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## **Welsh Government consultation on draft objectives to advance equality and inclusion across Wales (2020-2024)**

**Response from the Employment Lawyers Association**

**18 November 2019**

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#### **Introduction**

The Employment Lawyers Association ('ELA') is an a-political group of approximately 6,000 UK employment law specialists, including in house employment lawyers, trade union lawyers and private practice lawyers who advise employers and employees, and represent clients in Courts and Employment Tribunals. ELA's volunteers do not lobby on behalf of third parties or comment on the political merits of proposed legislation. However, we are happy to offer legal and practical insight gained from our experience as employment lawyers. ELA has no role in regulating the conduct of employment lawyers. ELA's Legislative & Policy Committee includes Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A working party set up by ELA's Legislative and Policy Committee to respond to the Welsh Government's consultation. Members of the working party are listed at the end of this paper.

From an ELA perspective, we felt that it was appropriate to respond to questions 3 and 9 only. Our responses are set out below.

#### **Question 3**

*Are there any emerging trends, issues or evidence regarding inequality in Wales that you feel should be addressed as a priority?*

From an employment law perspective, a key emerging issue regarding inequality in Wales is in relation to access to justice and the increasingly stretched resources of the Employment Tribunals in Wales.

As of 7 June 2018, the overall increase in the workload of Wales Employment Tribunals remained in the order of 100-125% compared to the same period in 2017.

In the ELA paper completed on 13 June 2019 by Shantha David, UNISON Legal Services<sup>1</sup> ('the Report'), it was reported that, at the time of writing, over 77% of respondents said that final hearings were being listed over a year after the issue of a claim.

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<sup>1</sup> <https://www.elaweb.org.uk/resources/surveys/employment-tribunals-ela-survey-results-revealed>

It is possible that the delays in listing the matter for a hearing could be found to exacerbate mental ill health conditions such as anxiety, stress and depression. It is unclear as to the impact this may have on access to justice.

In the Report, it was also reported that 15% of respondents said that they had been involved in a case where a hearing was transferred to another tribunal centre significantly far from the original location.

The statistics on single jurisdictional claims across Wales from March 2018-2019 shows disability discrimination claims are consistently the most common, coming in highest each month over the 12 month period; whilst this is to be expected given (amongst other things) that this can and often does include claims for reason of dismissal for capability ill health, claims for sex discrimination (not including equal pay claims) were the second most common, coming second each month over the 12 month period. Suffering a detriment or unfair dismissal due to pregnancy was the third most common claim over the past year, coming third in 10 out of the 12 months considered.

The recent Commission on Justice in Wales report highlights the impact that has been caused by the reduction in the Ministry of Justice's budget; notably it referenced the "increasing number of people representing themselves in courts and tribunals with a consequential adverse impact on outcomes and the efficient use of court resources" and "advice deserts" where people struggle to receive legal advice.

This is being combated to some extent by pro-bono schemes; for example the ELIPS (Employment Tribunal Litigant in Person Scheme) where solicitors and barristers provide free advice and representation to litigants in person. The ELIPS clinics take place monthly in Cardiff Employment Tribunal however the scheme relies upon the good will and availability of the lawyers providing their assistance. Accordingly, there are frequently more unrepresented litigants than there are lawyers to support them. Should an Employment Judge wish to list a preliminary hearing for a particularly vulnerable litigant in person on an ELIPS day (in order to give them an opportunity to receive free legal support), there may be a lengthy wait for the hearing to be listed. Whilst this scheme undoubtedly helps unrepresented litigants navigate the legal system, it is a limited resource which means that the majority of cases will still proceed without legal support.

In order to combat the limited access to free legal advice, the Commission on Justice in Wales report suggests, amongst other things, that an independent board should be established to give strategic direction for funding both legal aid and third sector advice. Further, there should be an independent board to oversee developments in civil and administrative justice and to

promote greater coordination between the work of ombudsmen, those providing alternative forms of dispute resolution and courts and tribunals. Whilst the proposed equality objectives are laudable, they may have limited impact if individuals are unable to enforce their rights due to limited access to justice.

***Noticeable trends:***

1. **Mental health related sickness-** There is a worrying increase in mental health related sickness (some of which may be protected as a disability (but some will not<sup>2</sup>)). A lack of available support outside the workplace means that many people affected are unable to actively engage in work in the way that they would want to. Increasingly employers are carrying the burden of supporting employees who may not be well enough to be in work but cannot afford not to be (for example waiting months for counselling). The long-term impact of this creates inequality.
2. **Fathers and parental leave-** In common with the rest of the UK, Wales has failed to incentivise fathers to share maternity leave through Shared Parental Leave. Take up is very low (and where leave is taken it is generally for a short period only<sup>3</sup>). Separately, the incidences of flexible leave requests made by men for childcare related reasons are also low (and the burden of childcare continues to fall on women). The UK government is consulting about potentially significant changes to family leave (which, if introduced, would obviously also apply to Wales). There is an increasingly urgent need to shift the cultural norms on these issues.
3. **Ageing work force-** There is an increasing practical challenge for employers in managing an ageing work force. More employees need to stay in work longer but the instances of health issues increase with age. That can be difficult for employers to manage without support and it leads to inequality (and wider socio-economic issues). The UK government has recently consulted on proposals to reduce ill-health related job loss<sup>4</sup>. Whilst it is clear that some action will be required, the most effective action would involve some sort of financial support (particularly for smaller employers, who make up the significant part of the Welsh economy).

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<sup>2</sup> [https://www.cipd.co.uk/Images/mental-health-at-work-1\\_tcm18-10567.pdf](https://www.cipd.co.uk/Images/mental-health-at-work-1_tcm18-10567.pdf)

<sup>3</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/819041/good-work-family-support-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819041/good-work-family-support-consultation.pdf)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/815944/health-is-everyones-business-proposals-to-reduce-ill-health-related-job-loss.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815944/health-is-everyones-business-proposals-to-reduce-ill-health-related-job-loss.pdf)

4. **Worker status-** There remains an unacceptable level of confusion about employment status and the rights of workers across the UK (including in Wales). The UK government has consulted extensively on this issue and a response to that consultation is keenly anticipated. This issue has the most immediate impact on low-paid workers (of which there are a significant number in Wales) who often lack job security and access to benefits (e.g. sick pay) as a result. Tackling this issue is a necessary part of meeting Objective 1 and eliminating inequality caused by poverty.
5. **Interaction of protected characteristics-** Increasingly employers face a practical challenge managing the interaction between different protected characteristics and other related issues (e.g. inter-generational and inter-faith). That leads to inadvertent inequality which could be supported by investing in guidance to employers on managing these issues.
6. **Transparency in employment-** The regulatory framework is moving towards addressing equality by increasing levels of transparency (using gender pay gap reporting as a perceived success). The Welsh government should consider the extent to which greater workplace transparency (e.g. reporting on the number of flexible workers/age profile of the business etc) could be introduced in the public sector in Wales order to meet Objective 8.

#### **Question 9 - Any related issues which had not been specifically addressed?**

We have focussed on three issues:

##### **Access to advice**

Equality Objective 5 refers to ensuring victims of abuse, harassment, hate crime or bullying as a result of having one or more protected characteristic have 'access to advice and support to live without fear or abuse'.

However there is no reference to 'access to advice' anywhere else in the objectives.

In the past, Wales has been described as an 'advice desert' in respect of the availability of employment advice (*Snakes and Ladders: Advice and Support for Discrimination Cases in Wales, Williams et al, 2003*). In a 2015 roundtable the Equality and Human Rights Commission noted a key difficulty in accessing justice in Wales was being able to get relevant advice, in that people often do not know where to go for advice, participants confirmed that advice provision can be piecemeal in Wales. It is understood that this remains the case in 2019.

As well as initial advice, many people facing problems at work have no access to legal representation. In the past the Welsh Government has funded some case workers e.g. via Citizens Advice, but this has been a limited provision.

Welsh Government may wish to consider using funding to improve workers’ access to specialist employment advice as part of its objectives. Where legal protection is available, it is important that a worker has the ability and opportunity to challenge an employer should they breach the rights of a worker. This means that not only does the worker require access to advice but also the opportunity to enforce their rights at tribunal. Welsh Government may wish to consider providing targeted support to particularly vulnerable groups (e.g. migrant workers and low income workers).

**Gaps in evidence**

Chapter 4 discusses what is revealed by the equality evidence. It does not refer to the areas where evidence might be missing. For example, the absence of sufficient information in relation to some people sharing certain protected characteristics, and in relation to certain topics, as noted in the 2018 report, “Is Wales Fairer?” In relation to employment, it was highlighted that there was a lack of availability of nationally representative figures on the extent of unfair treatment, bullying and harassment in workplaces in Wales.

In relation to the workplace, the lack of equality evidence in certain aspects might impact on both policy development and the measurement of elements of objectives 5 and 8.

**Mental Health and Wellbeing**

There is no specific reference to mental health in the workplace. Mental health has long been recognised as an equality and diversity issue in Wales (e.g. “Is Wales Fairer?”, EHRC 2015). The 2018 “Is Wales Fairer?” report included reference to a review of mental health in the workplace which recommended all employers should adopt six ‘mental health core standards’ to lay basic foundations to improve workplace health (*Stevenson, D. and Farmer, P. (2017), ‘Thriving at work: the Stevenson/Farmer review of mental health and employers’*).

**ELA Working Party**

Felicia	Epstein	ATL	Co-chair
Lucy	Lewis	Lewis Silkin	
Daniela	Mahapatra	NHS Wales	Co-chair
Sammie	Morris	NHS Wales	
Rhydian	Reeves	Slater and Gordon	
Pauline	Roberts	Cardiff Law School	