

Disability Charities Consortium's response to Government consultations on repeal of two enforcement provisions in the Equality Act

1. About Disability Charities Consortium

We are the Disability Charities Consortium (DCC), an informal coalition of seven disability charities: Action on Hearing Loss, Disability Rights UK, Leonard Cheshire Disability, Mencap, Mind, RNIB, and Scope. The DCC comes together to work on issues of shared concern, including equality legislation. This submission is also supported by NAT (National AIDS Trust).

2. General comments

The Equality Act was intended to provide a comprehensive legislative framework to protect the rights of disabled people and other groups from all forms of discrimination. DCC is seriously concerned about the genuine threat of backsliding on the recent gains around disability equality which were achieved with the coming into force of the Equality Act.

We urge the Government to retain the two provisions - the questionnaire in order to support an effective, judicial procedure and to encourage transparency; the wider recommendation power in order to drive behavioural change that benefits the workforce.

We also feel strongly that these changes – combined with the introduction of fees for tribunals and the restriction of access to legal advice – threaten to remove access to justice for disabled people who have experienced discrimination.

3. Repealing the questionnaire procedure

The questionnaire procedures which is set out in s.138 of the Equality Act provides an effective means of establishing where discrimination may have occurred, helping potential claimants to make an informed decision whether bringing a case would be warranted and gather evidence to support their claim.

The guidance from the Equality and Human Rights Commission (EHRC) highlights the ways in which this procedure could be used in cases of potential disability discrimination¹:

- “A questionnaire can be used to ask questions about why the employer has failed or delayed to provide certain reasonable adjustments or as to what steps have been taken to investigate or provide adjustments”.

¹ Equality and Human Rights Commission, How to use the Questionnaire procedure in cases of disability discrimination in employment, http://www.equalityhumanrights.com/uploaded_files/Questionnaire_guides/disability_questionnaire_guidance_ed_4_final_feb19.doc

- “A questionnaire is useful in direct discrimination cases to establish whether there are any comparators or to find out details of how any comparators, of which the claimant is aware, have been treated”.
- “A questionnaire is useful to find out why the employer has treated the disabled worker in a particular way, to see if that links to a reason arising from the worker’s disability”.
- “A questionnaire can be used to find out whether the employer has applied a provision, criterion or practice which has disadvantaged the claimant; whether or not anyone else within the workforce has been adversely affected, and the likely justification”.

The situations above demonstrate that the evidence which can be obtained through questionnaires is absolutely crucial to determine whether there is a genuine case of discrimination. In the absence of the questionnaire procedure, this kind of information may not be accessed by the employee in any other way.

It can be argued that this procedure avoids ‘the protection of anti-discrimination laws being rendered nugatory by obliging complainants to prove something which is beyond their reach and which may only be in the respondents’ capacity of proof’². Its repeal risks fundamentally undermining the effectiveness of anti-discrimination legislation as it effectively deprives the claimant of a crucial opportunity to gather the necessary evidence to prove their case, which is often only in the employer’s knowledge.

Some forms of discrimination are acknowledged to be particularly difficult to challenge, especially on grounds of disability.

For instance, establishing a failure to make adjustments for a disabled employee relies heavily on the issue of reasonableness. It would be almost impossible to decide whether an employer should reasonably have made certain adjustments without the access that a questionnaire can provide to information such as the availability of financial or other resources to make the adjustments. However, in most cases employers are extremely unlikely to give such information voluntarily.

This is also the case in seeking to prove discrimination in particular circumstances, such as in pre-employment or recruitment, or in a redundancy situation. To prove that disability was a factor in a recruitment decision would be impossible without using the questionnaire procedure to gather evidence.

The questionnaire procedure therefore solves the significant obstacles a claimant faces of accessing relevant evidence to their claim. Below we have referred to real life examples from the Disability Law Service’s casework which demonstrate that without it, discriminatory treatment or behaviour will be at risk of remaining hidden:

For example, a disabled woman made a request for flexible working but this was denied by the employer with no justification. Through the questionnaire

² Massinde Ntoko v Citibank [2004] 15 ELR 116, <http://www.labourcourt.ie/labour/labcourtweb.nsf/7a18f8963dd5836380256a01005bb358/80256a770034a2ab80256e37003f6577?OpenDocument>

procedure, it was identified that the employer had a very specific policy for flexible working in place which required working a shift pattern including evenings after 9 o'clock as a pre-condition for requests for flexible working to be agreed.

No allowance was made because the woman could not work after the evening shift due to her MS condition. The information obtained through the questionnaire helped prove that the employer had in fact discriminated in refusing her the request for flexible working.

An employer or provider can be alerted at an early stage through a questionnaire, allowing them to take action swiftly to remedy the cause of discrimination and rectify any wrongdoings:

For example, a disabled customer complained that hearing loops on certain tills in a supermarket were not working. The supermarket argued that they had discharged their duty to make reasonable adjustments by having the hearing loops installed.

The response to the questionnaire showed that the supermarket had no plans they had in place in relation to the servicing and maintenance of the equipment, or in relation to the training of staff to use the equipment. Having been informed about the potential of failing in their duties, the supermarket agreed to an out of court settlement which included putting the right procedures in place to address this.

In addition, the questionnaire procedure can help filter out unfounded cases or cases whose merit cannot be assessed at the outset. What may appear as discrimination may not be once all the evidence obtained through the questionnaire procedure is considered:

For example, in such a case, a disabled woman applied for a job for which she was well-qualified but was not offered an interview. She believed that this was caused by the fact that she had disclosed her disability in her application.

She served the employer a questionnaire to obtain copies of the process used for short-listing as well as anonymised copies of the other applications that the employer had received for the position. This showed her that despite being a strong candidate for the position, the other candidates who had been invited for an interview were in fact better suited. She was advised that a claim of disability discrimination was unlikely to succeed and did not take the case further.

The strengths and weaknesses of a possible discrimination claim would be extremely difficult to estimate without access to the kind of information that can be obtained through the questionnaire procedure.

For example, in one case, a disabled woman with mental health problems had her membership of an organisation terminated after having submitted a complaint of possible discrimination. This indicated a strong potential case for

victimisation taking into account the short period of time lapsed between making the complaint and her membership being terminated.

However, the information that was obtained through the questionnaire revealed that the decision to terminate her membership was due to her conduct after submitting the complaint, which included making derogatory comments in front of other people. The client was agreed not to take to the case any further after having a better understanding of the organisation's actions from the response to the questionnaire.

The repeal of the questionnaire procedure could inadvertently push claimants into litigation that could be easily be avoided:

For example, the parents of a disabled young woman who had autism believed that their daughter's treatment by the hospital amounted to discrimination. She was non-verbal and did not like to be touched at all. They argued that the hospital's failure to make reasonable adjustments delayed her getting a diagnosis, and that the delay in her getting the appropriate treatment after diagnosis amounted to direct discrimination.

The evidence that was obtained through the questionnaire procedure showed that despite the very long delay in getting treatment, this actually fell within the timeframes that the hospital had set for providing this kind of treatment. The case did not proceed further as there was no evidence of discrimination having occurred.

It would be entirely counter-productive to abolish the questionnaire procedure as this would potentially force applicants to make a claim to a tribunal so that they can apply for disclosure of documents. The consultation document fails to acknowledge the possibility of creating an additional burden on tribunals should this lead to longer and more protracted applications for disclosure.

Although there may be other opportunities while running a case to gather evidence (such as through disclosure), these are more restrictive than the questionnaire procedure in terms of the information that can be requested or ordered by tribunals. It is also the case that the normal process of disclosure comes late in the day, where costs to the legal system will have already been incurred. Such costs could be avoided if weak cases are identified at an earlier stage through the use of the questionnaire procedure.

Also, we believe that the time which is saved if a potential case does not proceed to a tribunal far outweighs the time spent by the employer responding to the questionnaire. In the event of a case proceeding to the tribunal, the response to the questionnaire could save important time in cross-examination at a hearing and thus increase the efficiency of hearings. We therefore question the assessment in the consultation document that the procedure has resulted in additional burdens.

The consultation document appears to suggest that the intended purpose of the questionnaire procedure was to encourage early settlement. The real life examples in our response demonstrate that the procedure has unquestionably led to early

settlements in many instances. However, it should be acknowledged that the purpose of the procedure as set out in the original legislation was to help 'a person who considers he may have been discriminated against or subject to harassment to decide whether to institute proceedings and, if he does so, to formulate and present his case in the most effective manner'³.

Finally, it is worth noting that the impact assessment appears to assume no implications for equality on the basis that 'this would apply in the same respect in relation to any of the protected characteristics'⁴. Merely invoking that all characteristics will be similarly affected does not suffice if this causes an adversely negative impact on all of them.

The impact assessment also simply purports that removing the procedure for obtaining information 'does not impact on an individual's access to justice'⁵. In the apparent absence of a meaningful or in-depth consideration by the Government of the implications for access to justice, we are not reassured that access to justice will not in fact be undermined by repealing this provision.

4. Repealing the tribunals' wider recommendations power

The widening of the recommendation powers tribunals have so that recommendations could benefit the wider work force was one of the important ways in which protection against discrimination was strengthened under the Equality Act compared to previous legislation. The latter only allowed for recommendations to be made which concerned the individual claimant.

This previous state of affairs was considered inadequate, as in many cases the claimant will have left employment in which case unlawful employment practices could be allowed to fester if it concerns a particularly resistant employer.

We disagree entirely that wider recommendations power can be discounted as serving no practical purpose. The recent use of this power in the case of *Crisp v Iceland Foods* – where the Employment Tribunal upheld a claim of direct disability discrimination and made a recommendation that HR managers should receive training relation specifically to the issue of mental health disability⁶ – shows the way in which this power can be applied to tackle systemic discrimination and ensure better employment practices.

We are concerned that the Government is at risk of repealing this provision before it has had time to properly take effect. We also share the view expressed by the

³ Sex Discrimination Act 1975,

http://www.legislation.gov.uk/ukpga/1975/65/pdfs/ukpga_19750065_en.pdf

⁴ Home Office, Equality Act 2010 Removing: (a) employment tribunals' power to make wider recommendations in

discrimination cases; and (b) the procedure for obtaining information: A consultation,

<http://www.homeoffice.gov.uk/publications/about-us/consultations/equality-act-wider-enforcement/consultation-document?view=Binary>, pp. 72

⁵ Ibid

⁶ Equality and Human Rights Commission, Recent use of power to make wider recommendations by Employment Tribunal, <http://www.equalityhumanrights.com/scotland/legal-news-in-scotland/articles/recent-use-of-power-to-make-wider-recommendations-by-employment-tribunal/>

Equality and Human Rights Commission that frequent use of this power was in fact never anticipated⁷, and believe that judicious use of recommendations in fact undermines the concerns that the consultation documents purposes have been raised about the potential for excessive or inappropriate recommendations to be made.

We believe that recommendations can be a very effective means to encourage better employment practices for disabled people and other protected groups and prevent the recurrence of discrimination in the future, with all associated costs if legal action is initiated. Recommendations are only enforced through allowing the tribunal to draw inferences where recommendations are not complied with in relation to other cases of potential discrimination.

Instead of seeking to repeal this, we would encourage the Government to emphasise that the recommendations made can benefit not only employees but also employers if it helps improve an employer's policy or practice with a view to eliminating discrimination.

Any concerns about this power can be addressed through clear, comprehensive guidance on the purpose and operation of the extended power.

In the light of these issues, DCC would strongly urge the Government not to proceed with its proposals to repeal this power.

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⁷ Equality and Human Rights Commission, Equality law Bulletin July 2012, <http://www.equalityhumanrights.com/scotland/legal-news-in-scotland/equality-law-bulletin/equality-law-bulletin-july-2012/>