



Discrimination Law Association Response to the Ministry of Justice Costs protection in discrimination claims: Call for Evidence

About Us

The DLA is a non-profit network that brings together a broad range of discrimination law practitioners, policy experts, academics, and concerned individuals and organisations, all united around a commitment to strengthening anti-discrimination law, practice, advice and education in the UK.

Since it was formally set up in 1995, the DLA has established a reputation for its knowledge, expertise and understanding of discrimination law issues. We help shape policy and influence positive change through our submissions to consultations and pro-actively raising issues of concern. Participation from members ensures that our contributions to policy and public debates are grounded in and informed by the experiences of those affected by discrimination cases and issues on a daily basis.

According to members, the DLA is special because of its:

“Wide range of people and groups that are represented...”

“Focus on discrimination law from the point of view of complainants...”

“Practical advice and application of law in practice...”

We now have some 300 members and reach hundreds more people through the individuals and organisations that are our members, as well as through allied networks, groups and institutions. We have surveyed our followers and provide this response with the benefit of those replies.

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Introduction and overview

DLA welcomes the opportunity to contribute to this consultation, as our members have shared with us their significant concerns regarding the difficulty that both individuals and legal professionals have in securing access to justice for those who have experienced discrimination in non employment situations.

Whilst such incidents remain commonplace for many with protected characteristics, [taking up claims in such situations remains extremely difficult and often presents barriers to those who are already facing discrimination and exclusion](#). Time limits are relatively short – 6 months – and the paucity of legal aid, coupled with an absence of solicitors who will work in this field because of the difficulty in securing support for clients – means that these cases are simply not pursued. The provisions of the Equality Act 2010 are not being used to their full effect – if at all in some circumstances - and, whilst legislation alone will not eradicate discrimination, it is and can be effective in raising awareness of the barriers faced and in producing society wide change. We consider that the legal aid currently available is insufficient but we say nothing further about that, focussing instead on costs protection for the purposes of this consultation on costs protection.

Survey

DLA conducted a survey of our members to establish a picture, where we could, of the experience of those who represent claimants and/or who are litigants in person, bringing, or trying to bring, claims. We collected information from people on the basis that we would keep their personal data confidential

Our respondents were split between litigants in person and professionals, both barristers and solicitors. Of the litigants in person, over half had to abandon their cases. Overwhelmingly, our respondents supported the introduction of qualified one way costs shifting. This would provide security for litigants; encourage take up of this work by more solicitors; and as a result assist in the societal progress that the equality legislation was introduced to facilitate.

Our responses to your questions are informed by these responses and they are set out below:

- 1 *Do you consider that there are any obstacles to bringing discrimination claims under the Equality Act (2010)? If so, does this relate to the prospect of adverse costs, or something else?*

Our respondents gave the following answers:

- 26 % Difficulty finding legal representation;
- 48% Unable to find insurance protection against adverse costs;
- 26 % The cost of Court Fees;

We understand that there are only two firms of solicitors that are able to currently offer adverse costs protection in the form of ATE insurance, though we have no details of the nature of those arrangements. It is important to note however that this insurance will be at cost to the Claimants and will reduce any damages paid to them, which will already be relatively low given the amounts awarded in non employment cases. We do understand that the quantity of work may far outstrip the resources available in this area of discrimination law. We consider that an extension of cost protection would be likely to increase the number of firms who would be willing to take this work on.

- 2 *If you have been involved in a discrimination claim, how was this funded? If so, please provide details on the funding method. If so, how are they affected and why do you consider this may be?*

- 13% Privately Paying
- 22% Pro Bono Assistance
- 43% Conditional Fee Assistance
- 22% Litigant in Person

3 *Are there particular obstacles to bringing disability claims under the Equality Act?*

The obstacles that were described all had common themes

- The additional obstacles faced by litigants in person, many of whom are disabled and already having to deal with the impacts of disability, having to prepare bundles for example, where the Defendant is represented by in-house counsel
- Costs risk – no costs protection
- Complexity of cases – and not finding legal advice/representation
- Court fees

Some of the examples of cases given that were not pursued because of a lack of ATE and any costs protection, and who we are advised by the solicitors concerned as having reasonable prospects of success, are as follows:

- Claimant had hearing loss and speech impediment; refused service due to assumptions of intoxication.
- – Claimant was a disabled child who was subject to less favourable treatment compared to other children. Refusals by the nursery to accommodate dietary needs and equipment recommendations from specialists.
- ; Claimant and her friend were 68 and 72, mobility scooter users. Refused service and refused use of the toilet.
- – Disabled claimant with mobility issue requiring home deliveries. Delivery driver refused to take shopping upstairs. He was asked if he was ‘really actually disabled’ left food on hallway and failed to deliver.
- –Disabled son, dad was service user as had contract with a holiday park. Was removed because of autistic son’s Stimming and alleged noise from this.
- – race discrimination, claimant followed round shop because of suspected theft when no basis
- - guide dog refusal .

4 *How do you consider the extension of fixed recoverable costs (FRC) in civil cases will impact on (a) disability-related discrimination claims or (b) other forms of discrimination claims under the Equality Act?*

There is nothing so far as we are aware in the CPR at present to exclude discrimination claims from the FRC regime. Our members offered no views on this. Many discrimination claims are suitable for multi-track only due to their complexity whilst the majority of the remainder are suitable for intermediate, again as a result of the inherent complexity, particularly in the context of disability discrimination claims. It does not provide a solution to the difficulties with enforcement.

- 5 *Do you think that some form of costs protection regime should be introduced for (a) disability-related discrimination cases or (b) other forms of discrimination claims under the Equality Act? If so, please provide suggestions as to how this should be designed.*

We strongly support the strengthening of costs protection for discrimination cases brought under the Equality Act, based on the evidence of our members and contributors but in addition we ask the Ministry Of Justice to have regard to article 5(2) of The UN Convention on the Rights of Persons with Disabilities which requires that the UK guarantees that disabled people have effective legal protection against discrimination.

Evidence given [by Disability Rights UK from the COVID-19 pandemic](#) shows that disabled people are more significantly impacted by social and economic factors and more frequently treated differently from non disabled people, with poorer outcomes. The purposive construction of the Equality Act was to create a culture where all lives are equal.

In addition, [research published by the Equality Trust in 2023](#) argued that inequality's impact on different areas of society were coming with large financial costs compared to more equal countries. They argued inequalities across society cost at least £106.2bn yearly compared to the average OECD country's level of equality.

In terms of practicalities we understand that it will be possible to amend the Statutory Instrument to the Civil Procedure Rules to include Injury to Feelings awards (restricted to Equality Act cases) to the definition of Personal Injury.

We adopt the recommendations of the Equal Justice Report admitted in evidence to the Leighton case which gave two practical suggestions to correcting the current discrimination against disabled litigants:

“There are two solutions. Either amend the Legal Aid Sentencing & Punishment of Offenders Act (LASPO) which forces a disabled Claimant to pay their own insurance premium in a successful case, or Amend the Civil Procedure Rules so that in cases brought under the Equality Act 2010, Claimants are at no more costs risk in bringing a case than in a personal injury case; that way no insurance premium is required. In the interests of keeping the costs of litigation down as much as possible, and in the hope that service providers’ budgets for making adjustments for those with disabilities then our preference would be for an amendment to the Civil Procedure Rules.”

- 6 *Do you think there is a role for alternative dispute resolution in resolving (a) disability-related discrimination claims or (b) other forms of discrimination claims under the Equality Act? If yes, please specify what this role should be.*

Have you previously used alternative dispute resolution to resolve discrimination claims related to (a) disability discrimination or (b) other forms of discrimination under the Equality Act? If so, and where appropriate, please provide details on the following:

Any alternative dispute resolution should be voluntary.

Typically, disability claims against Universities or Members Organisations resolve by Mediation. They allow for the rebuilding of relationships and can provide remedies beyond the gift of the Courts, but are always covered by confidentiality which clients almost always find unsatisfactory, much in the same way that the [Women and Equalities Committee expressed its discomfort with NDAs in discrimination cases in 2019](#).

- 7 *If additional measures are needed to improve obstacles to bringing discrimination claims, what should they be?*

Better awareness of the Equality Act would be useful, together with better funding of the EHRC and less reliance on the charitable sector to provide grant funding for advice services.

The Court service should be instructed to record the number of cases brought under the Equality Act in order to be able to qualitative review numbers and case progression, and their outcome. This would allow for a real-time analysis of claims and a better understanding of trends. Should this be disproportionately expensive, we would encourage the Court to have regular liaison with the Equality & Human Rights Commission who should have a record of every case issued in the County Court through the Practice Direction – [Proceedings Under Enactments Relating to Equality](#).

In addition, we would recommend that any proposed adjustments be the subject of a pilot scheme involving appropriately experienced practitioners in different areas of England & Wales.

Submitted by the Discrimination Law Association
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