Royal College of Nursing
The voice of nursing in the UK

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Equality Act 2010: Consultation on repeal of two enforcement provisions

Introduction

With a membership of over 400,000 registered nurses, midwives, health visitors, nursing students, health care assistants and nurse cadets, the Royal College of Nursing of the United Kingdom (RCN) is the voice of nursing across the UK and the largest professional union of nursing staff in the world. RCN members work in a variety of hospital and community settings in the NHS and the independent sector. The RCN promotes patient and nursing interests on a wide range of issues by working closely with the Government, the UK parliaments and other national and European political institutions, trade unions, professional bodies and voluntary organisations. The Royal College of Nursing welcomes the opportunity to respond to the consultation on the repeal of the two enforcement provisions.

Summary content

The RCN believes that the proposals to repeal the provisions of the Equality Act 2010 relating to the questionnaire procedure and the power of employment tribunals to make recommendations is flawed and therefore does not support the consultation proposal to repeal them.

Critically, we understand that none of these proposals deliver any significant public benefit. We are also of the view that in some cases, it is likely to cause confusion and misunderstanding which can be potentially costly and wasteful in terms of determining the merit of discrimination cases.

The Royal College of Nursing feels very strongly that the questionnaire procedure facilitates access to justice and enables both parties to assess whether a claim has merit. Critically, it also enables them to reach an early settlement where this is appropriate. We therefore urge the government not to repeal this valuable procedure.

Further, given the relative youth of employment tribunal's power to make recommendations, we believe that it is far too early to consider repealing this provision. We remain unconvinced by the arguments articulated in the consultation document and therefore do not wish this particular tribunal power to be repealed.

Detailed points

Questionnaire procedure (Equality Act 2010, section 138)

This particular procedure has been in place since 1975 in respect of sex and has been added when any further ground for discrimination has been prohibited. It is widely regarded as an extremely useful procedure to assist a potential applicant when deciding whether to bring a discrimination case or not. The original purpose of this provision was clearly set out in the Sex Discrimination Act 1975, section 74 and repeated in the Race Relations Act 1976, section 65 and briefly summarised below.

With a view to helping a person who considers they may have been discriminated against in contravention of the Act to decide whether to institute proceedings; the Secretary of State shall by order prescribe –

(a) Forms by which the person aggrieved may question the respondent on his reasons for doing any relevant act, or on any other matter which is or may be relevant

(b) Forms by which the respondent may if he so wishes reply to any questions.

Essentially, there were two original purposes for this procedure and the Royal College of Nursing believes that it is extremely important to keep a strong focus on them in responding to this consultation.

Firstly, the purpose was to see whether or not a person had a valid reason to believe that they had suffered discrimination. This is precisely why the section reads '*whether to institute proceedings*'. The consultation document does not appear to have focussed on this role. If there is no valid reason to commence proceedings the questionnaire procedure enables employers to make this entirely clear at a pre-litigation stage.

Secondly, if the person concerned did decide to commence proceedings, it enabled them to do so in the most effective way. This reduces costs in the long-run as only meritorious claims are brought to court. Therefore the appropriate use of the

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questionnaire procedure will reduce the circumstances in which financial resources are wasted both in the public and private sectors.

These two purposes advance the public interest in at least two ways:
If an employer (or other person questioned) was able to provide an explanation of the concerns of the person using the procedure, then no litigation would follow. Accordingly, any costs associated with litigation would not be incurred.

If the employer (or other person questioned) could not provide such an explanation then the litigation that followed would be carefully focussed and lead to less costly litigation (both in terms of the parties' expenses and tribunal costs).
In the absence of a questionnaire procedure, it seems likely that more speculative litigation proceedings will be initiated. It appears likely that the outcome of a case will rest heavily on the cross-examination of the key individuals against whom the allegation is made. However, if that person had been questioned through the questionnaire procedure in the first place, the need for and focus of such cross-examination would be proportionately reduced.

Naturally, if the reply to any such questionnaire did not provide an adequate explanation, then 'it will be more likely that the employer (or other person who was questioned) would settle any claim arising. The Royal College of Nursing regards this as a very beneficial outcome that would be lost if the questionnaire procedure was removed.

The Royal College of Nursing accepts that a by-product of this procedure may be to 'increase prehearing settlements and reduce employment tribunal loads'. The Royal College of Nursing considers that this demonstrates the usefulness of these procedures in settlement of cases which have no merit. This can only be in the public interest. There is no doubt that the questionnaire procedure has been successful in prompting earlier settlement of cases.

We understand the Government wishes to encourage early settlement of disputes in the discrimination field we support this objective. However, our fear is that if the questionnaire procedure is removed, then aggrieved employees and service users may be more inclined to bring unfounded cases or cases whose merit cannot be assessed at the outset.
Clearly the abolition of this procedure does not prevent an aggrieved person asking questions but without the questionnaire procedure no legal consequences follow from a failure to reply.

The consultation document appears to suggest that use of the ACAS conciliation service can provide an alternative way of gathering information. However, we do not see this as an appropriate function for the ACAS conciliation service to perform. We believe that this is more likely to dissuade individuals from going to conciliation as knowing the process could be used as a means to strengthen the case against them.

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This suggestion is therefore confused and likely to undermine the conciliation process.

Another important feature of the questionnaire process is its role in the assessment by employment tribunals of whether and when the burden of proof passes to the respondent. The importance of the answers to a questionnaire in determining whether or not the respondent has to provide proof that they did not discriminate; is set out in the key judicial guidelines in the case of Igen V Wong [2005] 3 ER 812. In that particular case the Court of Appeal set out the way in which an employment tribunal is required to assess whether or not the burden of proof passes to the respondent in a discrimination case. The guidelines clearly make reference to the questionnaire procedure.

As part of our response to this consultation process, we have reviewed the accompanying equality impact assessment regarding the proposed removal of the questionnaire procedure. It is in our opinion a flawed document which has partly relied on a survey conducted by the British Chamber of Commerce on micro-business in 2011. It is only in the recommendations section of the document (page 24) that a reference has been made to the adverse effect of the questionnaire procedure on small and medium sized businesses. This is not however supported by the data gathered as part of the wider survey in which the employers only showed concern on dismissal process, recruitment and flexible working procedures.

The Government has also relied on research prepared by the Government Equalities Office in 2009. However the research is "not published but available on request". The impact assessment also relies on anecdotal evidence to support employers' concerns having to respond to questionnaires relating to vexatious and unmeritorious claims.

Employment tribunal power to make recommendation (Equality Act 2010, section 124)

The power enabling employment tribunals to make 'an appropriate recommendation' to an employer as a possible remedy to a successful discrimination claim is a new power which was created in 2010. It applies to cases where the date of the action complained of took place after 1st October 2010. Given that this is a very new provision which has only been available for significantly less than two years, we feel that it is far too early for the Government to propose its repeal.

Further, we note that the provision is discretionary in nature and is intended to prevent further occurrences of discrimination within that employer's workforce. We are surprised that given the consultation document's own assertion that this provision appears not to have been widely used, that the government is of the view it is a burden to business.

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The power to make a recommendation is a discretionary remedy which the employment tribunal can decide whether it would be useful and appropriate to utilise given the circumstances of the particular case before them. It is therefore not routinely used in every single case.

In giving consideration to repealing this particular tribunal power, we urge the government to be aware of the inherent public interest involved through improving human resource management processes. A tribunal case is always heard by a panel of three who are likely to have considerable experience of human resource practice or by a highly-experienced judge. The RCN believes that it is within the domain of public interest that their expert insight into the shortcomings of human resource policies and processes of an organisation is put to good use.

Arguably, any prohibition of this power in cases where such intervention would improve efficiency seems to detract from the government's argument about placing an undue burden on business and therefore stifle economic growth and recovery.

The Royal College of Nursing believes that when a recommendation is made by tribunals it is to be expected that it will lead to better employment practice and prevent further cases of discrimination. In the short and long-term this has to be better for business. The Royal College of Nursing strongly urges the government to take the approach that a measure of prevention is far more valuable than attempting to remedy the problem after the event. We strongly recommend then, that this power is retained.

We trust that our response to this particular consultation is clear and we would welcome the opportunity to discuss our comments with you in further detail. Please contact , Head of Equality at for further informati vely telephone 0 3

Yours sincerely

Chief Executive and General Secretary

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