general public sector equality duty will continue to be less effective than it was originally intended by parliament to be.

Some provisions in the Act (such as section 163) have been on the statute books for over 20 years. Are failures of successive governments to bring them into force justifiable?

109. In short we believe that this failure is not justifiable. In particular if it is argued that the existence of PHVs outside London means that the section cannot be implemented due to the distorting effects on the market between taxis and PHVs, leaving the latter uncovered, it is suggested that this is an argument simply for introduction of rules governing PHVs which are coextensive with those governing taxis. It is not an argument for failing to commence section 163 at all.

The reluctance to commence provisions debate and enacted by Parliament is all the more difficult to understand where such measures do not impose a cost on the taxpayer. Is it reasonable for the government to fail to commence a provision that protects and promotes human rights of disabled people and that Parliament has debated and enacted with the intention that become the law?

110. Again the short answer to this is no, it is not.

111. *Other uncommenced provisions:* Before leaving this topic we have considered other uncommenced provisions which affect disabled people.

112. Section 1 of the Equality Act should be implemented. Disabled people are amongst the most socio-economically deprived in the country. Section 1, albeit a duty to have due regard, would at least encourage the focus of public authorities to be on the socio-economic position of persons with disabilities in conjunction with section 149 and would go at least some way to start considering some of the causes as to why disabled people remain amongst the poorest in the country.

113. *Section 14:* We also consider that the provision for multiple discrimination should be introduced. The position of persons with disabilities who are members of ethnic minorities tends to be worse in any less favourable treatment than the treatment of either a person from an ethnic minority or a person who simply has a disability. The DLA believes that it is important that section 14 of the Equality Act which applies to dual characteristic discrimination should be implemented.

Are there any legal or practical justifications for having further reviews or testing before commencing certain provisions?

114. The DLA says not.

The UNCRPD was ratified by the UK but it has not been incorporated, meaning that it is not directly applicable in UK law. Has the CRPD ever provided any practical protection to disabled people in UK?

115. Some respondents stated that although they have cited the UNCRPD, it has been of little practical importance. Prof Anna Lawson has written on this topic and we refer to chapter 14 of L Waddington and A Lawson (eds) '*The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*' (OUP, 2018). This gives the analysis of UK jurisdiction cases involving the UNCRPD. The cut-off date was 1 June 2016, prior to which there were 75 UK cases mentioning the CRPD. Since that time a quick survey has shown it has been cited in roughly 16 cases in England and Wales. It has been cited in two Law Commission reports since that time, in addition.

116. In the experience of several of the practitioners submitting evidence for this follow-up evidence session however, the UNCRPD has made some difference in cases. However all such effect is indirect rather than direct due to the lack of incorporation of the Convention.

117. Article 13 of the UNCRPD has provided some procedural protection in relation to modifications necessary for a fair trial[11]. Cases such as

[11] In Rackham v NHS Professionals Ltd UKEAT/0110/15, J v K and another (EHRC intervening) [2019] ICR 815 for example.

Rackham vs NHS Professionals could be cited. In addition since 6 April 2021 the civil procedure rules have been amended to make special provision for disabled persons.

118. However the way in which the Convention has been used when protection has been provided is generally to say that the common law provides protection covering the same ground. Thus a fair trial involving a person with disabilities will require modifications which are reasonable to be made to the procedure to enable the disabled person fully to participate in proceedings.

119. The Convention is an important document however because, of course, it sets out an internationally agreed statement of what the government who signs up to it should do. The U.K.'s ratification of it represents a commitment to implement the rights.

120. It has the indirect effect that human rights are being used more often by disabled persons or organisations both when lobbying and, on certain occasions, when representing disabled persons.

121. However, because of the dualist system, judges are very unlikely to state that the Convention has provided a major influence on their decision-making. They are able to take it into account in certain situations where law is unclear.

122. _The way in which the Convention operates is to require that other human rights that a disabled person has, in any event, are rendered equally accessible to them.

123. The DLA suggests that the Convention has had some effect but that incorporation in the way suggested below would render it capable of achieving the full effect which ratification suggests it should have.

Has Brexit it had an impact?

124. In employment cases the impact of the UNCRPD will continue via its impact on the Directives, e.g. 2000/78, which governed the employment of disabled persons. In addition, as equality is a fundamental right under EU law, it is likely to form part of the retained law under the Withdrawal Act.

125. In respect of cases brought in the County Court however, the position is slightly more opaque because there are only certain aspects of County Court jurisdiction which will touch on EU law in respect of disabled persons. In those cases, although this point is as yet untested, the same argument will apply concerning retained law and the fundamental nature of the right not to be the subject of discrimination.

126. However in respect of most aspects of goods and services provision the UNCRPD and the limited use that can be made of it has not been affected by Brexit.

What more could be done to ensure that disabled people in the UK can fully benefit from the protections contained in the UNCRPD?

127. The general view was that the convention should be incorporated into UK law in some way. The DLA suggests that it should be incorporated into UK law by giving it enforceable effect as its provisions affect the rights under the Human Rights Act 1998. This would be consistent with the international obligations of the UK and its commitments under the Convention and it would also be consistent with the scope of the rights afforded under that Convention. It would permit disabled persons to make arguments concerning their rights against public authorities so as to ensure that they have equal human rights under the Human Rights Act 1998 and it would also permit them to require courts and tribunals in cases between individuals to interpret the relevant provisions of the Equality Act in accordance with their human rights under the 1998 Act as given specificity in relation to disabled persons via the Convention.

128. This modification is relatively simple to achieve. It has no greater scope than the existing Human Rights Act 1998. It would however ensure that disabled persons have, as is the objective of the UNCRPD, equal access to human rights protection in domestic law.

129. The DLA suggests that the government could not argue that this would be an unwarranted extension of scope for the Human Rights Act. This is unarguable because the scope of any implementing provisions relating to the UNCRPD would be no greater than the Human Rights Act 1998. Similarly it would not add to the burdens of private businesses or government because it would in effect simplify many of the claims that at the moment need to be brought under article 14 of the European Convention on human rights as implemented under the Human Rights Act 1998. Lastly it would make much clearer the circumstances in which such article 14 discrimination might be justified by government in relation to disabled persons.

DISCRIMINATION LAW ASSOCIATION

21 JUNE 2021