

10 Years of the Commission: Scotland Legal Team's 10 Major Achievements



To mark the Equality and Human Rights Commission's 10th anniversary, the Scotland Legal Team have picked out '10 Major Achievements' to illustrate the range of legal powers at our disposal and the difference that the Commission can make to society.

In October 2007 the Equality and Human Rights Commission was formed, bringing together the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission. For ten years now the Commission has played an instrumental role in strengthening the framework of human rights and equality that exists in Scotland and across Britain. The Commission has taken on hundreds of legal cases – many of which have significantly improved the lives of people across the country.

1. Strengthening the law around human trafficking

The Commission has powers under s.16 of the Equality Act 2006 to conduct an inquiry and make recommendations into matters of human rights or equality

In 2010, the Commission undertook to inquire into the nature and extent of human trafficking in Scotland and in November 2011, the Commission published the findings and recommendations of its Inquiry.

The Inquiry focused on trafficking for the purposes of forced labour, domestic servitude and criminal exploitation, but more explicitly on commercial sexual exploitation, which Investigating Commissioner Baroness Helena Kennedy called ‘the most prevalent and pernicious manifestation of human enslavement’. The findings led to a series of ten recommendations aimed at those with responsibilities to prevent and tackle human trafficking in Scotland.

Work by the Scottish Government and key stakeholders following the inquiry led to the Human Trafficking and Exploitation (Scotland) Act 2015 which introduced a single offence for all kinds of trafficking for the first time, consolidating and strengthening existing law. The new offences of human trafficking and of slavery, servitude and forced or compulsory labour now have the maximum penalty of life imprisonment. The Act also gives courts new powers and measures to prevent and punish trafficking and provides clear rights to adult victims to access support and assistance.

2. Meeting healthcare needs in schools

Under s.28 of the Equality Act 2006 the Commission can provide assistance in legal proceedings which relate to equality law. This can include legal advice and representation for the Commission to act in-house or for solicitors to request legal funding

We supported a claim by the mother of a pupil in a primary school in North Lanarkshire Council. Julie Wyper had lodged a disability discrimination claim on behalf of her son Callum, after the teacher previously checking his blood sugar and administering his insulin injection refused to continue. He was accordingly unable to attend school from December 2012 until his mother arranged to attend to administer the injections whilst the Council sought a new volunteer.

The Tribunal looked at the new duty on education authorities to provide auxiliary aids and services and in particular considered what reasonable adjustments should be provided to help with pupils' health care needs. The Tribunal found that the Council had failed in their duty to make reasonable adjustments as they should have recruited an Additional Support Needs assistant in December 2012, rather than wait for a new volunteer who wasn't in place until March 2013. Referring extensively to the Commission's Guidance in relation to reasonable adjustments for disabled pupils, the Tribunal said that the Council had unlawfully discriminated for the period of Callum's absence from school.

The Council appealed the decision and the Commission again supported Ms Wyper. Following negotiations, the Appeal was withdrawn. We have since worked with the Scottish Government to update its schools guidance to reflect the duties under the Equality Act 2010.

3. Improving NHS provision for hearing impaired people

The Commission can use more than one of its powers to achieve greater impact. Under s.28 of the Act we have the power to provide assistance in legal proceedings as explained above. Under s.23 of the Act we have the ability to enter agreements with parties under which they undertake not to commit a specific unlawful act and to take, or refrain from taking, other specific action

In 2014 we raised a case, on behalf of Mrs Doering, a profoundly deaf woman, against NHS Tayside following Perth Royal Infirmary's failure to provide a BSL (British Sign Language) interpreter during her 7 day hospital stay, despite repeated requests. This meant that she had limited ability to understand what treatment was provided, to consent to treatment, participate in her care, to ask questions and let staff know when she was in pain. The case settled and Mrs Doering received compensation.

The Commission signed a formal agreement with NHS Tayside, under section 23 of the Equality Act 2006, to ensure all deaf patients have their communication needs met when accessing NHS Tayside's services. We worked with NHS Tayside for a period of two years while they implemented their Improvement Plan and submitted progress reports to us on a quarterly basis. This agreement ended in October 2016 and was successful in achieving positive changes within NHS Tayside.

It became clear that the problem was more widespread and that the experience of Mrs Doering was not an isolated incident and not confined to NHS Tayside. Therefore, we commenced nationwide research and are currently working with NHS Scotland to improve the experience of people with hearing impairments in all NHS boards.

4. Fighting associative pregnancy discrimination

The Commission provided legal assistance to Mr Kulikauskas in his employment tribunal claim against Macduff Shellfish. This case raised the interesting question of whether a man can bring a sex discrimination claim on

the basis that he has been treated less favourably due to his association with a pregnant woman.

The Commission represented Mr Kulikauskas in his claim that he had been discriminated against on the ground of his association with his partner who was pregnant. Andrius Kulikauskas and his partner Alisa Mihailova had been employed in the respondent's fish factory for nine days when a supervisor noticed that Mr Kulikauskas was doing Ms Mihailova's heavy lifting. Mr Kulikauskas alleged that he informed the supervisor that Ms Mihailova was pregnant and the supervisor gave the impression that she would be dismissed as a result. On the same day, Ms Mihailova and Mr Kulikauskas each received letters of dismissal and were told that their work was unsatisfactory.

Both brought unfair dismissal and sex discrimination claims, but the employment tribunal refused to accept Mr Kulikauskas' claim. The employment appeal tribunal upheld the tribunal's decision. The Commission continued to support Mr Kuliakauskus and the case was appealed further to the Court of Session, which decided that a reference would be made to the Court of Justice of the European Union on the question of whether it is unlawful to directly discriminate against a person on grounds of another person's pregnancy. The case was then settled out of court in the initial stages of the proceedings at the Court of Justice.

5. Improving access for women boxing in Scotland

The Commission entered into an agreement with Boxing Scotland to ensure fair access to their support for female boxers according to their level of experience and ability. Boxing Scotland committed to an improvement action plan, setting themselves targets to further increase participation and development of women in boxing in Scotland. We worked with Boxing Scotland who demonstrated improvement in the access for women boxers from junior level to performance level.

This work also led to a review of how Sportscotland can work more effectively to promote access and commitments made by both Sportscotland and the Scottish Government to progress equality in sports in Scotland.

6. Tackling potential breaches of patients' human rights

The Commission provides training for advisers working with individuals who may have suffered discrimination or a breach of their human rights. Training

events and wider stakeholder engagement allows us to get information and intelligence, for example about any patterns of systemic discrimination.

At one such training event, concerns were raised with us about a practice of unlawful short term mental health detentions which potentially breached patients' human rights. We examined the issue with stakeholders and established these concerns were shared more widely. We then worked with the Mental Welfare Commission who, as a result of our intervention, took steps which included issuing advice notes to NHS and social work services and making recommendations to the Mental Health Tribunal.

7. Confronting homophobic discrimination

If the Commission thinks that someone is likely to commit an unlawful act, under s.24 of the Equality Act 2006 we can apply for an interdict which prohibits the party from committing the act

This year the Commission reached a successful conclusion in its case against the owners of a bed and breakfast. We had received several complaints about the Cromasaig Bed and Breakfast website, which previously stated it is a 'heterosexual friendly bed and breakfast'. The website also contained a pictorial version of the statement 'man + woman = marriage'. The Commission was concerned that these statements were potentially discriminatory.

The Commission wrote to the owners asking them to remove these phrases from their website. The phrases were not removed and so we asked the Court for an order to require that the phrasing be removed.

The owners of Cromasaig Bed and Breakfast have now voluntarily removed the phrases and the Court action has therefore been halted. Although the case has concluded successfully, the case raises questions surrounding the continued prevalence of homophobic discrimination which exists in Scotland. Despite the recent Scottish social attitudes survey suggesting a sharp reduction in negative attitudes towards LGBT people.

8. Addressing poverty in kinship families

If the Commission thinks that an organisation has taken a decision or acted (or failed to act) in a way that is in breach of equality or human rights law we can, under s.30 of the Equality Act 2006, apply for a judicial review of whether the organisation has acted lawfully

In 2013, the Poverty Truth Commission contacted us with concerns about the number of kinship children and families living in, or at risk of, poverty. They asked us whether, using our legal powers, we could help address problems around the low levels of financial support provided to kinship families.

We started conducting pre-enforcement work by gathering evidence and making efforts to understand the situation. In four councils we found that looked after children in kinship care received around 60-70 per cent less money per week than those in foster care. We were concerned that this may have been a violation of Article 14 in conjunction with Article 8 and Article 1 of Protocol 1 of the European Convention of Human Rights.

We explained our concerns to COSLA and the Scottish Government and informed them we were minded to use our legal power to raise judicial proceedings in our own name against one or more of the Councils, challenging the lawfulness of their arrangements for providing financial support to looked after children in kinship care. In response, the Scottish Government agreed to take action to address our concerns. An additional £10.1 million is provided every year to increase kinship allowances to the same level as foster allowances and the Government is working on developing a longer term policy which will respond to changes in social security benefits.

9. Developing a new NHS protocol on gender reassignment

In 2010 the Commission wrote to the Cabinet Secretary for Health and Wellbeing to raise concerns about the Scottish Government's policy and guidance to Health Boards about the circumstances in which transsexual patients could receive gender reassignment treatments and surgery on the NHS potentially being in breach of equality and human rights law.

In response the Scottish Government agreed to develop a new NHS protocol on gender reassignment. The Government worked with the Commission during the development of the new protocol and the final version included most of the Commission's recommendations. The gender reassignment protocol introduced for the first time a consistent patient pathway for gender reassignment across Scotland, with the majority of procedures being included within Government waiting time guarantees and targets.

10. Protecting victims of domestic abuse

The Commission has the power under s.30 of the Equality Act 2006 to intervene in legal proceedings if they are relevant to a matter in connection with which the Commission has a function

The Commission has the statutory power to intervene in court proceedings in human rights and equality cases initiated by others. An intervention allows us to make expert submissions to assist the court. We used this power in the case of *A v SSHD* [2016] CSIH 38, an appeal, following a judicial review of the Secretary of State's decision to refuse Mrs A's application for Indefinite Leave to Remain (ILR). The case, essentially, dealt with the lack of immigration status and, consequently, lack of protection from domestic abuse and no recourse to public funds, for spouses of refugees who leave an abusive marriage.

It was argued, in the judicial review proceedings, that the Secretary of State discriminated, under articles 14 and 8 of the European Convention on Human Rights, against spouses of refugees by excluding them from the Destitute Domestic Violence Concession (DDVC), while spouses of British citizens and of persons settled in the UK were able to access the DDVC. It was further argued that the rule was indirectly discriminatory against women, on the basis that women are more likely to be the victims of domestic violence. The Lord Ordinary held that while discrimination had occurred, it was justified. The inner house overturned the decision of the Lord Ordinary and reduced the Secretary of State's decision to refuse Mrs A's application for ILR. As a result, pre-flight spouses of refugees who have separated from their abusive partners and are applying for settlement may rely on this judgment, while awaiting a formal amendment to the immigration rules.

These achievements provide a snapshot of the legal powers at the Commission's disposal, including taking on strategic discrimination cases in-house, bringing judicial review claims, providing funding for cases, intervening in cases and holding inquiries.

While it is valuable to reflect on the significant achievements of the Commission in just ten years, and the myriad ways in which our legal powers can be used to bring about positive changes, the fight for equality and human rights is far from over. We must also look ahead at the challenges facing people and the ways in which we can most effectively overcome them. The best way that we can do this is through utilizing our legal powers, and the only way we can do this is when we have cases to fight.

The Commission is always interested in hearing from solicitors, advocates and advisers who are bringing cases which the Commission may fund or in which we may intervene. As a first step, if you would like to speak with our legal team about a case or issue that you think we might be interested in, you can call us on: 0141 228 5951 (Monday to Friday).