

CRE Legal Strategy

The Advice Services Alliance's response to the
Commission for Racial Equality's consultation
paper

The Advice Services Alliance (ASA) welcomes the opportunity to respond to the CRE's consultation paper.

ASA was established in 1980, and is the umbrella organisation for independent advice services in the U.K. Our aims are to:

- champion the development of high quality information, advice and legal services
- ensure that people are not denied access to such services on account of lack of means, discrimination or other disadvantage
- encourage co-operation between organisations providing such services
- provide a forum for the discussion of issues of common interest or concern to advice organisation.

Full membership of ASA is open to national networks of independent advice services in the U.K. Current full members are:

- Advice UK (formerly Federation of Information and Advice Centres)
- Age Concern England
- Citizens Advice (formerly National Association of Citizens Advice Bureaux)
- Citizens Advice Scotland
- DIAL UK (the disability information and advice service)
- Law Centres Federation
- Scottish Association of Law Centres
- Shelter
- Shelter Cymru
- Youth Access

Our responses to the consultation questions are as follows:

Strategic Law Enforcement

1 Do you agree with the criteria for assistance under Section 66 of the Race Relations Act? Do you have views on what other criteria might be applied?

We accept that any organisation providing advice, assistance and representation has to have criteria for prioritising [and therefore rationing] the service they provide. We can understand the Commission's desire to move towards a more strategic approach. The 'expanded test' set out at p.12 of the consultation document appears reasonable, although we trust that it will not prevent the Commission from providing assistance to meritorious cases which do not meet the criteria. Our main concern relates to the alternative sources of advice, assistance and representation that will be available to applicants who are refused assistance by the Commission, the number of whom will presumably increase as a result of the implementation of the criteria.

2 **Should the Commission actively promote the alternative dispute resolution approach for non-strategic cases that are amenable to this approach?**

We are slightly unclear as to what is being proposed here. The consultation document states that the Commission, together with key stakeholders, 'propose to establish an alternative dispute resolution forum to determine disputes that are appropriate for referral to independent mediation and arbitration services with the consent of the parties.' [p.13] We are somewhat unclear as to the precise role of the proposed forum: whether it would essentially be a 'one-off' exercise to try to reach agreement on principles; or whether it would have a continuing role as a clearing house which would refer cases on to ADR providers. We assume that it would not itself provide ADR services. At this stage we are somewhat unclear as to how the proposed forum would relate to existing services, including those presently provided in the employment field by ACAS.

There are of course important differences between arbitration and mediation, and indeed conciliation as presently practised by ACAS.

We have doubts as to the extent to which arbitration is likely to be of assistance in discrimination cases.

We accept however that there are significant arguments in favour of mediation in some discrimination cases, and perhaps particularly in employment cases. We are inclined to agree with the suggestions made in the recent report on discrimination cases in employment in Wales that:

'mediation could be a valuable tool in the settlement process and may remove much of the anguish and conflict associated with the process of arbitration and adjudication.'¹

'Changes in workplace practices and better systems of internal grievance and mediation are fundamental. What is needed is specialist support to those serving in mediation roles to facilitate preventive action and speedy conciliation.'²

In general, it is our view that mediation can be a useful approach to dispute resolution, where both parties are willing to participate. The advantages are:

- It can encourage good communication skills
- It is private and confidential
- It can be much quicker, cheaper and less stressful than the legal process
- It can help maintain rather than damage an ongoing relationship between disputing parties
- The range of possible outcomes is much wider and more flexible than through litigation

The disadvantages are:

- It cannot set a legal precedent, nor can previous legal precedents be relied on

¹ Williams et al, Snakes and Ladders: Advice and Support for Discrimination Cases in Wales, 2003, p. 67

² Ibid, p. 96

- Because it is private and confidential, it does not publicise bad practice or encourage better practice in other related cases
- Compensation settlements may well be lower than in court or tribunal
- It can disadvantage an individual who is uncomfortable with direct negotiation, or who is less articulate and confident than the other party

Where such services are available, however, we believe that it is important that the individual concerned should have access to independent legal advice in order to help her/him make an informed decision about the most appropriate dispute resolution option in all the circumstances.

3 Do you think the proposed priority areas for formal investigations are appropriate? Would you propose others?

We do not have any views on this.

4 Should we give greater priority to the public duty than we do at present?

5 In allocating our resources should we prioritise enforcing the public duty over other areas?

We do not have specific views on these questions save for our concern as to the impact of the Commission's proposed strategy on the extent of advice, assistance and representation available to individuals who complain of discrimination. See our comments below.

Building Access And Expertise

6 How do you think we can assist individual complainants better?

We believe that there is a serious lack of assistance available to individual complainants nationally. The seriousness of the situation has been highlighted by the recent report on the position in Wales³. While the situation may be worse in Wales, we believe that there is also a serious problem in England. The lack of quality employment advice in the various regions in England has been highlighted by the various regional reports prepared by the Regional Legal Services Committees covering the English regions. We appreciate that discrimination cases do not just arise in the context of employment, but we note that employment complaints still constitute the majority of complaints to the Commission.⁴

However, we are not convinced that the solution should be considered in terms of racial discrimination alone, for a number of reasons, including:

- the similarities in the legal provisions concerning race, sex and disability discrimination
- the extent to which, in employment cases, discrimination cases also involve non-discrimination elements⁵

³ Ibid

⁴ CRE Annual Report 2002, p.25

⁵ The Wales study records that, out of 2,673 discrimination cases in two tribunal offices in 2001, 2,028 combined discrimination with non-discrimination elements. Snakes and Ladders, op cit p.34

- the government’s proposals for the creation of a single equality body with the aim of harmonising the equality legislation.

We believe that action on a national level is necessary in England and Wales in order to improve the provision of advice, assistance and representation in employment and discrimination cases, both at generalist and specialist levels. The suggestions made in the recent report on Wales could well be used as a basis for considering the action necessary in England. This would clearly involve action by the Commissions, the Legal Services Commission and others, supported by additional funding from central government. We believe that such action should be taken in relation to employment advice generally, discrimination advice in particular, and that it should also cover discrimination in relation to goods and services outside the employment sphere. It may be, as the Wales report suggests, that this will involve the establishment of Employment Advice Consortia on a regional or sub regional basis, with formalised constitutional links between major providers, and steered by a high level co-ordinating body.⁶

We would respectfully suggest that the Commission could take the lead by initiating discussions with the other major stakeholders, with a view to pursuing these options further.

7 Should we develop quality standards or an accreditation scheme for alternative providers of advice and assistance on racial discrimination claims?

As suggested above, we are not convinced that action is necessary in relation to race discrimination cases alone. We appreciate that some providers do specialise in this area, but we believe that they are already well known and doubt whether they need an additional promotional and marketing tool, as suggested by the consultation document [p.17].

We note that the Wales report suggests that the Law Society and/or Bar Council should give consideration to following the Scottish Law Society’s lead in providing for expert status accreditation based on peer review for employment discrimination work for solicitors⁷. It may be that an evaluation of the Scottish experience should be undertaken, in order to assess the usefulness of such an approach.

If consideration is to be given to such a scheme, we would suggest that accreditation based on peer review is likely to be preferable to a scheme which relies on self accreditation, accreditation obtained as a result of training received, or accreditation based on procedural requirements, as exemplified by the Quality Mark system developed by the Legal Services Commission.

8 How best can we assist employers and service providers?

We do not have any comments on this question, as it falls outside our [and our members’] remit.

⁶ Ibid, p.102, 103

⁷ Ibid, p.106

9 What are your views on how to provide an effective complainant aid referral service and support for complainant aid organisations?

It would appear to us that considerable resources will be necessary in order to improve the support needed by existing complainant aid organisations. We note the suggestion in the Wales report that many RECs are presently unable to fulfil this role, and that it may be appropriate to direct resources to particular RECs which can act as an expert resource to others.⁸ As indicated above, it is our view that national action is necessary in order to bring about a substantial improvement in the provision of advice, assistance and representation at all levels of discrimination law. We believe that such action is necessary before consideration can properly be given as to a referral service.

10 Should we establish a conciliation scheme or Ombudsman process for individuals who pursue a complaint against the CRE itself?

In principle we would support this suggestion, particularly since the proposed strategy will reduce the extent of assistance provided by the Commission to individual complainants.

Improving The Legal Process And The Legal Profession

11 Will the proposed arrangements for improving the legal process and the legal profession lead to more specialist discrimination advisers providing advice and assistance?

If the proposed arrangements were carried out on their own, we are not convinced that they would make a significant difference.

12 Do you think that the system for quality standards proposed for the legal profession would cause excessive bureaucracy?

We refer to our answer to question 7 above. Without knowing what exactly is proposed we find it somewhat difficult to comment on this question. If quality standards are adopted which are similar to the Quality Mark then this is likely to be the case. A system based on peer review might not have this result.

13 How do you think we might extend and improve the reach of current legislation and improve the processes and practices within the justice system generally?

We do not wish to comment on the reach of current legislation. We believe that a significant extension of services providing advice, assistance and representation is necessary in order to improve the processes and practices within the justice system generally, and that improvements in ADR provision might also be of considerable assistance.

⁸ Ibid, pp.65-66