



Access to legal aid for discrimination cases

June 2019



Equality and
Human Rights
Commission

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Foreword

British justice has a deserved global standing as one of the best in the world. Lawyers are rightly proud of its calibre and reputation.

Our hard-won rights are protected by equality law. Anyone who suffers discrimination can claim their right to justice, regardless of age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity.

However, these rights mean nothing without a level playing field between ordinary people and organisations able to afford professional legal representation. And if the rights mean nothing, they do not operate as the powerful deterrent we need to effect lasting change and build a fairer society.

These rights are under threat. Vulnerable individuals are not being supported to bring claims, and unnecessary obstacles are standing in the way of justice being served.

This report contains evidence that shows the current civil legal aid system for discrimination cases in England and Wales is flawed, and there is a real danger of our rights being rights on paper only. The numbers are startling. Between 2013/14 and 2017/18, not a single workplace discrimination case received legal aid funding for representation in the employment tribunal, and only 1 in 200 cases taken on by discrimination specialists received funding for representation in court.

In some instances where victims were not eligible for funding for representation, they abandoned their claims or represented themselves, despite being unfamiliar with the law. This is an imbalance of justice. It is inevitable that miscarriages of justice will happen as a result.

‘They could not attend the Tribunal. This was the very reason I required their help as I was an emotional wreck and could not speak on my own.’

There are multiple obstacles in the way of access to justice. Our report shows what needs to be done and what can be done. Without these changes, the risk is that the

law will only offer protection for the rich and powerful. That is not the society we advocate for.

Many have an important part to play here. Trade unions and advice agencies provide vital advice and support, helping victims of discrimination understand and enforce their rights. Ombuds and other regulators are there to tackle systemic discrimination in different sectors. The Commission is Britain's national equality body and works to protect equality legislation and to work strategically to defend the right to redress.

The Government must also play its part. The Equality Act places enforcement by individual victims of discrimination at centre stage. We cannot make real progress until the Government has ensured that legal aid is available to anyone who genuinely needs it to enforce their rights.

For Britain to retain its global standing, the legal system must be there to protect everyone.

A handwritten signature in dark ink, appearing to read 'Rebecca Hilsenrath', with a stylized, cursive script.

Rebecca Hilsenrath

Chief Executive

Executive summary

Equality law provides a legal footing to the fundamental principal that everyone is born equal and should be judged on their own merits. It recognises the harm that is done to the person who is discriminated against – whose value as an employee, a customer, a human being, is called into question on the basis of their personal characteristics. When everyone has the opportunity to succeed free from discrimination, society can thrive. And in an increasingly globalised marketplace, it is more important than ever that people can make the most of their talents.

The law provides protection from discrimination by giving individuals rights that they can enforce in the courts. The threat of legal action provides a powerful deterrent, holding perpetrators to account and making it clear that society will not tolerate such behaviour. An effective and accessible legal system is crucial to this.

However, recent years have seen access to justice restricted to such an extent that many people experiencing discrimination are not getting the help they need to seek redress.

Claims concerning discrimination in the workplace must be brought in the Employment Tribunal, but the introduction of tribunal fees in 2013 led to a drop of around 70% in the number of claims. The fees were abolished in 2017, after the Supreme Court held that they were unlawful because they prevented access to justice,¹ but the number of claims has not recovered to pre-2013 levels. And while legal aid is available for advice and representation in certain types of discrimination case, it does not cover representation in the Employment Tribunal. This means that individuals must either pay privately for representation or represent themselves, often against an opponent with more resources and professional legal representation. This ‘inequality of arms’ is particularly stark when cases are factually and legally complex, which is often true of discrimination claims.

Furthermore, where legal aid is available, it is subject to strict financial eligibility requirements, the thresholds for which have not been updated since 2010. Not keeping pace with inflation has meant that, in real terms, more and more people are

¹*R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

being excluded from legal aid despite being unable to afford to fund their case themselves.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force in 2013. Its stated aim was to discourage unnecessary litigation, target legal aid at those who need it most, make significant savings to the legal aid budget, and deliver better overall value for the taxpayer.² Some of the key changes it introduced were to: strictly limit the types of case for which legal aid is available; introduce additional eligibility requirements for people on certain benefits; raise the contributions that some have to pay towards their legal aid; and reduced legal aid providers' fees.

LASPO also removed the right of a successful privately-paying claimant to recover certain legal costs from the defendants. Instead, 'qualified one way cost shifting' was introduced to provide costs protection for claimants in certain types of case. However, this does not include discrimination claims. People funding their own discrimination cases therefore risk having to pay the defendant's full costs if they lose. This uncertainty acts as a barrier to justice, discouraging people from taking their cases to court.³

We commissioned research into the impact of LASPO on access to justice. The people we spoke to reported significant financial deprivation as a result of trying but not being able to resolve their legal issues. A lack of early advice meant that they were unable to deal with issues at an early stage. In some cases, this meant costs were transferred to the public sector, including an increased reliance on welfare benefits as a result of unresolved employment issues.⁴

The Government recently carried out a review of LASPO and we made a submission to the review setting out recommendations to address the issues that we identified.⁵ We are pleased that some of these have been adopted as part of the Government's action plan following the review.⁶ We recognise the cost involved in implementing the

² Ministry of Justice (2019), '[Post-implementation review of part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(LASPO\)](#)', para 89 [accessed: 14 June 2019].

³ We have recommended extending 'qualified one-way cost shifting' protection to people bringing discrimination claims. See EHRC (2018), '[Response of the Equality and Human Rights Commission to the Post-Implementation Review of Part 2 of LASPO 2012](#)'.

⁴ EHRC (2018), '[The impact of LASPO on routes to justice](#)' [accessed: 14 June 2019].

⁵ EHRC (2018), '[Response of the Equality and Human Rights Commission to the post-implementation review of LASPO 2012](#)' and note 3 [accessed: 14 June 2019].

⁶ Ministry of Justice (2019), '[Legal support: the way ahead](#)' [accessed: 14 June 2019].

action plan and we welcome the Government's commitment to it as an indicator of how important it considers these reforms to be.

But we remain concerned that victims of discrimination are not getting the help they need to enforce their rights in the courts. This inquiry took a closer look at whether legal aid allows victims of discrimination to access justice. We found too many barriers in their way.

The commitments made in the Government's action plan must be implemented in a way that genuinely improves access to justice. We make recommendations on how this can be achieved. And we recommend further steps that the Government should take to reduce the additional barriers that we have identified.

Findings and recommendations

Face-to-face advice

Since LASPO, anyone seeking legal aid for a discrimination issue must do so through a phone line known as the Telephone Gateway ('Gateway'). If they are then assessed as unsuitable for telephone advice, they should be referred for advice face-to-face. Yet, of the 7,768 discrimination cases taken on between 2013/14 and 2017/18, only 18 such referrals were made. Many of the service users we spoke to said they would have liked face-to-face advice, but legal aid providers told us that the system discouraged them from making these referrals. The Government has committed to making the Gateway non-mandatory. To us, this means ensuring that face-to-face advice a genuine option for anyone who wants it by:

- Identifying the minimum number of legal aid providers required to provide acceptable geographical coverage across each procurement area.
- Ensuring that the contracts offered are sustainable enough to attract sufficient interest from providers.
- Keeping the minimum number of legal aid providers, and the minimum number of 'matter starts' (cases that each provider can open), under review to ensure that supply continues to meet demand if public awareness of legal aid increases as a result of better promotion of its availability.

Telephone advice

Telephone advice will still be the preferred option for some people. But we found that service users do not always get the support they need to access advice in this way. This support should include making reasonable adjustments for disabled people

(such as ‘Typetalk’ or BSL translation for people with hearing impairments), or providing translation services for people who do not speak English. The Government should:

- Satisfy itself that systems are in place to ensure compliance with the Equality Act 2010, and with human rights obligations under the UN Convention on the Rights of Persons with Disabilities, by ensuring reasonable adjustments are put in place for every disabled person who requires them to access telephone advice.
- Satisfy itself that other service adaptations are made for anyone requiring them to access telephone advice.
- Ensure that Gateway operators and specialist providers discuss the availability of adjustments and adaptations to each service user, at first contact and again at any point during the case if it becomes clear that the client needs additional support to access the service.

Extent of help provided and outcomes

We found that the majority of Gateway discrimination cases receive only telephone advice (not casework, representation assistance or representation in court), and just 13% of cases resulted in a positive outcome. We also found an unexplained disparity in the number of white service users and the number of ethnic minority service users receiving positive outcomes. The Government should:

- Monitor and compare the stages that discrimination cases reach, and the outcomes that are secured, across modes of delivery (telephone and face-to-face) and providers.
- Where disparities are identified, take steps to identify and address the underlying causes, such as peer review of specialist providers’ case files. This may include ensuring that all providers have the knowledge and capacity to apply for representation funding and carry out litigation.
- Take steps to understand the cause(s) of the disparity between positive outcomes for white and ethnic minority clients, and put measures in place to mitigate against them.

Representation in court

Only 0.5% of Gateway discrimination cases receive funding for the service user to be represented in court. Our evidence suggests this may in part be caused by two areas of misunderstanding about how the funding rules should apply to discrimination cases.

The first is that the discrimination claims are often treated as being ‘primarily for damages’ even when they seek additional remedies, such as an injunction or declaration. The ‘cost benefit’ test for claims that are ‘primarily for damages’ simply compares the likely cost of the case with the likely damages. It is very difficult for discrimination claims to pass this test because their complexity means legal costs tend to be high, while damages awards tend to be low. A different test applies to claims that are not primarily for damages (or of significant wider public interest). This test asks whether a reasonable privately-paying individual would be prepared to fund the case, taking into account the prospect of success and all the other circumstances of the case. Recognising the importance to the individual and to society of challenging discrimination, it should not be assumed that discrimination claims seeking other remedies in addition to damages are ‘primarily for damages’.

The second is the assumption that a discrimination claim brought in the county court will be allocated to the ‘small claims track’, for which representation funding is not available. Track allocation depends on a number of factors, including the value of the claim and the complexity of the facts, law or evidence. We found that some providers appeared to believe that representation funding was not available in the county court at all, presumably on the assumption that the low value of discrimination claims would mean they are allocated to the small claims track. In fact, the complexity of discrimination claims means they are often allocated to another track, for which funding is available.

The Government should amend the Lord Chancellor’s guidance for civil legal aid⁷ to:

- Recognise the importance to the individual and to 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 a claim for damages’.
- Highlight that county court discrimination cases may, regardless of their value, be allocated to the fast track or multi track as a result of their complexity, and that decision makers should bear this in mind when determining funding applications.

To increase transparency and provide comprehensive, accessible information about discrimination cases in the county court, HM Courts and Tribunals Service should:

- Publish data on discrimination claims in the county court.
- Publish copies of written judgments in proceedings brought in the county court under the Equality Act 2010.

⁷ [Lord Chancellor’s guidance under section 4 of LASPO 2012](#) [accessed: 14 June 2019].

Exceptional case funding

Funding is not routinely available for representation in the Employment Tribunal but 'exceptional case funding' (ECF) can be granted for any case where it is necessary to avoid a breach of a person's human rights or EU rights. Between 2013/14 and 2017/18, 10 applications were made for ECF but none were granted, suggesting that the scheme is not providing the safety net that it should. The Government should amend the Lord Chancellor's ECF guidance⁸ to:

- Include a section setting out considerations relevant to an application for ECF for a discrimination case. These should include the legal and factual complexity of the case, the relative resources of the parties, and any factors that may affect the person's ability to present their own case.
- Amend the section on employment cases to highlight the above factors when considering funding applications for employment cases involving discrimination.

Financial eligibility

Research shows that even some people living below the poverty line are not financially eligible for legal aid. There is a growing justice gap between those who are eligible for legal aid and those who can afford to pay for their own legal advice. On top of that, the complex evidence requirements can put some people off applying for funding. It is critical that everyone has the ability to enforce their rights, either with their own resources or with legal aid. In fulfilling its commitment to reviewing the legal aid financial eligibility requirements, the Government should:

- Ensure that the thresholds are set so that only those who can genuinely afford to pay for their own legal representation are excluded from legal aid. Any contributions people are required to make towards their legal costs should be set at a level that is genuinely affordable.
- Ensure the financial evidence requirements do not present barriers to legal aid providers or prevent individuals from securing the legal support to which they are entitled.
- As an interim measure, immediately reinstate the 'passporting' process, where people in receipt of certain benefits are automatically deemed eligible for legal aid. This can provide the basis for a pilot to support the upcoming review.

⁸ Ministry of Justice, [Lord Chancellor's Exceptional Funding Guidance \(Non-Inquests\)](#) [accessed: 14 June 2019].

Awareness of legal aid

Our research found low levels of awareness of legal aid among the public and, to a lesser extent, in the advice sector. In fulfilling its commitment to promote awareness of legal aid, the Government should:

- Actively publicise the availability of legal aid for discrimination cases and the ways in which it can be accessed. This includes ensuring that information on Government websites about legal aid for discrimination cases is clear and easily located.
- Work with the advice sector to build awareness of the availability of legal aid for discrimination, the processes by which to access it, and to identify and address barriers to referral.
- Monitor the effectiveness of its work to promote awareness, adapting it where necessary to ensure maximum impact.

Introduction

In September 2018, the Equality and Human Rights Commission ('the Commission') launched a formal inquiry into whether legal aid enables victims of discrimination in England and Wales to get justice.

Access to justice is fundamental to the rule of law and to a fair and just society. The right to a fair hearing is protected by the Human Rights Act 1998, with access to legal representation is an important part of realising that right.

Challenging unlawful discrimination benefits the victim and society. Doing so in court shows that discrimination will not be tolerated. Where people cannot afford to challenge discrimination, funding should be available to help them.

In addition to the individual and societal benefits, access to legal aid has an economic upside. Early intervention prevents problems escalating and becoming a greater cost to the taxpayer. Professional legal advice can resolve cases at an early stage, reducing the burden on the courts.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force in 2013.⁹ Its aims were to discourage unnecessary and adversarial litigation at public expense; target legal aid to those who need it most; make significant savings in the cost of the scheme; and deliver better value for money for the taxpayer.¹⁰

LASPO, and secondary legislation made under it, introduced major changes to legal aid's scope and financial eligibility criteria. These steps reduced access to legal aid leading to a dramatic fall in spend.¹¹

Following LASPO, people seeking advice for discrimination, debt and education issues, must do so through the Legal Aid Agency's telephone gateway ('the Gateway').

⁹ [Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) [accessed: 14 June 2019].

¹⁰ [Reform of Legal Aid in England and Wales](#) [accessed: 14 June 2019].

¹¹ Real-terms expenditure on civil legal aid decreased from £1,125 million in 2010/11 to £859 million in 2013/14 to £646 million in 2016/17 ('Is Britain Fairer?', EHRC, 2018).

Since its introduction, LASPO has faced criticism. The United Nations challenged its adverse impact on access to justice, especially among disadvantaged groups and people with protected characteristics, such as disability.¹²

The Government looked at the impact of LASPO and reviewed whether it had achieved the Government's objectives (LASPO Review). We made submissions to the Review¹³ and are pleased to see the Government's commitment to tackling the parts of LASPO that are not delivering against its objectives.

While we welcome these commitments, we are concerned that they do not go far enough towards tackling the issues that we have identified in this inquiry. The commitments must be implemented in a way that brings genuine improvements to how victims of discrimination can access legal aid.

To ensure that discrimination can be tackled effectively, we urge the Government to consider the further steps that we recommend in this report.

Terms of reference

Our inquiry was conducted under section 16 of the Equality Act 2006. Inquiries are a way for us to find out more about an issue of equality, diversity or human rights.

Based on our findings we can make recommendations for change and improvement in policy, practice or legislation to any organisation, and the organisation must have regard to our recommendations.

The inquiry sought to determine whether legal aid for discrimination cases provides access to justice for those who have suffered discrimination. It explored:

- how discrimination cases are funded by legal aid
- how many people receive legal aid for discrimination claims
- whether there are barriers to effective access to justice
- whether some individuals experience specific duties in accessing legal aid, and
- the operation of the telephone Gateway.

¹² [UN Committee on the Rights of Persons with Disabilities, concluding observations, para 33\(c\)](#) [accessed 14 June 2019].

¹³ EHRC (2018), [Submission to the post-implementation review of LASPO](#) [accessed: 14 June 2019].

The terms of reference for the inquiry can be found at **Annex 1**.

Methodology

In carrying out this inquiry, we drew on a range of evidence sources.

- We reviewed existing secondary evidence and then collected evidence to fill any gaps.
- We commissioned two research reports and analysed unpublished data provided by the Legal Aid Agency covering civil legal aid and public funding certificates. Both research reports have been published alongside this report.
- We conducted a call for evidence and developed two online questionnaires. One focused on individuals in England and Wales who said they had experienced discrimination since January 2017. This received 99 responses. The other focused on organisations which provide advice or assistance to such individuals. This received 42 responses.
- We conducted 23 follow-up telephone interviews with individuals who responded to one or other of the online questionnaires.
- We analysed selected 32 case files held by three 'specialist providers' - organisations who have, or have had, a legal aid contract to provide advice on discrimination issues through the Gateway.
- We interviewed 10 front-line and more senior staff at the specialist providers, who provided their own views based on their experience of legal aid work.
- We interviewed 25 of the service users whose case files we analysed. These are people who contacted the specialist providers through the Gateway seeking legal advice on a discrimination issue.
- We analysed other unpublished data provided by Citizens Advice and the Equality Advisory and Support Service.

Face-to-face advice

Key findings

- Face-to-face advice plays an important role in building a rapport between service users and their advisors. It enables communication and makes it easier to deal with paperwork. Some service users prefer it to telephone advice. For others, face-to-face advice is essential for them to explain their issue and understand the advice they receive.
- The number of people being referred for face-to-face advice is extremely low, which suggests that some people who need face-to-face advice are not receiving it.
- The contractual arrangements in place at the time of the research discouraged specialist providers from assessing service users as requiring face-to-face advice.

Evidence

In 2013 the Government changed the way that people access publicly-funded legal advice for discrimination issues.

If their issue falls under certain other legal aid categories (for example, discrimination arising in a decision that can be challenged by judicial review), they can seek advice face-to-face or over the telephone. If their discrimination issue does not fall under another legal aid category (for example, discrimination by someone selling goods or services), they can only get advice by calling the mandatory telephone gateway ('the Gateway').

The Government wanted most Gateway cases dealt with by telephone, with face-to-face appointments offered to those for whom remote advice is not suitable. In the case of some disabled service users, face-to-face advice may be a reasonable adjustment to which they are entitled under the Equality Act 2010.

The Government originally estimated that 10% of all discrimination cases would be referred for face-to-face advice.¹⁴ Based on the number of matters taken on by specialist providers between 2013/14 and 2017/18, this would equate to around 777 cases. In fact, only 18 referrals were made during that period.¹⁵

The majority of service users we spoke to (22 of 25) indicated a preference for face-to-face advice. Many said that speaking to someone in person makes communication easier, helping them to feel more relaxed and better able to explain their circumstances.

‘I would have liked a face-to-face meeting because at least then you can see the person that’s dealing with it; you can ask questions that you probably wouldn’t think of over the telephone or when you were doing an email.’

—Deaf service user with a cognitive impairment, mental health condition and a physical impairment, interviewed together with his wife

Several service users found that dealing with documentation by phone was challenging and expensive.

‘Because if you’re face-to-face I’ve got a folder with all my documents in, and I can say, “Oh this when I transitioned, this is my gender recognition certificate...” But when you’re on the phone it can sometimes be quite difficult... And you know what the post is like in general, and you don’t want to be sending sensitive documents unless it’s really essential. I mean, normally if I have to send anything to the solicitors, I normally send it by special delivery, but that costs like £7... And if you’re on benefits...’

—Transgender service user with no known impairments

Academic research backs up the importance of face-to-face advice for some people, including black and minority ethnic groups which may be more likely to have a language barrier when seeking legal advice.¹⁶

Research by Dr Marie Burton, who specialises in access to justice and legal aid, found that face-to-face interaction between advisor and client can better facilitate

¹⁴ LASPO Review, para 536;

‘Matters’ are termed ‘acts of assistance’ in the LASPO Review.¹⁶ N. J. Balmer et al (2012), ‘Just a phone call away: is telephone advice enough?’, *Journal of Social Welfare and Family Law*, 34:1, 63-85.

¹⁶ N. J. Balmer et al (2012), ‘Just a phone call away: is telephone advice enough?’, *Journal of Social Welfare and Family Law*, 34:1, 63-85.

advice using non-verbal cues and body language.¹⁷ This leads to the client being more open with their advisor, providing more detailed instructions and working more collaboratively.

One unexpected finding was the extent of some clients' mistrust of telephone communication, which was particularly pronounced in clients who were born outside of the UK. Dr Burton notes that privacy concerns such as worries about phone-tapping and government surveillance appeared to have an impact on clients' psyche.

'The research concluded that, while telephone advice may work well for some clients, it is less suited to those who are vulnerable, have limited communication skills or are in an urgent or complicated situation.'¹⁸

We spoke to some of the specialist providers who give discrimination advice through the Gateway. Some said that clients tend to like the convenience of telephone advice. Others said that they could advise clients equally well on the telephone as they could face-to-face.

But some specialist providers felt it was difficult to build rapport over the telephone, and that face-to-face interaction would benefit their relationships with service users.

'It's different for everyone but I think it's difficult sometimes to have a remote service. I think even just in terms of developing a relationship, a rapport with the case worker, if you don't have someone right in front of you it can be quite difficult for these people to put trust in us and accept our advice and decisions.'

—**Specialist provider**

Some pointed out that it was easier to deal with clients' paperwork when seeing them face-to-face.

'It can be quite easy and straightforward to sift through it right there and then and pick out what's key and what's not, and the client can get a good idea of all those notes that you made. Just put them to one side, because that's not evidence... I think it's easier to make yourself understood face-to-face, to be honest with you. Don't know why, just is.'

—**Specialist provider**

¹⁷ L. M. Burton (2018), 'Justice on the line? A comparison of telephone and face-to-face advice in social welfare legal aid', *Journal of Social Welfare and Family Law*, vol. 40, no. 2, pp. 195-215.

¹⁸ As above.

Despite specialist providers acknowledging the importance of face-to-face advice for some people, we found very little evidence of specialist providers treating it as a genuine option or giving it proper consideration when taking on a new case.

Under the terms of their contracts, specialist providers must assess whether service users are suitable for remote advice. If not, they should refer them for a face-to-face appointment.

There is no express requirement for specialist providers to discuss the possibility of face-to-face advice with the service user. Nor do they have to make referral simply because a service user asks for one.

We would expect to see some evidence of specialist providers considering whether remote advice is suitable for a service user. In fact, some of the service users we spoke to were given the impression that face-to-face advice was simply not an option.

‘I was told it would all be done by telephone... I think I did ask the question about coming into the office and I’m pretty sure I was told “No, we do it this way”.’

—Service user with long-term physical condition and cognitive impairment

‘And she says to me, but what I need you to do, because we don’t do face-to-face appointments, we only do it all by telephone and writing.’

—Service user seeking advice on sexual harassment

Some of the specialist providers did not seem to be aware that it was their responsibility to assess a service user’s suitability for remote advice.

‘The onus is on the person, isn’t it, to explain why. So, what would be the difference between a Skype call and being physically in person face-to-face? How would they benefit? How would it be different? But it was never anything that I was opposed to. Yeah, I suppose but I’ve never done face-to-face, but I just knew if someone was adamant, they need to explain why that is the case and I’d have to take a view from above.’

—Specialist provider

One specialist provider explained that the difficulties of arranging face-to-face advice discourage specialist providers from providing it:

‘The way the system’s set up does not encourage providers to assess somebody as needing face-to-face advice. I know that’s awful, but that is what it is... Because we’ve got to see the client. If we say they need face-to-face advice, it’s our responsibility to provide that advice face-to-face, either ourselves or through someone else. If they happen to live near one of the other providers, that’s fine, but all three providers are in the North, North-West ... [if we contracted a third party to provide the advice] we would have to pay those people to provide the advice and we’d be responsible for the quality of the advice, or we had to go to wherever the client was and do it ourselves, and that’s quite difficult to organise when you’re already running a service that’s got to be quite lean because of the way it’s funded; it’s quite hard to make money at all. If you suddenly have someone out of the office for two days because they’ve got to get a train to Exeter to see a client for an hour and then come back again, it’s not possible. So, I think that’s the fundamental flaw really.’

—Specialist provider

Recommendations

The Government has committed to making the Gateway non-mandatory. To us, this means ensuring that face-to-face advice is a genuine option for anyone who wants it by:

- Identifying the minimum number of legal aid providers required to provide an acceptable geographical coverage across each procurement area.
- Ensuring that the contracts offered are sustainable enough to attract sufficient interest from providers.
- Keeping the minimum number of legal aid providers, and the minimum number of ‘matter starts’ (cases that each provider can open) under review to ensure that supply continues to meet demand if public awareness of legal aid increases as a result of better promotion of its availability.

Telephone advice

Key findings

- An estimated 60% of people who received discrimination advice through the Gateway are disabled.
- Not all disabled service users receive the reasonable adjustments they need to access advice through the Gateway.
- Not all service users get the adaptations (such as a translation service) they need in order to access advice through the Gateway.

Evidence

As with all service providers, specialist providers must make reasonable adjustments to assist disabled people to access their service. While a referral for face-to-face advice may be a reasonable adjustment for some service users, others may prefer to access support over the telephone.

The Gateway can make a range of other adjustments or adaptations to support disabled people to access remote advice. These include providing Typetalk text relay or webcams for users of British Sign Language.

We found that an estimated 60% of people who receive discrimination advice through the Gateway are disabled. Of those describing themselves as disabled, 24% said they had a mental health condition and 8% said they had a learning disability.

Despite these numbers, only 7% of disabled service users receive support in the form of adjustments or adaptations to access the service, which seems a low figure.¹⁹

We found that specialist providers did not always understand the service user's mental health conditions and/or physical or cognitive impairments. They did not

¹⁹ As outlined in Kaye, 'Civil Legal Aid', the categorisation of disability is based on the clients' self-declaration and the ground of challenge. This is explored more fully in that report.

always give them the opportunity to discuss whether they needed any reasonable adjustments.

The Gateway also offers ‘service adaptations’ for people who need help with telephone advice because, for example, English is not their first language. These include use of a ‘Language Line’ translation service or speaking to a third-party caller on the service user’s behalf.

Our research found that service adaptations were used in a very low proportion of cases: out of 7,768 matters, just 20 involved the use of the Language Line (0.26%) and just two involved the use of ‘Typetalk’ text relay (0.03%).²⁰

The Government has acknowledged that ‘many of the available adjustments and adaptations have had a very low uptake’.²¹ This reflects previous findings that adjustments and adaptations were not routinely offered. In some cases, requests for adjustments were not implemented.²²

While many service users will choose face-to-face discrimination advice when it is reinstated, there will be some for whom telephone advice is preferable. It is therefore essential that people seeking advice through Gateway receive the adjustments and adaptations they require in order to use the service.

Recommendations

The Government should:

- Satisfy itself that systems are in place to ensure compliance with the Equality Act 2010 and with human rights obligations under the UN Convention on the Rights of Persons with Disabilities by ensuring reasonable adjustments are put in place for every disabled person who requires them in order to access telephone advice.
- Satisfy itself that other service adaptations are made for anyone requiring them in order to access telephone advice.
- Ensure that Gateway operators and specialist providers discuss the availability of adjustments and adaptations with each service user at first contact and again at any point during the case if it becomes clear that the client needs additional support to access the service.

²⁰ Kaye, ‘Civil Legal Aid’, table 7.1.

²¹ LASPO Review, para 547.

²² [Civil Legal Advice mandatory gateway: overarching research summary \(2014\)](#) [accessed: 13 June 2019].

Extent of help provided and outcomes

Key findings

- Only one in five discrimination matters taken on through the Gateway receives casework assistance, such as writing letters, negotiating with the other side, and preparing court documents. The rest receive telephone advice only.
- Only 13% of matters result in a positive outcome for the service user, such as a financial settlement, an explanation or apology.

Evidence

What level of help do people with discrimination cases receive?

We analysed data on the number of people seeking advice on discrimination issues through the Gateway in the five-year period between 2013/14 and 2017/18.

During that time:

- The Gateway's operator service received 33,150 calls about discrimination.
- 17,717 of those calls were passed on to the specialist providers.
- 7,768 were taken on as matters by the specialist providers. The rest were found to be ineligible, for example, because they were not covered by legal aid, or not financially eligible.²³

Of the 7,768 cases taken on by the specialist providers:

- 6,064 received telephone advice only.
- 1,646 received casework assistance. This can include the specialist provider writing to the alleged perpetrator, negotiating a settlement, drafting court documents, and helping the service user prepare for a court hearing. However, it

²³ The remaining 9,946 ineligible calls are termed 'determinations'. 'Determinations' are termed 'other work done' in the LASPO Review.

does not include a lawyer attending court and speaking on the service user's behalf.

- 43 received funding that would cover representation in court.²⁴ This means a lawyer attending court and speaking on behalf of the service user.

We are surprised that only one in five of the cases taken on by specialist providers received anything beyond telephone advice. It seems likely that some of the remaining four out of five would have benefitted from the specialist provider carrying out the casework on their behalf. An estimated 14% of all service users had a mental health condition and 5% had a learning disability or difficulty.

This lack of casework has been noted by some of the advice organisations that would normally refer cases to the Gateway.

'I've kind of stopped doing that [referring service users to the Gateway], partly because I've seen the statistics which say that, you know, casework is... there's minimal casework. Also, because I've had experience of people coming back having gone to the Gateway... either not having had... you know, being turned down for help or not getting the help they need.'

—Respondent to call for evidence

What does the help achieve?

We looked at discrimination matters which achieved a positive outcome for the service user. For us, a positive outcome is specific and tangible, such as a financial settlement, getting a reasonable adjustment made, or securing an explanation or apology.

Only 13% of all cases going through the Gateway achieved a positive outcome at the point where their file was closed by the specialist provider (8% secured a financial settlement outside of court, 1% resulted in a financial award by a court or tribunal, and less than 1% resulted in a reasonable adjustment being made.)²⁵ Those who received either casework assistance or representation in court were much likely to achieve a substantive positive outcome than those who only received telephone advice.²⁶

Across all the discrimination cases taken on through the Gateway, more white service users (26%) than ethnic minority clients (17%) secured a positive outcome.

²⁴ P. Jancz, 'Civil Legal Aid: analysis of Public Funding Certificate data' (Numbertelling).

²⁵ Other substantive positive outcomes are listed in the Kaye report.

²⁶ As above.

We do not know why but we note that research has shown that black and minority ethnic groups may be more likely to have a language barrier when seeking legal advice.

The Legal Aid Agency treats 'client advised and better able to plan/ manage their affairs' as a positive outcome. It is the result achieved in most cases (52%). However, we think it is too vague to know whether the service user has gained anything from the advice.

We spoke to some service users whose cases were recorded as having this outcome. Not all of them agreed that the advice had allowed them to better plan or manage their affairs.

One service user said:

'No help at all. I think they misunderstood, completely, my case. Although I tried very hard, verbally, and in writing, to tell them where they had gone wrong... my case has not been addressed at all. Nothing in my case has been addressed. I am saying to someone who is taking a look at the particulars of my case, "Look, I have been asking for help for so long and nothing at all has been done"'.

We decided to treat cases with this outcome as being neither positive nor negative. Without this outcome included as wholly positive, the percentage of cases achieving a positive result is low.

What could be behind the low proportions of cases that receive casework and achieve positive outcomes?

We have identified two factors behind the low number of cases making it past the telephone advice stage and why so few achieve positive outcomes.

1. Financial eligibility requirements and remote advice

Many cases appear to be closed at an early stage because the service user has not provided evidence of their financial eligibility. Data from the Legal Aid Agency shows that 14% of cases are closed for this reason. We understand that an ambiguity in the way information is recorded may mean that some of these cases are closed for other reasons before the service user is required to provide their evidence, for example, because the case has been resolved. But we assume that many of the cases in this category are ones that would have carried on if the requested evidence had been provided.

This statistic is broadly reflected in the specialist providers' case files that we analysed. Most of these cases were closed after receiving only telephone advice. The most common reason for closure: the service user failed to provide documents (such as proof of financial eligibility) or instructions.

This reason was more than twice as common as the service user being found to be financially ineligible, the case lacking merit, or because the service user did not want to continue.

Some service users are put off continuing with their case by the difficulties of providing the necessary evidence. Both service users and specialist providers have said that people can find it particularly difficult to deal with the paperwork themselves when receiving advice by telephone.

'It's easy to just pick up a phone and talk. But then when you're sending people forms – and there's a lot of forms, as well, there's the client care letter, which is a big letter. There's an initial advice letter, there's the legal help form, and we need all this information off you.'

—**Specialist provider**

Research has shown that the rapport and emotional engagement built through face-to-face contact leads to more detailed sharing of information by the client.²⁷ In our view, this 'buy in' from the client decreases the likelihood that they will be put off by the burden of providing proof of their financial eligibility.

If the Government adopts our recommendations on face-to-face advice and financial eligibility requirements, we believe that more cases would remain open and be pursued to their conclusion.

2. Specialist providers' knowledge and capacity to apply for representation funding

We believe that meritorious cases are closed at an earlier stage than necessary because some specialist providers do not have the knowledge or capacity to apply for representation funding. One of the specialist providers we spoke to said that there was not much awareness in their organisation about representation funding and suggested that more training for specialist providers would help. Another said that their team did not have much experience of legal aid work prior

²⁷ L. M. Burton (2018), 'Justice on the line? A comparison of telephone and face-to-face advice in social welfare legal aid', *Journal of Social Welfare and Family Law*, vol. 40, no. 2, pp. 195-215.

to starting work on the Gateway. They found the application process and the implications of the 'cost benefit test' off-putting.

It is vital that all providers know about representation funding and make an application in each case that may warrant it.

Recommendations

The Government should:

- Monitor and compare the stages that discrimination cases reach and the outcomes that are secured, across modes of delivery (telephone and face-to-face) and providers.
- Where disparities are identified, take steps to identify and address the underlying causes, such as peer review of specialist providers' case files. This may include ensuring that all providers have the knowledge and capacity to apply for representation funding and carry out litigation.
- Take steps to understand the cause(s) of the disparity between positive outcomes for white and ethnic minority clients, and put measures in place to mitigate against them.

Representation in court

Key findings

- Only 0.5% of discrimination cases receive funding for representation at court, an average of nine cases per year.
- In discrimination cases, 45% of applications for representation funding were successful; lower than in public law (64%), education (67%), actions against the police etc. (70%), debt (72%), community care (79%) and housing (91%).
- Applications for discrimination cases are more likely to be refused than applications for other areas of law. The most prevalent reason for applications being turned down are because they fail to meet the 'cost benefit test'.

Evidence

How many cases receive funding for representation at court?

Under the first stage of legal aid funding ('legal help'), specialist providers can give telephone advice on a discrimination issue and carry out casework.

They can take the case on, write to the person who discriminated against the service user, try to resolve the case, and can even help their client to bring a legal claim in a court or tribunal. This stage does not cover the costs of the lawyer representing their client at court or tribunal.

If the specialist provider wants to represent the service user in court (or instruct a barrister to do so), they must apply to the Legal Aid Agency for the second stage of funding. This is a 'public funding certificate'. If they do not, the service user will have to represent themselves, pay for representation or find someone willing to do it for free.

Between 2013/14 and 2017/18, 43 cases received funding for representation in court - an average of nine cases per year. This means that only 0.5% of discrimination cases going through the Gateway receive representation funding.

Some cases are not included in these figures. For example, claims in the Employment Tribunal, where legal aid funding is not available, other cases involving discrimination pursued under a different legal aid category (an average of 28 per year), or cases not recorded as discrimination cases (an unknown number).

Even taking this into account, the number of people receiving legal aid for representation in their discrimination claims appears to be extremely low.

Of the 43 Gateway discrimination cases that received representation funding, we found that:

- 29 had proceedings issued but did not get as far as a final hearing (for example, because the case settled).
- 3 did not have proceedings issued (again, possibly because the case settled).
- The remaining 11 cases did not have a record of the stage the case reached.

This is a concern for discrimination cases not covered under any other category of legal aid, such as discrimination in the provision of goods and services. We do not know how many of the 43 discrimination cases that received representation funding were goods and services cases. Even if they all were, the maximum number of goods and services cases receiving legal aid funding for representation in court in the past five years is just 43. This has serious implications for access to justice.

We also found that that funding applications for discrimination cases were much less likely to be granted than those in other categories.

In the discrimination category, 45% of applications were successful, lower than for public law (64%), education (67%), actions against the police etc. (70%), debt (72%), community care (79%) and housing (91%).

Cost benefit test

As noted above, only 45% of applications to fund representation in discrimination cases are successful. Failing the 'cost benefit test' is the most common reason, appearing twice as often as the second most common reason (insufficient prospect of success).

In the files we reviewed, specialist providers assessed two cases as not satisfying the cost benefit test, so applications were not made.

The 'cost benefit test' is one of the criteria that applicants seeking funding for representation must satisfy before their application will be granted. The potential

benefit to be gained from a case must justify its anticipated costs.²⁸ Different tests apply depending on the nature of the case:

- 1) If the case is primarily a claim for damages and is not of significant wider public interest, and
 - a) the prospects of success are very good, the likely damages must exceed the likely costs
 - b) the prospects of success are good, the likely damages must exceed the likely costs by a ratio of two to one
 - c) the prospects of success are moderate, the likely damages must exceed the likely costs by a ratio of four to one
- 2) If the case is not primarily a claim for damages and is not of significant wider public interest, the potential benefit to be gained justifies the likely cost, such that a 'reasonable private paying individual' would be willing to fund it.
- 3) If the case is of significant wider public interest, the likely benefits to the individuals and to others justify the likely costs. 'Significant wider public interest' means that the case could bring real benefits to the public, other than the kind of benefits that normally flow from that type of case, and benefits for an identifiable group of people other than the claimant and their family.

There are two problems with the cost benefit test and how it is applied to discrimination cases.

1. It is very difficult for discrimination cases which fall into the first category ('primarily a claim for damages') to pass the cost benefit test

Some discrimination claims seek other remedies in addition to damages, like a declaration that someone was discriminated against, or an order requiring someone to make reasonable adjustments.

Others will only seek damages for injury to their feelings or some other personal injury or financial loss resulting from the discrimination. This may be because no other remedies are necessary, perhaps because the discrimination is clear cut, or the reasonable adjustments are no longer necessary.

It does not make the claim any less valid, or less important to tackling discrimination and preventing a culture of impunity developing.

²⁸ Reg 42, Civil Legal Aid (Merits Criteria) Regulations 2013.

If the claim is ‘primarily a claim for damages’, then the question is purely numerical: how do the likely damages stack up against the likely costs of the case? This is a difficult test for discrimination claims to pass.

Discrimination cases can often be complicated, time consuming and expensive. This means that the likely level of damages awarded needs to be high in order to meet the cost benefit ratio.

As an indication of what these claims cost, the discrimination cases we fund²⁹ can involve legal costs ranging from £4,000 to £80,000, with an average case costing around £28,000.³⁰

By contrast, damages in discrimination cases tend not to be very high. Case law has provided three guideline ‘bands’ for damages awarded for injury to feelings.³¹ The lower band ranges from £900 to £8,800, the middle band from £8,800 to £26,300 and the higher band, from £26,300 to £44,000. The majority of discrimination claims will fall into the lower or middle bands.

While data is not available for damages awards in discrimination claims in the county court, it is available for those that take place in the Employment Tribunal. In 2017/18, the median award for a disability discrimination claim in the Employment Tribunal was £16,523, and for a race discrimination claim it was £11,299.³²

With awards at these levels, most discrimination cases (even those with a good prospect of success) would fail the relevant cost benefit test.

Taking our indicative average case cost of £28,000 and assuming that the claim has a good prospect of succeeding (meaning that likely damages must outweigh the likely costs by a ratio of two to one), the likely damages would need to exceed £56,000 in order for this cost benefit test to be met.

This level of damages exceeds any band on the Vento scale and is extremely unlikely to be awarded in most discrimination cases. An exception to this may

²⁹ The Commission has a limited budget to provide funding for strategic discrimination cases brought by individuals, such as those that have the potential to clarify or expand the law in relation to a particular issue. The power to provide funding in this way can be found in section 28 of the Equality Act 2006.

³⁰ EHRC submission to the Women and Equalities Select Committee on Enforcement of the Equality Act 2010.

³¹ Originally set out in *Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102 and now the subject of [guidance by the Presidents of the Employment Tribunal](#) [accessed: 13 June 2019].

³² [Ministry of Justice Employment and Employment Appeal Tribunal Tables 2017 to 2018](#) [accessed: 13 June 2019].

be where there is a claim for damages other than injury to feelings, such as loss of earnings.

Case study

'T' is disabled and has multiple conditions which limit her mobility. As a result of this, T struggled to get to her classroom. She asked her college to make a reasonable adjustment by moving her to a different classroom, but the college did not. T wanted advice on bringing a claim against the college.

The location of T's classroom meant that T could not easily access the restroom facilities or join her classmates for lunch. Getting to and from the classroom was so difficult that, at one point, T was hospitalised as a result of the walk. T eventually moved to a different college to complete her studies.

T sought help from a specialist provider to bring a claim against the college for disability discrimination and a failure to make a reasonable adjustment. T's solicitor gave a broad initial estimate that the value of her claim was £800-£8,400 in damages for injury to her feelings.

The solicitor considered whether to apply for funding to represent T. Having moved to a different college, the only relevant remedy for T was damages. T's solicitor applied the cost benefit test. She advised that an application would be unlikely to meet the legal aid funding criteria because, considering the value of the claim, there was 'insufficient benefit' in taking it to court.

T's solicitor assisted her in trying to settle the case without going to court, which was unsuccessful. She also advised on how T could pursue the case herself. Eventually, the solicitor said that she had taken the case as far as she could. The case file was closed at this point, so the outcome is not known.

For victims of discrimination bringing a claim may not be primarily about compensation. They are often seeking an apology, or recognition that they have suffered discrimination, and to try to ensure this does not happen to others.

'You rarely get a client that says it's just about the money. They want it to stop happening and they want it not to happen again.'

—**Solicitor**

Applying the first limb of the cost benefit test to discrimination cases fails to recognise the importance to society of discrimination cases. It is essential that discrimination is challenged, and that individuals can pursue their rights.

The legal aid guidance should be amended to remind legal aid lawyers and the Legal Aid Agency of this.

2. Even when a case is not 'primarily a claim for damages', the Legal Aid Agency often treats it as one

If a case is not primarily a claim for damages (and is not of 'significant wider public interest'), the cost benefit test says that the potential benefit must justify the likely cost, such that a 'reasonable private paying individual' would be willing to fund it.

It is usually easier for discrimination cases to pass this test because it takes the other benefits individuals often seek in discrimination cases, such as a vindication of their rights, into account. It also recognises that this is often more important to them than receiving a financial settlement.

However, we have heard evidence that, even when a claim seeks other remedies in addition to damages, the Legal Aid Agency often treats it as 'primarily a claim for damages'. It then applies the stringent financial test and refuses funding.

Case study

'M' and her family are Irish Travellers and live on a caravan site. A public service provider refused to deliver a service to her on her site. They failed to give adequate reasons and did not inform M of her right to appeal the decision, as they are required to do.

M sought advice from a solicitor and was advised that she had a good case for indirect discrimination on the grounds of race.

M's solicitor applied to the Legal Aid Agency for funding. She explained that M was seeking a declaration from the court that the service provider had discriminated against her, and damages. Despite this, the Legal Aid Agency decided that the claim was primarily for damages and applied the cost benefit test.

M's solicitor had estimated the likely cost of the case (up until the point where she believed the service provider was likely to settle) as £15,000. She estimated that the likely damages were up to £15,000. The case was assessed as having a moderate prospect of success. This meant the likely damages would need to outweigh the likely costs by a ratio of four to one. In other words, the damages would need to have been £60,000 in order for funding to be granted.

On this basis, the Legal Aid Agency decided that M's case had failed the cost benefit test, and funding was refused.

We are concerned that cases like this are being subjected to the wrong cost benefit test. Cases are being assessed as 'primarily for damages', despite evidence to the contrary and affirmations by the solicitor making the application.

Claims in the county court

Subject to the funding criteria, representation funding is available for discrimination cases that take place in the county court. The county court is where many non-employment discrimination cases take place, such as discrimination by a provider of goods or services.

We were surprised to find that some specialist providers did not seem to be aware that funding is available:

'I think a lot of people are very surprised that we don't offer representation in court or tribunal. I think it leads to a lot of people not wanting to even proceed with the claim. Obviously, that's their choice at the end of the day. We can see that they do have a strong claim we're just not able to represent them in court or tribunal and these people a lot of the time they're not able to ... represent themselves.'

—Specialist provider

'I think the CLA representation at tribunals and the county court would be a huge step forward.'

—Specialist provider

In the county court, cases are allocated to one of three 'tracks': 'small claims track', 'fast track' and 'multi track'. This is important because the legal aid rules say that

representation funding is not available for cases that are ‘likely to be allocated to the small claims track’.³³ It is available for cases in the fast track and multi track.

The court will decide which track to allocate the case to.³⁴ The Civil Procedure Rules say that the small claims track is the normal track for personal injury claims where the value of the claim is not more than £10,000 and the value of any claim for damages for personal injury is not more than £1,000.

However, discrimination claims may be allocated to a different track due to the complexity of the facts, law or evidence and/or the importance of the claim to persons who are not parties to the proceedings.³⁵

Some of the specialist providers seemed to focus on the financial thresholds rather than other factors. We are concerned that specialist providers are put off from applying for representation funding in the county court.

They may assume that cases will be allocated to the small claims track, or that the Legal Aid Agency will refuse their application in the belief that it is likely to be allocated there.

We think the legal aid guidance should be amended to clarify this for legal aid lawyers and the people making decisions on their funding applications.

We also found that a lack of available data about discrimination claims in the county court makes it difficult to get a full picture, for example, of how many there are, how long they take, and to which tracks they are being allocated. Furthermore, transcripts of judgments in the county court are not routinely published. Doing so for discrimination cases would increase transparency, act as a valuable resource for lawyers and people representing themselves, and provide comprehensive evidence to inform the Commission’s enforcement of the Equality Act 2010.

Recommendations

The Government should amend the Lord Chancellor’s guidance for civil legal aid³⁶ to:

³³ [Reg 39\(f\), Merits Regulations](#) [accessed: 13 June 2019].

³⁴ CPR 26.8(1).

³⁵ All of which are matters to which the court must have regard when deciding to which track a case should be allocated (CPR26.8(1)(c) and (g)).

³⁶ [Lord Chancellor’s guidance under section 4 of LASPO 2012](#) [accessed: 13 June 2019].

- Recognise the importance to the individual and to society of challenging discrimination and advise that, as a general rule, a discrimination claim that seeks other remedies in addition damages should not be assumed to be 'primarily a claim for damages'.
- Highlight that county court discrimination cases may, regardless of their value, be allocated to the fast track or multi track as a result of their complexity, and that decision makers should bear this in mind when determining funding applications.

To increase transparency and provide comprehensive, accessible information about discrimination cases in the county court, HM Courts and Tribunals Service should:

- Publish data on discrimination claims in the county court.
- Publish copies of written judgments in proceedings brought in the county court under the Equality Act 2010.

Exceptional case funding for Employment Tribunal hearings

Key findings

- Between 2013/14 and 2017/18, 10 applications were made ECF but none were granted, suggesting that the scheme is not providing the safety net that it should be.

Evidence

A notable gap in support for people experiencing discrimination is that legal aid is not available to cover the cost of legal representation in the Employment Tribunal, where individuals represent themselves or pay privately for representation. Background support, such as helping with paperwork and preparation for the hearing, may be provided by a specialist provider but funding will not normally be granted for representation at a hearing.

Discrimination cases can be complex and individuals representing themselves frequently find themselves up against a barrister. Vulnerable individuals, such as those who are bringing a complaint of sexual harassment, find this particularly difficult as they must cross-examine the perpetrator themselves.

‘Asking people to run a sexual harassment case, when they are challenging evidence, assembling evidence, making legal argument, when in many cases they have no training to do that and they may not have the educational background or the language skills, they can be vulnerable in all sorts of ways that makes that incredibly daunting. They are often entering a very alien, very intimidating environment.’³⁷

³⁷[‘Make enforcement processes work better for employees’](#) [accessed: 14 June 2019].

— Michael Reed of the Free Representation Unit, giving evidence to the Women and Equalities Select Committee

Some service users described the difficulties of going to the Employment Tribunal without representation. They found the process stressful, overwhelming and that they were not on an equal footing with the other side.

‘They could not attend the Tribunal. This was the very reason I required their help as I was an emotional wreck and could not speak on my own.’

— Respondent to call for evidence on why they did not take their case further after contacting the Gateway

Specialist providers also noted that the prospect of not having representation at a hearing put many people off pursuing their cases.

‘What a waste of money to pay us to do all the work and then make the client go on their own. It’s ridiculous. So often you’d have a great case and the client just wouldn’t be able to manage it themselves or they’d settle for £500 on the morning because they couldn’t face it. It’s really wrong, and it’s such a nonsense to say, “Oh, well, it’s much easier than the court proceedings.” It’s not at all. You quite often have a barrister on the other side... Employment law is so complicated and fast-moving. It’s really frustrating for judges and the other party. Everyone’s done all this work to get it to this point, and you get there on the day and you’ve got a layperson who, with the best will in the world ... they’ve never done anything like that before. It’s just bonkers.’

—Specialist provider

This is supported by Acas research into what deters unrepresented people from pursuing a case at Tribunal. It found factors including a lack of confidence in a positive outcome, their emotional and mental health and wellbeing at the time, and the foreseen impact on their health and wellbeing as a result of going to the Tribunal.³⁸

Service providers we spoke to also reported that not having representation can discourage people from bringing a claim.

‘I think that they might give it a go but when it’s a more complex issue like even so much as submitting your ET1 [claim initiation form], sometimes that is quite overwhelming for clients so I think that they will then go, “Do you know what, I can’t take this any further, for me it’s too much time and it’s not

³⁸ Acas (2017), [Acas Early Conciliation decision-making](#) [accessed: 14 June 2019].

something I am capable of doing on my own” so I think that they do just drop it so it’s not... fair.’

—Employment law service provider

LASPO introduced the ‘exceptional case funding’ (ECF) scheme³⁹, to provide legal aid to people whose cases are not in scope but who still have a right to legal assistance under the Human Rights Act 1998 and/or EU law. Broadly speaking, ECF should be granted when, without legal aid, the legal process would not be fair or, the individual would not be able to present their case effectively. Government guidance sets out factors that should be taken into account when determining applications for ECF⁴⁰, such as how important the issues in the case are, and how complex the case is. In addition, all applications for ECF are subject to the same financial eligibility and ‘merits’ criteria as any other application for legal aid.

However, the evidence suggests that the scheme is not working as intended: between 2013/14 and 2017/18, only 10 ECF applications were made for discrimination cases, and none were granted.⁴¹

While we welcome the Government’s commitment in the LASPO Review to considering improvements to the ECF procedure, we are concerned that they do not address the central issue, which is that vulnerable people who are unable to represent themselves in complex Employment Tribunal cases are being deprived of access to justice.

We consider that this can only fully be addressed by bringing Employment Tribunal representation into scope for discrimination cases, subject to appropriate criteria regarding merits and complexity. Recognising that this is a long-term aspiration requiring changes to legislation, we recommend that, as an intermediate step, the ECF guidance should be amended to clarify how applications for funding in the Employment Tribunal should be approached.

Recommendations

The Government should amend the Lord Chancellor’s ECF guidance⁴² to:

³⁹ Section 10 of LASPO 2012.

⁴⁰ [Lord Chancellor’s Exceptional Funding Guidance \(Non-Inquests\)](#) [accessed: 13 June 2019].

⁴¹ [Legal aid statistics tables October to December 2018, MoJ](#) [accessed: 13 June 2019].

⁴² Ministry of Justice, [Lord Chancellor’s Exceptional Funding Guidance \(Non-Inquests\)](#) [accessed: 13 June 2019].

- Include a section setting out considerations relevant to an application for ECF for discrimination cases. These should include the legal and factual complexity of the case, the relative resources of the parties, and any factors that may hamper the person's ability to present their own case.
- Amend the section on employment cases to highlight the above factors when considering funding applications for employment cases involving discrimination.

Financial eligibility

Key findings

- The financial eligibility thresholds exclude people from accessing legal aid even though they cannot afford to pay their own legal costs.
- 14% of cases are closed as a result of service users failing to provide proof of financial eligibility.
- This may be because providing evidence of eligibility is complex and onerous, particularly for certain groups.

Evidence

To access civil legal aid, including in discrimination cases, applicants must show that they are financially eligible based on their income and assets. Evidence includes wage slips, bank statements, financial statements, insurance policies, tax forms, childcare receipts, maintenance payment receipts, and benefits statements such as housing benefit awards.⁴³

Applicants whose income and assets are below a certain threshold are eligible for legal aid. However, some may be required to pay towards their legal costs. In the context of this inquiry, contributions would only have to be paid towards representation funding, not the telephone advice and casework provided in most cases.

LASPO introduced changes to the financial test, including increasing the amounts that people must contribute towards their legal costs from their own income.

⁴³ Legal Aid Agency (2019), [Means assessment guidance](#) [accessed: 13 June 2019].

Regulations under LASPO also extended the capital means test to all applicants. Previously, people in receipt of means-tested benefits were automatically eligible for legal aid.⁴⁴

In our submission to the LASPO Review we expressed our concern that the means test prevents people on low incomes from accessing legal aid. Law Society research has shown that people on incomes already 10 to 30 per cent below the minimum income standard are excluded from legal aid.⁴⁵

We welcome the Government's commitment to reviewing the legal aid eligibility scheme by 2020.⁴⁶ It should include measures to expand eligibility and ensure that financial contributions towards legal costs are affordable.⁴⁷

We also point out the Supreme Court's judgment in *R (on the application of UNISON) v Lord Chancellor*, which underscored that financial eligibility must reflect the likely 'real world' effects.⁴⁸

Financial eligibility thresholds

A number of people we interviewed said that the financial eligibility thresholds are too low, and prevent too many people from accessing legal aid:

'When I first started to do Legal Aid in 1990, well over half of the people that came to us qualified for legal aid. And now, it is a tiny, tiny minority. You have to be on the lowest of benefits at the moment to qualify... When you think about access to justice for the poor and vulnerable, it just doesn't happen, does it?

—Specialist provider

'I don't earn enough in order to be able to afford a private solicitor yet legal aid judges me as financially ineligible for legal help. This system is very unfair on

⁴⁴ Ministry of Justice (2019), '[Post-implementation review of part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(LASPO\)](#)', paras 685-689 [accessed: 14 June 2019].

⁴⁵ Law Society (2018), '[Priced out of justice? Means testing legal aid and making ends meet](#)' [accessed 14 June 2019].

⁴⁶ Ministry of Justice (2019), '[Legal support: the way ahead](#)' [accessed: 14 June 2019].

⁴⁷ EHRC (2018), '[Submission to the post-implementation review of LASPO](#)' [accessed: 14 June 2019].

⁴⁸ *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51. The [case details and judgment](#) are available online [accessed: 14 June 2019].

us low income single individuals. Legal aid should change their disposable income rules’

—**Service user**

Research commissioned by the Law Society in 2018 found that the thresholds are set so low that, in some cases, people do not qualify for legal aid despite having an income well below the minimum amount required to meet key material needs and participate in society. The same research found that even some people living below the poverty line are excluded from legal aid.

Complexity of proving financial eligibility

A number of specialist providers commented on the difficulty of providing the required evidence:

‘The Legal Aid Agency expect you to explain an absolutely ridiculous level of detail about your client’s finances, even when they are [on] means-tested benefits [...] Then the Legal Aid Agency will start saying, ‘Well, what’s that £50 there? What is that £20 there?’ It’s backwards and forwards, and backwards and forwards, sometimes for weeks.’

—**Legal aid provider and respondent to call for evidence**

62% of advice agencies questioned said that the difficulty of providing evidence of financial eligibility might prevent someone from pursuing a discrimination claim through legal aid.

Specialist providers also noted that it can be difficult and time-consuming to assess whether someone qualifies for legal aid.

‘It’s not always a definitive answer of whether something is income or not. You have to often get further explanations and what have you. So, a lot of investigation [...] And then you’re not guaranteed that you’ve got the right answer anyway, just because you’ve assessed that that should be discounted or that should be included. It doesn’t always mean that somebody else is going to come to the same conclusion because it’s not always hard and fast answers.’

—**Specialist provider**

Those we interviewed highlighted the particular difficulties some individuals, including those who share certain protected characteristics, may face in demonstrating their financial eligibility:

‘A lot of our client group, so, a lot of people who face discrimination are on, say, zero-hours contracts, or they are in insecure employment, or they are on [...] a form of asylum support. So, their finances are messy. It’s not clear from the bank statements what is going on [...] One of the main barriers, I think, to getting legal aid, and it’s a particular problem with the Traveller community, for instance.’

—**Respondent to call for evidence**

‘I can say, with sort of a broad brush, that people who lead chaotic lives find it difficult to provide documentary evidence of their outgoings, and sometimes [...] income.’

—**Respondent to call for evidence**

Recommendations

In fulfilling its commitment to reviewing the legal aid financial eligibility requirements, the Government should:

- Ensure that the thresholds are set so that only those who can genuinely afford to pay for their own legal representation are excluded from legal aid. Any contributions people are required to make towards their legal costs should be set at a level that is genuinely affordable.
- Ensure the financial evidence requirements do not present barriers to legal aid providers or prevent individuals from securing the legal support to which they are entitled.
- As an interim measure, immediately reinstate the ‘passporting’ process, where people in receipt of certain benefits are automatically deemed eligible for legal aid. This can provide the basis for a pilot to support the upcoming review.

Awareness of legal aid

Key findings

- 66% of people responding to the English and Welsh Civil and Social Justice Survey who had experienced discrimination said they do not know how to seek legal redress for it. More than a third took no action about the discrimination they experienced.
- Of the 99 people who responded to our call for evidence, 59 said they did not get access to justice for the discrimination they suffered.
- Many advice service providers have limited awareness that legal aid is available for discrimination cases and how to get it.
- Some advice service providers do not make referrals to the Gateway because they lack confidence in the service provided.

Evidence

Discrimination cases can be complex and often involve wider, related issues that need to be understood before deciding whether discrimination has occurred. Many people find it difficult to do this without professional help. The English and Welsh Civil and Social Justice Survey results showed that 66% of people who faced a discrimination problem did not know how to seek legal redress.⁴⁹

Research for the Law Society and Legal Services Board looked at what action people took about legal issues they had experienced. It found that 36% of respondents who had experienced discrimination did nothing about it (compared to an average of 14% across the 29 different issue types).⁵⁰

⁴⁹ 'English and Welsh Civil and Social Justice Panel Survey: waves 1-2, 2010-2012', referenced in 'The impact of LASPO on routes to justice', EHRC 2018

⁵⁰ '[Online survey of individuals' handling of legal issues in England and Wales 2015](#)' Law Society and Legal Services Board [accessed: 14 June 2019].

Only 5% of respondents who had experienced discrimination sought the advice of a legal professional (compared to an average of 10%). 42% of the respondents who did nothing about a discrimination issue said that they did nothing because they thought nothing could be done.⁵¹

We spoke to 99 people who said they had experienced discrimination. When asked whether they had heard of the Gateway, 53 of the respondents said they had not. Overall, 59 of the 99 respondents said they did not get access to justice for the discrimination they suffered.

Specialist providers remarked on the lack of promotion of legal aid:

‘They don’t want people to know about the service because they don’t want people to exercise the right because it costs the Government money... it doesn’t have its own website anymore, you have to find it through .gov.uk...’

—**Specialist provider**

According to both external advice providers and specialist providers, the gov.uk website is not effective in promoting the availability of legal aid:

‘I worked at the Department of Health for maybe 30 years, well a number of government departments, and I find the website now absolutely...you know the... whole government portal website a minefield.’

—**Advice sector representative**

We also spoke to some organisations that provide support to people who have experienced discrimination. Fewer than half (40%) said they had a good knowledge of the services that the Gateway provides. By comparison, 86% said they had good knowledge of Citizens Advice, and 38% said they had good knowledge of the Equality Advisory and Support Service.

Some advice providers raised concerns about the quality of advice provided by specialist providers:

‘I’ve had a couple where I have encouraged clients to ring the Gateway, and the Gateway providers have said things like, “That’s not discrimination”, when it clearly has been.’

—**Discrimination lawyer**

⁵¹ [‘Online survey of individuals’ handling of legal issues in England and Wales 2015’](#) Law Society and Legal Services Board [accessed: 14 June 2019].

Others lack confidence in the service provided by the Gateway, which discouraged them from making their client aware of, or referring them to, the service.

One legal practitioner commented, 'I don't generally refer people to the Gateway. I tell them it exists. I tell them that they can approach them for advice, but I do explain that I have concerns about the quality of the advice that is being given.'

Because of their low confidence in the service, some agencies use their own funding to pursue discrimination cases, even if the victims were potentially eligible for legal aid.

Recommendations

In fulfilling its commitment to promoting awareness of legal aid, the Government should:

- Actively publicise the availability of legal aid for discrimination cases and the ways in which it can be accessed. This includes ensuring that information on Government websites about legal aid for discrimination cases is clear and easily located.
- Work with the advice sector to build awareness of the availability of legal aid for discrimination, the processes by which to access it, and to identify and address barriers to referral.
- Monitor the effectiveness of its work to promote awareness, adapting it where necessary to ensure maximum impact.

Annex 1 – Inquiry Terms of Reference

Notice of publication of terms of reference in accordance with paragraph 2 of schedule 2 to the Equality Act 2006

Statutory inquiry under section 16 and schedule 2 of the Equality Act 2006 into legal aid provision for victims of discrimination in England and Wales:

1. The inquiry will examine the extent to which legal aid provides effective access to justice for individuals who raise a complaint of discrimination in England and Wales.
2. It will examine:
 - a) how discrimination cases are funded by legal aid
 - b) how many individuals receive legal aid funding for discrimination claims, including representation or assistance with bringing a case in a court or tribunal, and how this compares with evidence of the number of individuals who seek advice about discrimination
 - c) whether there are barriers to effective access to legal aid
 - d) whether some individuals experience specific difficulties in accessing legal aid, for example language or literacy difficulties, or because of a protected characteristic
 - e) the operation of a mandatory telephone gateway as the access point for most discrimination advice, and
 - f) considering the above, whether legal aid provides effective access to justice for individuals who complain of discrimination, and whether improvements could be made to reduce barriers and improve access to justice.
3. The inquiry's focus is on the position in 2017-2018 but it may examine earlier evidence from 2010-2016 where relevant.
4. The inquiry will make recommendations as appropriate.
5. Interpretation:
 - a. **'Discrimination'** in this inquiry means conduct in breach of the Equality Act 2010, or a previous discrimination enactment as further set out at

schedule 1 paragraph 43 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), and a complaint, claim, or case of discrimination means a complaint, claim or case that alleges such a breach.

- b. **‘Legal aid provision for a victim of discrimination’** means civil legal services that can be provided under LASPO to an individual who complains of discrimination.
- c. The mandatory telephone gateway is called **Civil Legal Advice (CLA)**. In most cases, an individual seeking legal aid for a complaint of discrimination must contact CLA as the access point for legal aid.
- d. **‘Protected characteristic’** means the characteristics protected by the Equality Act 2010 (set out at section 4 of that Act), which are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

Contacts

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