Equality and Human Rights Commission – Supplementary Written Evidence (EQD0200)

Section 28: Legal Assistance

Thank you for your email dated 22 December offering us the opportunity to comment on concerns raised by the Discrimination Law Association (DLA) about the Commission's approach to providing legal assistance under Section 28 of the Equality Act 2006.

The DLA was one of the consultees to our strategic litigation policy and it accepts that the policy does not rule out first instance cases although it will have the effect of the Commission tending to fund more appellate level cases.

Our experience shows that are a number of reasons why supporting an appellate case may provide a better use of limited public resources:

- Between 80% and 90% of first instance cases settle. Most respondents demand a confidentiality clause in the settlement agreement. This is our experience of providing support for first instance cases, including three pregnancy cases relating to discrimination in employment which we supported last year. Where cases settle, individual claimants are provided with compensation. However, the substantial legal resources deployed in reaching a settlement frequently amount to months of work and do not provide any public benefit. The confidentiality of the settlement also largely removes the opportunity of using the case to raise awareness of equality law with a view to securing better understanding of rights and obligations. (This is a criterion for accepting a case under paragraph 4.2.5.2 of the strategic litigation policy.)

- Supporting a first instance case generally requires considerably more funding or resource than an appellate case. This is because the facts and credibility of the witnesses have yet to be determined by the court. An employment discrimination complaint is frequently listed by the Employment Tribunal for a hearing of between 10 and 15 days. Moreover, at appellate level, the Commission will recover its costs if successful, whereas it will often recover no costs for first instance cases. The Commission is therefore able to stretch its budget to more appellate than first instance cases.

- Even if successful, a first instance case does not result in a binding legal precedent. Nor will the majority of first instance cases raise a novel or contentious legal point. Thus they are much less likely to present an opportunity to clarify or strengthen the law or to extend or test compliance.

- Having said the above, the Commission continues to seek strategic first instance cases through its stakeholder engagement. For example we actively seek strategic cases in goods and services and in the education sector, because the paucity of discrimination cases outside the employment sphere means that a successful

judgment in a first instance case is likely to have wider impact, even without setting a precedent. We also seek cases that provide the opportunity to address widespread or systematic breaches of the 2010 Act – for example through judicial review of the policy or practices of a public body. We are particularly interested in such cases where litigation by others has failed to resolve the issue. In the event of making a decision as to whether to intervene or to support a case, a factor will be the existence of alternative sources of funding for the applicant. However, identifying appropriate first instance cases has been challenging since the helpline was removed from the Commission's management.

In addition we make use of the findings of the Employment Tribunal. We receive all ET judgements relating to breaches of the Equality Act and engage with employers to prevent further discrimination.

I trust that this clarifies the Commission's position. Please do not hesitate to get in touch if you require any further information.

Yours sincerely

Rebecca Hilsenrath
Chief Executive

6 January 2016