The Discrimination Law Association

Response to Carter Report and the LSC/DCA paper "Legal Aid: a sustainable future"

1.1 Do you have a particular interest in legal aid? If so, what (e.g practising lawyer)?

The Discrimination Law Association ('DLA') is a membership organisation established to promote good community relations by the advancement of education and good practice in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

Currently it has about 400 members. Members are either individuals - lawyers and experienced caseworkers, working in private practice or for voluntary sector organisations such as national charities, law centres and the like, employment tribunals chairs, academics etc - or organisations such as CABs, local authorities, Trade Unions and solicitor firms.

We appreciate the significant impact the proposed changes to legal aid will have to many areas of legal practice; in this response we have limited our comments to the impact of the proposed changes on the practice of discrimination law which predominantly involves discrimination in employment, but also, and increasingly, involves discrimination in access to goods, facilities and services, housing, education, the exercise of public functions generally etc.

<u>Why discrimination law matters</u>

Discrimination in employment is now unlawful on grounds of race (which includes nationality and national origin), gender, disability, sexual orientation, religion or belief and age. Discrimination in provision of and access to goods and services, housing, education and in the exercise of public functions - such as policing, detention of mental patients, child protection intervention - is currently unlawful on grounds of race, sex and disability (plus religion or belief and sexual orientation from January 2007.).

Since the 1960's there has been a recognition by government and parliament of the harm that racism, racist violence and discrimination can cause to fabric of society. Enforceable discrimination law is a highly effective gate-keeper against social exclusion, social tension and conflict.

Lord Scarman identified disadvantage and discrimination in housing, education and employment as major contributing factors to the Brixton disorders in 1981 and called for "a clear determination to enforce the existing law on racial discrimination"[1]

"*the evidence I have received…leaves no doubt in my mind that racial disadvantage is a fact of current British life. It was, am equally sure, a significant factor in the causation of the Brixton disorders."*[2] .

Persistent disadvantage in access to employment housing and education was found to be a contributing factor to the disturbances in town in the North of England in 2001[3]

"*Opportunities are also far from equal, with many differences in real terms, in respect of housing, employment and education."*[4]

Parliament has extended the groups protected by discrimination law. However, for all the progress made since the first discrimination statutes over 30 years ago, discrimination on unlawful grounds remains a stubborn and serious problem. For instance, signs saying "No blacks, no Irish, no dogs" are long gone; racial discrimination is not.

Unlawful discrimination is not just a problem for the individual victim, although individual suffering can be extreme; even in cases not involving physical assault (including sexual assault) tribunals have found victims to be suffering from, for instance, severe depressive illnesses, suicidal thoughts, radical changes of personality and to have lost several years from their working lives.

In the words of Hale LJ in the case of *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293 (10 October 2006)

"The adverse effects of unlawful discrimination are manifold. Discrimination can have a severe negative psychological effect on the individual involved, as well as a loss of dignity and self-esteem, and induce a sense of alienation. This sense of alienation can lead to a mistrust of institutions, such as the police or the justice system. This mistrust is detrimental to social cohesion. The co-operation of minority groups is particularly important in the fight against crime and terrorism (see for example per Lord Hope in *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 WLR 537 at [57]).

Unlawful discrimination has economic consequences too. Discrimination in educational and other opportunities can lead to a reduction in the pool of available candidates for further education and employment. This hinders social and economic progress since it means that society loses the benefits of the talents of these individuals and the different perspectives that they can bring to the solution of the problems facing business or society. Society

[1] The Scarman Report para. 6.35
[2] The Scarman Report, Conclusion page 209
[3] Community Cohesion – a report by the Independent Review Team, Ted Cantle Chair.
[4] Community Cohesion as above

benefits when each individual realises his or her potential and thus this process should not be impeded by unlawful discrimination."

Discrimination distorts and disfigures all our society. It is not in our national economic interest if we fail to use the potential of all members of our society. As a nation we are missing out on the skills and abilities of too many of our people through unlawful discrimination.

Such discrimination does appalling damage to community relations if vulnerable minorities experience patterns of discrimination. Entire communities can fail to be integrated into the wider society with wide-reaching consequences. Enforceable discrimination law is a highly effective gate-keeper against social exclusion and all its consequences.

See the Appendix for further information regarding discrimination.

1.2 If you are a lawyer, do you undertake legally aided work? If so, what type(s) and for how many years?

A significant number of our members are practitioners doing LSC work. Other members such as academics work in the field of access to justice and the effectiveness of discrimination law. Therefore, they are concerned at the impact of the proposed changes on this.

1.3 If you are a legal practitioner, how do you think these reforms will impact on your business?

Private practice

The basic hourly rate has not changed since April 2001 and these proposals represent a further erosion of profit costs in this area. Many well known firms listed in Chambers Directory and the Legal 500 have already ceased to do legal help work because it is regarded as a 'loss leader'. A number of high profile public law and human rights solicitor firms, which in the past played a lead role in discrimination litigation no longer undertake such work. Private practice solicitors have commented that the LSC cannot expect firms to continue in this area in the long term if effective hourly rates are falling even in nominal terms. A private practice solicitor commented that there seem to be fewer and fewer private practice firms undertaking publicly funded employment work (evidenced by clients' feedback, by feedback from colleagues and by the large geographical spread of their current clients) and these proposals are only likely to make the situation even worse.

These proposals will, for reasons discussed below, make discrimination law impractical and uneconomic for private practice. It must be questioned if businesses will be prepared to subsidise discrimination work out of their private work, rather than concentrate on more profitable (or break-even) sectors.

According to one private practice practitioner, it is difficult to envisage many of the cases they do falling below the fixed fee thresholds, unless initial advice is negative, the case settles very early on or the client ceases to provide instructions - as such, most cases which do not reach exceptional level will represent a loss. Given that such work will be a 'loss leader' a private practice firm is either unlikely to continue doing legal help work or may run at a loss. Such would not result in a sustainable and equitable system of legal provision.

Few cases in the employment category proceed to full certificates - only those where appeals arise. Prospects of recovering inter partes costs are virtually nil in Tribunals and in the EAT. As such, Legal help is basically all there is for employment, unlike other areas where it frequently leads to certificated work and often the possibility of recovering inter partes costs if a case settles or is successful. Legal Help in employment cannot operate as a 'loss leader' into more profitable types of funding. This provides another disincentive for private practice to continue with discrimination Legal Help work.

NFP

The Regulatory Impact Assessment states that the proposals could cut by half the LSC total spend in the Not For Profit sector on social welfare law including discrimination law. It could also significantly cut the income of 92% of the Not For Profit agencies it currently funds.

It must be recognised that, currently, the Not for Profit sector is disproportionately represented in discrimination law contracts (at least partly because of the problems experience by private practice as set out above).

The sustainability of the Not for Profit sector needs to be urgently addressed. The LSC pay only for casework but not core funding. Thus the reduction of mainstream funding has adversely affected this sector. Many Not For Profit agencies have crises in funding infrastructure costs. Private practice has at least the opportunity of funding core costs from private work. Core funding of Not For Profit agencies by local authorities is a postcode lottery and always subject to change.

If the new Legal Services Commission contracts and cuts lead to a reduction in this sector, this will unavoidably lead to a significant cut in discrimination work.

The voluntary sector usually has no means of subsidy. It is becoming ever harder to find charitable sources of funding for casework, especially since the publicity surrounding the Community Legal Service. Charitable trusts and other grant-making bodies such as local authorities are understandably reluctant to make grants to subsidise LSC casework. Further, many funders refuse to fund projects as a result of a government funding cut, for fear of creating a precedent. Therefore, any reductions in service because of these proposals will be very difficult to repair.

The current problems with recruitment and retention of the necessary skilled and experienced caseworkers could very significantly worsen. Discrimination/employment solicitors have easily transferable skills into the highly paid private sector. Discrimination cases are normally more complicated than other employment cases and need the skill and knowledge of experienced lawyers and legal caseworkers.

Without these, untrained and inexperienced (if enthusiastic and committed) generalist advisors will be up against employers represented by highly experienced, skilled and trained solicitors in large commercial firms with extensive resources.

1.4 How many fee earners are there at your firm?

n/a

1.5 Approximately, what proportion of your firm's work comes from legal aid?

n/a

Criminal Legal Aid

2 – 4

Our members are generally not criminal practitioners; however our commitment to combating discrimination does encompass all aspects of legal practice. Our primary concern regarding these changes is that they must not disadvantage groups that are over-represented in the criminal justice system, notably black, Asian and other ethnic minority men and women. Everyone who is brought within the criminal justice system should receive high quality legal advice and representation, without direct or indirect discrimination We are particularly concerned that the continuing disparities based on ethnicity within the criminal justice system should not result in disparities in access to legal aid.

Any changes to criminal legal aid will need to accommodate special needs including, but not limited to, communication needs of clients and witnesses in relation to their disability, nationality, ethnicity, religion or age.

Supporting Measures

5.1 Do you have any comments on Lord Carter's proposals in Chapter 3 paragraph 43 and Chapter 5 paragraphs 11 to 29 for implementing a quality threshold for those who would like to undertake publicly funded work? Are there any impacts in particular that should be taken into account? If so, please give reasons.

We support the general principle of a quality threshold for those doing discrimination work, due to its complexity, provided it does not impose a

disproportionate bureaucratic burden which takes practitioners' time away from working for their clients. We are not commenting on the specific proposals.

5.2 Transitional Arrangements (Recommendations 5.4, 5.5, 5.6, 5.7, 5.8 and 5.9)
Do you have any comments on the transitional arrangements proposed by Lord Carter in Chapter 5 paragraphs 90 to 141 of the final report? Are there any impacts in particular that should be taken into account? If so, please give reasons.

n/a

5.3 Wider Justice System Efficiency (Recommendations 5.10, 5.11 and 5.12)
Do you have any comments on the arrangements to encourage optimal use of all resources within the justice system proposed by Lord Carter in Chapter 5 paragraphs 160 to 166 of the final report? Are there any impacts in particular that should be taken into account? If so, please give reasons.

n/a

5.4 DCA/LSC – External Engagement (Recommendations 6.1, 6.2, 6.3, 6.4 and 6.5)
What are your views on Lord Carter's proposals in Chapter 6 on information management and sharing? Do you have any comments on the proposals regarding stakeholder relations and cross-justice system working arrangements?

We support the proposal for the DCA and all parts of the justice system to appreciate how legislation and government policy will affect demand for legal services. For example, at a time when new laws intended to protect a wider range of people from discrimination and harassment are coming into force (see above) it is wholly inappropriate to reduce their opportunities to receive skilled legal advice and assistance. Further for example, the Statutory Dispute Resolution Procedures have significantly increased the length of discrimination cases (see 6.1).

Civil, Family and Immigration Legal Aid

Replacement for TFF (section 6)

6.1 Do you consider that any other types or categories of work should be excluded from the scheme? If so please explain why.

Our submission is that discrimination law should be excluded from the fixed fees scheme and current funding arrangements continue.

<u>Discrimination in employment</u>

The great majority of work in the field of discrimination law (including that funded by the LSC) is in employment.

According to Time for Equality at work : The global report under the Follow-up to t e ILO Declaration on Fundamental Principles and Rights at Work 2003, "work is a strategic entry point from which to combat discrimination in society.. . in the workplace.. discrimination can be tackled more readily and effectively. By physical ability and treating (workers) fairly, the workplace helps to defuse prejudices and shows that social life and activity free of discrimination is possible, effective and desirable."

The report continues, "At its worst, the discrimination that certain groups such as women or racial minorities face in the labour market, makes them vulnerable to abuse. Discrimination at work deprives people of their voice at work and full participation. The elimination of discrimination at work is essential if the values of human dignity and individual freedom, social justice and social cohesion are to go beyond formal proclamation".

The importance of discrimination casework

Much has been achieved by campaigns, formal investigations by the respective commissions and negotiation. However, regrettably perhaps, it is at the sharp end of discrimination law - cases in the courts and tribunals - where the impact is clearest.

There is an analogy with public attitudes to drink driving. Hard-hitting campaigns against drink driving had impact but it was limited. It was only when Barbara Castle grasped the nettle and brought in the breathalyser that drink driving went into sharp decline. Drivers stopped drinking because they knew they risked being caught and punished. The follow-on was a revolution in social attitudes to drink driving which drove down the figures yet further.

The same pattern can be seen in discrimination law. Much was spoken about sexual harassment. But it was only when high profile cases were won, damages awarded and embarrassing publicity endured that it became standard for major employers to have effective sexual harassment policies.

A single (simple and small-scale) discrimination case can have nation-wide benefits. For instance, the refusal of one blind woman with a guide dog in one supermarket led to a court case and to the supermarket chain bringing in nationwide disability awareness training from the Royal National Institute for the Blind.

A successful discrimination case attracts widespread publicity; people remember it. Such a case only directly affects a few people but it is like a stone thrown into the centre of a pond : the stone only hits a small drop of water but the resulting ripples go much wider.

A qualitative study of the experience of claimants involved in RRA ET cases[5] highlighted the benefits of skilled advice and representation and found that "the availability of advice , support and representation greatly affected how claimants experienced the process of taking their case, and claimants believed this was a key factor in the case outcome. However, few had been able easily to secure good quality, trustworthy and reliable representation. The research report ,commented on the 'inequality of arms' between claimants the respondents:-

"The fact that most claimants were not able to afford to pay for solicitors and barristers was seen to stack the odds of winning the case in the respondents' favour, regardless of the strength of the case. Respondents were able to afford solicitors, barristers, and in a small number of cases, a QC, to prepare their defence, and to fight the claimant on their behalf at Tribunal. According to the claimants, almost all of the respondents in these cases had legal representation" [6]

This report describes the impact on claimants of bring a race discrimination case, including negative effects on their emotional well-being and physical health, changed attitudes of their employers and deterioration in relationships with colleagues increasing stress and making it very difficult to continue in employment. [7] The difficulties in finding suitable legal advice were often a further cause for stress.

"In general, claimants found the process of seeking advice and support, and securing representation for Tribunal hearings bewildering, and in some instances, frightening…."[8]

<u>The central importance of the Legal Services Commission in discrimination casework</u>

Widely accessible legal aid is vital if discrimination law is to be effective. Many victims of discrimination are not financially eligible; however, the nature of discrimination itself means that vulnerable groups are likely to be disproportionately financially eligible. Discrimination, compared to other employment law, time-consuming and specialised : it is costly.

Other sources of funding are limited. There are excellent fee-charging discrimination lawyers. However, cost deters the great majority of complainants. A complex race case can last many days at hearing and require over 60 hours of preparation. The organisations offering pro-bono representation by trainees, barristers and solicitors are rarely willing to take a discrimination case because of the detailed preparation required and, especially, the likelihood that it will involve days if not weeks in the ET.

[5] The Experience of Claimants in Race Discrimination Employment Tribunal Cases, Institute for Employment Studies for DTI Employment Relations Research Series, No. 55, April 2006
[6] P.55
[7] p.99
[8] Ibid. p.62

Conditional Fee Agreements (No Win No Fee) are practicable in only a minority of discrimination cases. The report of research commissioned by the DTI into the experiences of claimants in race discrimination ET cases states, "Several claimants sought representation from 'no win no fee' solicitors …. Those who secured representation through contingency fee arrangements often experienced difficulties in taking their cases forwards. Many felt that their 'no win no fee' solicitors were unwilling to take the risk of having cases heard and decided at the Tribunal, and rather, sought to settle cases in order to ensure that their fees would be paid. Once these solicitors had been hired, however, claimants were unable to change representation without incurring charges for the services rendered up to that point."[9]

The Three Commissions (soon to be only one) state that they are not able to meet the demand for advice and assistance and are searching for skilled external practitioners to take on cases.[10]

Only a minority of workers are now members of trade unions. Unions do much valuable discrimination work but they, too, are not able to support all cases brought by their members. Unions today are poorly represented among many work sectors and vulnerable groups. In discrimination cases trade unions may face a conflict of interest when they are asked to assist a victim and the alleged discriminator or harasser is a also their member.

Law Centres are increasingly dependent on the LSC and are suffering heavy cuts from other funders.

CABx are also suffering funding cuts and many lack the necessary skills and experience or the facilities to take on even relatively straight forward discrimination cases.[11]

If discrimination law is to offer protection and rights of redress to more than a handful of women in the City earnings six figure sums (and for the law to thus retain public respect), access to specialised discrimination advice must be at least maintained and should be widened. It is unavoidable in employment litigation that there is usually an inequality of arms between worker and employer.

The Practice of Discrimination Law Today

Particularly in discrimination cases, employment tribunals have moved far away from the original idea of informal forums where employers and workers

[9] The Experience of Claimants in Race Discrimination Employment Tribunal Cases" DTI Employment Relations Research Series No. 55 April 2006

[10] In 2004 CRE provided legal representation in 1 case; in 2005 this figure increased to 3 cases – CRE Annual Reports 2004 and 2005. In 2004-5 Commission for Racial Equality is devoting only 2 per cent. of its budget to representing complainants in employment discrimination cases and that the Equal Opportunities Commission and the Disability Rights Commission are only devoting 3.1 per cent. and 5.5 per cent. of their respective budgets

[11] See "Challenging Discrimination: a challenge for the Citizens Advice Service, January 2006, Cohen and 1990 Trust available on http://www.citizensadvice.org.uk/winnn6/challenging_discrimination_full_report.pdf

can resolve their differences quickly and cheaply. As the former Lord Chancellor Lord Irvine told the Parliamentary Constitutional Affairs Committee, the idea that workers can represent themselves in all employment tribunal cases is no longer tenable.

According to the former Lord Chancellor, Lord Browne-Wilkinson, “it is not at all easy for a person without representation to win their discrimination case.” Unrepresented applicants face ever-higher barriers in the tribunals, both in preparation and hearing. As the court Civil Procedure Rules are used, expert evidence is required more often, interlocutory hearings become the norm and the legislation and caselaw pile up, the scales of justice are weighed yet more heavily the unrepresented party, more usually the worker. Statistics clearly show that represented workers (particularly those with skilled representatives) achieve better outcomes in their cases.

The law is ever more complex. For instance in the vital field of indirect sex discrimination there have been three separate and very different legal definitions of the law in four years and still there are different definitions for employment and non-employment circumstances. Currently in, there are separate definitions of indirect race discrimination depending on whether someone is claiming discrimination on the grounds of race, ethnic or national origins or on grounds of nationality and colour. There are different definitions of harassment for race, sex and disability depending where the harassment took place and, again for race, whether it was on grounds of race, ethnic or national origins or nationality or colour.

The introduction by the government of the Statutory Dispute Resolution Procedures in October 2004 has had unintended consequences. The extreme complexity of the regulations (as commented upon by the judiciary, all sides of the legal profession and many commentators) has led noticeably to an increase in length, particularly in discrimination cases. For instance, in many discrimination cases it is now necessary to issue two separate claims (for one case), have two separate responses from the employer and it takes a very long time to marry the two claims back up. In effect, the early stages of a case may now take twice as long to do.

Emphasis in the past has been placed on representation at the hearing only. However, in discrimination cases, this is now out of date; skill and expertise are as important in preparation as in advocacy. Discrimination cases are often won by detailed and careful preparation - gathering of evidence from the employer, persuading the tribunal to order the employer to provide vital evidence, obtaining expert evidence on the damage to the worker's health and well-being, pleading the case precisely. Extensive knowledge and experience of tribunal procedure and discrimination caselaw are necessary; errors in preparation too often disable an otherwise strong case. The Statutory Dispute Resolution Procedures mean that a Claimant needs expert and specialist advice at the very beginning of their case; if they have not complied with the complex grievance procedures, they lose the right of access to the Employment Tribunal.

Discrimination Law as part of Legal Aid

As stated above, as a result of these proposals, the future of some, if not, many, NFP agencies must be in serious doubt and therefore provision of discrimination law will suffer. The long-term proposal to move to fewer, larger private practice providers, will only worsen this trend.

It appears that the small Not For Profit sector is more heavily involved in providing employment law (and hence discrimination) advice than the large private practice sector.

In 2003 Out of 182 254 legal help cases done by Solicitor agencies in London, only 1397 were in employment (0.8%). Out of 140 894 hours of legal help work done by Not For Profits, only 10 507 (7.5%) were in employment.

Out of the 4 292 completed employment cases reported by NFP agencies in 2004-5, 13% (555) were discrimination. Discrimination had easily the longest average caselength with a +309 variation from the mean.

There is no equivalent practitioner lobby to compare with family or housing law to draw the attention of the LSC, or other powerful and influential bodies, to trends and issues in legal aid employment or discrimination law.

Special features of discrimination cases - how will they fare under the proposed fixed fees?

We propose that the LSC have a separate head for discrimination.

There are particular issues that are far more likely to arise in discrimination cases than other cases. These factors all relate to the denial of justice under the proposed fixed fee scheme which restricts time allowed to be spent on each client. Discrimination cases are more complex and need more time to prepare and more time in court/tribunal. An average length for employment cases works against this.

As the Carter Report itself states, there is a risk that suppliers to cherry will pick straightforward cases. We believe that in practice pressure on practitioners under financial pressure in their organisations will end up having to cherry pick simple cases. Discrimination is rarely straightforward. Practitioners will be limited to providing basic advice and preparatory work only in discrimination cases. Even then, they will be discouraged from doing so as the End Code will show that the case was not finished when they had to stop work.

It will not be possible to manage a discrimination law case in 4.6 hours (or even 9, let alone just over 2 in Wales). In the experience of many discrimination law practices it can take well over ten hours simply to consider documents, interview the client and draft a questionnaire. In future, this will be all which discrimination advisers will be able to do for their clients. The clients will have to present proceedings and run entire discrimination cases

without any assistance. It is not uncommon for a discrimination case to take over 60 hours work, not including hearings (which will usually be multi-day and often at least two if not more separate hearings) for which practitioners are not paid at all by the LSC, essentially the LSC “gets” this input from its practitioners for free). These cases are front-loaded ie much work must be done at the beginning, especially to ascertain if the case is of sufficient merit for public funding. It is particularly dangerous to bring poor cases in discrimination law for fear of creating bad law.

Discrimination *clients* themselves often require disproportionate time from their advisor; there are higher proportions of discrimination clients than the average who speak no English, who are suffering from psychiatric injury or have learning or physical impairments.

Thus, fixed fees discriminate against particular types of client.

Time taken for interpreters etc will eat up the 4.6 hours of time on a case leaving a client with far less “advisor time”; they will get much less out of their 4.6 hours than other clients.

This will have a significant effect on the access for justice for certain ethnic minorities, and many disabled people. This will impact particularly harshly in discrimination law.

Full allowance needs to be made for the difficulties of taking instructions and giving advice to individual discrimination clients for reasons such as disability or language. It should be noted that disabled clients may have a claim for disability discrimination against the advisor and Legal Services Commission if they fail to make adjustments to their procedures to fit around a disability.

Further, the eligibility test is complex and requires extensive documentary back up. Carrying out the eligibility test and obtaining the necessary evidence can easily take one hour and in some cases more than one and a half hours. Again, it is particular types of clients, disproportionately found in discrimination cases, who are at the biggest disadvantage. Migrant workers sometimes have property or savings abroad (usually considerably under the eligibility limit) but obtaining the evidence and doing the calculations when all evidence and assets are abroad is very time-consuming.

Also, more marginalized groups have more complex finances. For instance, many of those who are most at risk from discrimination have more than one job. In one recent case, there were four payslips to consider, one for the wife, and three for the husband, one of which was paid on the week, the second a week in arrears and the third two weeks in arrears.

When there are problems with communications (because of language or perhaps lack of a telephone or a fixed address) , it can take several appointments and many calls to establish eligibility.

Again, fixed fees mean that such clients get less “advisor time” out of their 4.6 hours as more time is spent establishing eligibility.

The Minister has accepted that this system will have a particular adverse impact on discrimination law. The Minister did state that there may be grounds to create a special category for discrimination law, and the DLA urges the Government to act upon this.

Consequences of applying the proposed scheme to discrimination law

If discrimination law is not treated separately from employment law and is subjected to a fixed fee of 4.6 hours (or regional variations), it is very likely that that specialist discrimination advice nationwide will be significantly reduced. The effects of this will be serious. Discrimination will not stop; with less fear of legal sanction it is more likely to increase.

Discrimination cases will continue to be brought, but without specialist legal advice, success rates will fall. Poor cases, which are currently filtered out by LSC-funded discrimination caseworkers, will be presented to the employment tribunal with consequent waste for the tribunals and employers. Good cases will fail. Victims will lack redress.

The media and politicians have, rightly, helped raise victim's awareness of their rights and their expectations of justice. Traditionally disadvantaged groups are far less likely to accept their lot. As a society we are justly proud of this. We are also proud of the protection against discrimination our laws offer our citizens. However, passing laws and raising awareness whilst removing access to justice is a recipe for bitter disillusionment amongst disadvantaged groups.

Discrimination law is important. It must be adequately funded. It should not be merely pages of legislation set out on the page and unenforceable. Discrimination must make a appreciable difference to the lives of individuals and communities.

6.2 Which of the 2 options set out for the replacement of the TFF scheme do you prefer and why?

We believe that both schemes are inappropriate for discrimination law, both national and local fees.

Currently the fee structure in the NFP sector is more appropriate to discrimination work that that in solicitors’ firms. Putting all providers onto a general employment law fixed fee scheme, as proposed here, will remove the space in which much discrimination law has been done.

According to analysis by the Advice Services Alliance, case lengths in the NFP sector were (in line with the proposed regional fees) longer in London than elsewhere (+162 variation from the mean). However, the proportion of discrimination cases to employment cases is higher in London than compared

to the rest of the country. The national average of discrimination cases was 755 whereas it was 1080 in London.

It appears that at least one important “driver” of long caselengths in London is the disproportionately high number of discrimination cases. As discrimination cases take longer than all other types of work, it appears that the more discrimination work a provider does, the longer their average caselength.

6.3 Do you agree with the proposals for payment of tolerance work? If not please explain why?

Discrimination law outside of employment is often over-looked. Discrimination in the provision of goods, facilities and services is, however, a very serious problem; our members report of Muslim women thrown off buses for wearing a hijab, a wheelchair user refused entry to a nightclub; a Black person racially insulted in a restaurant; a guide dog owner unable to use their local supermarket. These deeply humiliating experiences go to the heart of a person’s integration into our society. Parliament has recognised this when making discrimination unlawful.

Yet such cases remain remarkably rare; this is very much a developing area of law, especially with discrimination on the grounds of sexual orientation in the provision of goods, facilities and services being outlawed next year.

The reasons for this are complex. However, we fear that these proposals will choke this important and growing area of law. Non-employment discrimination does not have a code (because it is rare it is usually “other/ other”); therefore it is usually done under tolerance. Therefore it will be paid at 15% less than employment discrimination work. Tolerance work has traditionally been seen as allowing providers to do innovative work which is not yet sufficiently established to have its “own” specialist code.

We can see no reason for this discrimination. Other county court work is not paid at 15% less than other work. Why should discrimination in goods, facilities and services be singled out because it is relatively small?

Further, if a non-employment discrimination law case *does* fit into another category, the people with the expertise to provide advice are most likely to be employment caseworkers. Therefore, non-discrimination law cases are very usually done by an employment caseworker. A provider may have the necessary skilled practitioner (in their employment unit) but not the contract in the other category. This skilled practitioner is thus prevented from doing the non-employment casework.

6.4 Do you agree that the scheme should apply to work done by not for profit providers? Do you agree that there should be a transitional scheme and what are your views on the initial proposal?

The new fees scheme should ensure that the NFP sector will not be penalised in its ability to do discrimination law having regard to its different financial basis, compared to the private sector.

Care Proceedings and Family Help

7

Our members are generally not family law practitioners; as stated above, our commitment to combating discrimination includes all aspects of public authorities and areas of legal practice. Our primary concern regarding these changes is that they must not disadvantage groups who may have particular needs in relation to care proceedings or family law more generally. Not only will more time be required where there is a need for interpretation/translation (for people with particular disabilities, people who have difficulty understanding or speaking English) but there may be other special needs in relation to the disability, sexual orientation, nationality, ethnicity, religion or age of clients or witnesses that must be accommodated within the scheme for legal aid.

Immigration & Asylum (section 8)

8

The DLA recognises the extreme vulnerability of the vast majority of immigration and asylum clients. Our concern is that any changes to legal aid should not make it more difficult for them to receive timely, high quality legal services. In this regard we endorse the response under this section by the Immigration Law Practitioners Association.

Mental Health

9

Our members are generally not mental health law practitioners; as stated above, our commitment to combating discrimination includes all aspects of public authorities and areas of legal practice. Our primary concern regarding these changes is that they must not disadvantage groups who may have particular needs in relation to mental health proceedings more generally. Not only will more time be required where there is a need for interpretation/translation (for people with particular disabilities, people who have difficulty understanding or speaking English) but there may be other special needs in relation to the disability, sexual orientation, nationality, ethnicity, religion or age of clients or witnesses that must be accommodated within the scheme for legal aid.

Many of the concerns we have highlighted are replicated in the submission by the Mental Health Lawyers Association and the Law Society in their submissions on the Fixed Fee Scheme. The DLA is particularly concerned about the discriminatory implications of:

(a) drawing a distinction between forensic and non-forensic mental health clients; and
(b) the failure to recognise that those clients with mental disorders/disabilities require specialist advice and care which is not amenable to provision within a fixed fee scheme.

The DLA urges the LSC to consider carefully the detailed responses of the MHLA and the Law Society which can be found at:

http://www.mhla.co.uk/modules/smartsection/item.php?itemid=17;
http://www.lawsociety.org.uk/documents/downloads/dynamic/legalaidlscdca_laws
ocresponse121006.pdf"

Common Issues (section 10)

10.1 Do you agree with the proposals for varying the fees? If not, please explain why.

n/a

10.2 Do you agree with the proposed arrangements for payment of exceptional cases? If not how else might we manage these cases?

We believe that these exceptional cases are unworkable. Most discrimination cases would be exceptional. However, practitioners will have the greatest difficulty to persuading their firm or NFP agency to “bet” on a case taking four times as long once they go over 5 hours.

Discrimination cases by their nature are unpredictable. A case may appear complex but settle after 15 hours; the agency will see this as a loss as they will only be paid for 4.6.

Discrimination cases are front-loaded – questionnaires, close reading of documentary evidence, complex work with the Statutory Dispute Resolution Procedures. Discrimination casework should be fully funded. Practitioners must know from the outset that a case will be properly paid.

One private practice commented that their experiences of individual assessment of exceptional cases under the tailored fixed fee regime was that it was a very time consuming and protracted process. A number of their cases were reduced to nil or 2 hours work on eligibility grounds and only reinstated following a lengthy appeal process.

10.3 Do you agree with the arrangements for payment of disbursements? If not, please explain why.

Discrimination cases need, compared to other employment work, a disproportionate amount of disbursements. Almost all disability cases require

at least one medical report, other disbursements include interpreters, employment consultants, job evaluation, and other medical experts.

10.4 Do you agree with the proposed arrangements for the application of the statutory charge? If not, please explain why.

Yes we support the proposal to remove the statutory charge from Legal Help except where property is recovered or preserved under a certificate.

10.5 Do you agree with the proposals for payment of VAT? If not, please explain why.

n/a

10.6 Do you agree with the proposal to remove payments for file review in order to fund more civil matter starts? If not, please explain why.

n/a

10.7 Do you agree with the proposed amendments to the Funding Code set out at Annex C?

N/a

Proposed Unified Contract (section 11)

11.1 Do you agree with our proposal that eventually all our providers, including NfP organisations, will be covered by the same contract terms? If not why not?

In order for discrimination law to be properly funded, both the NFP and private sectors must be able to provide high quality advice and representation having regard to their very different financial arrangements.

11.2 Do you agree that there should be a minimum income requirement, of not why not?

n/a

11.3 Do you agree with our proposals for the future of the SQM? If not why not?

No comment

11.4 Do you agree with our proposals to introduce new provision on the length of the Unified Contract and powers to terminate the contract in order to introduce Lord Carter's reforms or CLACs and CLANs? What contract length would you like to see and do you agree with the proposals on termination?

No comment

11.5 Do you agree with our proposals on self-monitoring, approved personnel, an open book relationship and technology? Do you think that they will improve the working relationship between the LSC and its providers? If not why not?

No comment

11.6 Do you agree with our proposal that all contracts will include a number of new matter starts thereby bringing to an end licensed only contracts? If not why not and are there circumstances where licensed only contracts should continue?

No comment

11.7 Do you agree with our proposals to publish information about contracts? If not why not?

No comment

11.8 Do you agree with our proposals on quality assurance and client service particularly the use of peer review and mystery shopping? If not why not?

No comment

11.9 Do you agree with our proposals that under the contract all providers will be paid on the same basis? If not why not?

In order for discrimination law to be properly funded, both the NFP and private sectors must be able to provide high quality advice and representation having regard to their very different financial arrangements.

11.10 Do you agree with the removal of level 1 work for NfP organisations? If not why not?

No. We recognise that publicly funded legal services will be limited in respect of the means of the clients.

Level 1 work is a vital part of discrimination law services and enables NFP organisations to help vulnerable clients who are unable to access other advice services but need advice and assistance to enable them to understand their options and how to deal with the issues.

This advice is akin to a general practitioner service in medicine. This service allows everyone easy access to specialist advisers by phone or in person. Thus it is as accessible as possible to all in the community.

This advice identifies problems early and effectively. Often early and specialist intervention prevents the problem from escalating. It is highly cost efficient. If the system is cut, agencies will only be able to help clients once they have been sacked and take a case to Tribunal.

The significant part of Not For Profit agencies work is early advice and successfully saving clients' jobs by explaining to both employer and employee the legal and discrimination consequences of their actions.

Discrimination law is complex and often employer and employee do not realize the legal implications of simple decisions.

For instance, a single mother (who does not qualify for legal aid) phones a law centre explaining that her employer wants her to start work half an hour earlier in the morning. The employer thinks this is minor change. However, the single mother has two children, one in a nursery and one at primary school. She has a tight morning timetable to get her children to childcare and school etc and get herself to work on time. Having to be in work half an hour earlier makes this timetable unworkable. Unable to comply with her employer's request, she loses her job.

In this situation (based on real life example from one of our members) both parties were utterly unaware that the employer's plan is potentially indirect sex discrimination and hence unlawful. Half an hour's free advice allows the mother to explain the legal situation to her employer and allows her employer to reconsider.

Without the Level 1 service, the employee will lose her job, qualify for legal aid, come to the law centre and probably end up in an Employment Tribunal where she might obtain substantial damages.

But this is not what she wanted. She wanted to keep her job. A lack of early preventative advice results in a tribunal case no-one wanted. Everyone loses. The mother has lost her job. The employer has had to pay for the legal fees and then perhaps substantial compensation (on top of the wages of her replacement). The tax payer has had to pay for the Employment Tribunal time and many, many hours of LSC-funded caseworker time.

All this could have been saved by the government's keeping the Level 1 service - half an hour's advice.

It should not be objected that people who are not eligible can afford to and will approach private solicitors. As stated in question 6.1, the eligibility test is highly complex and can be very slow. Our members have advised us of level 1s clients who fail to qualify because they own (in London) a flat worth over £200 000. They have thousands of pounds of debts and cannot take out a loan to pay for private legal advice unless it is secured against their property. This would take many weeks or months to arrange. It would then be too late for the original employment problem.

Private practice rates are about £150 per hour, far higher in commercial firms. Without the level 1 service, victims of discrimination will be reliant on the goodwill of private practitioners resulting in a piecemeal and less accessible service.

Again the level 1 service is particularly useful for migrants who have particular difficulty in proving eligibility, see question 6.1. The UK is currently experiencing a large influx of migrant workers (partly as a result of government policy) who are in great need of specialist employment advice in order to protect the employment conditions of the entire workforce and hence secure community cohesion.

Further, again by analogy with the GP service, one of the reasons that GP appointments are free at the point of delivery, is that this encourages hard-to-reach patients attending. Also GPs, by their basis and standing in the local community, are, in practice, far more accessible than a hospital. A middle-aged man with chest pain is far more likely to pop into his local GP for a quick appointment (and thus have his serious heart condition diagnosed and treated) than he is likely to attend a hospital heart unit.

In this way the GP service not only deals with a serious health problem, it also saves the tax payer the vast cost of an emergency admission for a heart attack.

Level 1s, like GPs, are cost effective as well as practically effective.

Further, because of the nature of the problem some discrimination victims may prefer to speak face to face with an advisor and not over the telephone. Also, initial advice is often far easier if the advisor can see the documents.

If people have to pay for a half hour appointment, most of those needing discrimination advice (many of whom do not realise this) would not go. Discrimination would continue unchecked. More Employment Tribunal cases will result.

11.11 Do you agree with our proposals to change the way that contract sanctions are imposed and our proposed changes to the CRB?

No comment

11.12 Do you agree with our proposal for amending contracts and allowing the LSC to introduce contract amendments at times other than April and October?

No comment

11.13 Are there any other points that you either agree or disagree with that have not been specifically addressed in these questions? Please give your reasons for either agreeing or disagreeing?

Since April 2001 it has been unlawful, under the Race Relations Act 1976 (as amended by the Race Relations (Amendment) Act 2000), for the DCA, as a public authority, to discriminate on grounds of race, colour, nationality, ethnic or national origins in the carrying out of any of its functions. From that date the DCA has been subject to a statutory duty in carrying out its functions to have due regard to the need to eliminate racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. From 5 December 2006, a parallel prohibition of discrimination will apply in respect of disability, and the DCA will have a statutory duty in carrying out its functions to have due regard to the need to promote equality of opportunity between disabled people and others, to eliminate unlawful discrimination but also other matters including the need to take steps to take account of disabled people's disabilities, even where that involves treating disabled people more favourably than other people.

We are concerned that the proposed changes to legal aid may indeed have a disproportionately adverse impact on members of ethnic minorities and disabled people who seek advice and assistance across all legally aided areas but especially clients who need legal advice and assistance in cases of discrimination in employment, but also in housing, education, access to public and private goods and services. Nothing we have seen in the consultation document or the Draft Impact Assessment indicates whether the DCA has fully considered the impact of these proposals. Failure to do so itself puts the DCA in breach of its statutory duties. If the DCA is aware of evidence suggesting a disparate impact of these proposals, then we would expect that the proposals would be modified to remove or reduce any discriminatory aspects.

Further, under European Community law, nation states are responsible for ensuring that their citizens have proper access to anti-discrimination laws. we are concerned that these proposals infringe this duty.

Finally, with a view to ensuring maximum access to high quality legal services for all groups within society, especially the most vulnerable we would stress that any changes to legal aid should not discourage newly qualified solicitors or barristers from engaging in legally aided work. Further, it is essential that changes to legal aid should not create new discriminatory barriers to entry to the legal profession and should not disproportionately disadvantage ethnic minority solicitors' practices or ethnic minority, women, mature entrants or disabled members of the Bar.

Appendix

The recent Interim Report for Consultation from the Equalities Review highlighted the following data on inequality in Britain today:-

Gender

In 1975, the proportions of girls and boys achieving 5 or more higher grades at GCE/CSE was broadly equal. By 2005, 46.7% of girls achieved 5 GCSEs, including English and Maths, with grades A*-C, compared to only 38.4% of boys.

In higher education, more than half of all students are now female, compared to one-third in 1970/716.

The number of women in the workforce has increased by over a third in the last 30 years.

The hourly gender pay gap for full-time women workers is 17%; the gap for part-time women workers is more than double this – 38%8. Women's average income in retirement is 57% of the average for men.

It is estimated that one in four women experiences domestic violence. About 100 women die each year as a result of violence from a current or former partner.

Age

Age discrimination is the most commonly experienced form of discrimination, with 29% of adults reporting experiences of age discrimination.

The highest unemployment rates are in the younger age groups.

Older people are the fastest growing segment of the population. Over one in six (16%) of the total population is aged 65+ and that proportion is rising.

More than one in five pensioners live in relative poverty.

Nearly a third of pensioners do not take up their entitlement to Pension Credit.

The health of a 65-year old from a routine or manual occupational background is estimated to be equivalent to the health of a 75-year old from a professional background.

Ethnic Minorities

In 2005, over 95% of students from all ethnic groups achieved at least one pass at GCSE (Key Stage 4), except for Traveller and Gypsy/ Roma children (70% and 83% respectively).

In 2005, 42.5% of pupils achieved five or more A*-C grades at GCSE, including English and Maths. For Chinese pupils the figure was 69%; 57% of Indian and White/Asian and 51% of Irish pupils, compared to only 9% of Gypsy Roma pupils.

Black Africans and Indians are over-represented among under-graduates in higher education, while Pakistanis and Bangladeshis are under-represented. Black Caribbean women showed higher participation rates than their male counterparts in both 2000 and 2004.

The average weekly net earnings of Bangladeshi men are currently about half those of White men. Indian men are the only non-White group to earn more, on average, than White men: in 1994, they earned 8% less than Whites; by 2000 they earned 3% more (£20 less in 1994; £10 more in 2000).

Health

The 2004 Health Survey for England (Department of Health, 2005) found that older Pakistani and Bangladeshi men and women reported worse general health than others, showing no change since the last such survey in 1999. Asians are also more likely than others to report long-term illness or disability that restricts daily activities.

Crime and justice

Compared to the White population Black people are more than five times as likely to be a victim of crime. Pakistani and Bangladeshi people are more than ten times as likely to be a victim of crime.

Of UK nationals in prison in 2005, one in five males belonged to an ethnic minority, (10% Black, 5% Asian and 3% Mixed), as did about one in eight female prisoners (8% Black, 1% Asian and 4% Mixed). Of the foreign nationals in prison, nearly three in four were non-White.

Religion and Belief

Population

One in four 16-34 year olds (23%) said that they had no religion compared with less than 5% of people aged 65 or over.

One in three Muslims (34%) were aged 16 or less in 2001, as were one in four (25%) Sikhs and one in five (21%) Hindus, while fewer than one in ten in these groups was aged 65 years or over.

The oldest groups on average were Jewish and Christian, where one in five was aged 65 years or over (22% and 19% respectively).

Employment

Among men in employment, Jews and Hindus were most likely to work in managerial or professional occupations – about half in each group in 2004, compared to fewer than one in three of Christian, Muslim and Sikh men.

In 2004, almost one in ten Muslim men was a taxi driver, cab driver or chauffeur. Sikh women are the most likely to be working in low skilled jobs – around one in ten of them was a process, plant and machine operative in 2004 compared to about 3% in most other groups.

Education

One in three Muslims (33%) and one in five Sikhs (20%) of working age in Great Britain had no qualifications – the highest proportion for any religious group. Only 15% of Hindus, 14% of people with no religion and 7% of Jews had no qualifications.

Sexual orientation and Transgender

What little research is available suggests that lesbian, gay and bisexual (LGB) people constitute 5-7% of the total adult population. There is no robust estimate of the transgender population.

Lesbian and gay adults reported that over four in five (82%) had been subject to name-calling at school, while well over half (60%) reported being hit or kicked. Over half (53%) had contemplated self-harm as a result of the bullying, and two in five (40%) had attempted suicide on at least one occasion.
A Stonewall survey of secondary school teachers found that four in five (82%) of them were aware of incidents of verbal homophobic bullying. One in four (26%) knew of physical homophobic bullying. However, only 6% of schools had anti-bullying policies that dealt specifically with LGB issues.

In 2004/2005, the Crown Prosecution Service prosecuted 317 instances of homophobic hate crime.