



Response to Northern Ireland Law Commission consultation paper on vulnerable witnesses in civil proceedings

June 2010

Introduction

1. The Equality Commission for Northern Ireland ('The Equality Commission') is an independent public body established under the Northern Ireland Act 1998. The Equality Commission is responsible for implementing the legislation on age, fair employment and treatment, sex discrimination and equal pay, race relations, sexual orientation and disability. The Equality Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998, and the disability duties under the Disability Discrimination Act 1995.
2. In addition, the Equality Commission, along with the Northern Ireland Human Rights Commission, has been designated under the U.N. Convention on the Rights of Persons with Disabilities ('UN Disability Convention') as the independent mechanism tasked with promoting, protecting and monitoring implementation of the UN Disability Convention in Northern Ireland.
3. The Equality Commission welcomes the opportunity to respond to the Northern Ireland Law Commission's ('NILC') consultation on vulnerable witnesses in civil proceedings. In responding to this consultation, the Commission draws on its unique experience on advising and assisting complainants (including disabled claimants) in relation to proceedings under the anti-discrimination legislation in both courts and tribunals.

4. The Equality Commission, in responding, has concentrated on those questions relevant to its remit and experience. Its detailed responses to the specific questions that it has addressed are outlined below.

Comments

5. In general, the Equality Commission welcomes the stated aim of the NILC to provide a more co-ordinated, consistent and accessible legal regime for allowing witnesses to give evidence in civil proceedings otherwise than by oral evidence. In relation to the specific questions raised, the Commission responds as follows.

Eligibility for special measures

- **Parties and witnesses**

6. The Equality Commission agrees that all parties to civil proceedings and witnesses should be able to access special measures if they are eligible to do so. It agrees with the NILC that there is no justification for differentiating between parties to the proceedings and witnesses.

- **Children**

7. The Equality Commission agrees that child witnesses should be eligible for special measures. It agrees that children, because of their age and varying levels of maturity have particular needs whilst giving evidence in court. As highlighted in the consultation document, they may experience difficulty in understanding the legal proceedings and in communicating their evidence. They may also experience higher levels of stress as a result of giving evidence.
8. The Equality Commission is of the view that any special measures should be available to children under the age of 18. It will be noted that the UN Convention on the Rights of the Child ('UNCRC') defines a child as being below the age of 18 years, unless, under the law applicable to the child, majority is attained

earlier. The Commission agrees that limiting the definition of “child” to those of the age of 16 or 17, would have the effect of removing the protection for some young people who may be in need of those protections whilst giving their evidence in court.

9. The Commission further agrees that the Scottish approach of taking into account the best interests of the child witness, together with both the views of the child witness and his parent (or persons with parental responsibility for the child), when considering to grant special measures, is appropriate.
10. The NILC will note that a general principle underpinning the UNCRC is that the best interests of the child is a primary consideration when decisions are being made that affect children. Article 3 of the UNCRC specifically states that in all actions undertaken by ‘courts of law, administrative authorities and legislative bodies’, the best interests of the child must be a primary consideration.
11. In addition, the UNCRC makes it clear that children have a right to express views and have those views taken seriously. Article 12 of the UNCRC states that a child shall, in particular, be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

In summary, the Equality Commission recommends that courts and tribunals, when deciding on special measures, take into account the views of the child concerned, as far as they can be ascertained given the child’s age and level of understanding.

Disabled people

12. The NILC has sought views on whether people with a ‘mental disorder’ as defined by the mental health legislation and people living with significant impairment of intelligence and social functioning should be eligible for special measures. It also asks whether people with a physical disability or disorder should be eligible for special measures.

13. The NILC will be aware that under the Disability Discrimination Act 1995 ('DDA 1995'), courts and tribunals, as service providers and bodies which exercise public functions, are under a duty to make reasonable adjustments in relation to disabled people. This duty includes the duty to take reasonable steps to provide auxiliary aids or services, or change its policies, practices or procedures.
14. If the policies, practices and procedures of the court or tribunal as regards the giving of evidence, make it impossible or unreasonably difficult for a disabled person to give evidence, then the court or tribunal is under an obligation to take reasonable steps to ensure that practice or procedure no longer has that effect.
15. Requirements under the DDA 1995, apply to all people who meet the definition of disability within the DDA 1995. They must provide auxiliary aids or services if this would enable (or make it easier for) disabled people to make use of the services or facilities. Responsibilities relate to people who have a physical or mental impairment which has a substantial and long term adverse effect on a person's ability to carry out normal day-to-day activities. There is no longer a requirement that a mental health condition is "clinically well-recognised".
16. In deciding what is 'reasonable', a number of relevant factors need to be considered; including the type of service that is being provided, the nature of the service provider and its size and resources and the effects of the disability on the individual disabled person.
17. The Equality Commission is of the view that people with a mental or physical disability, including people with personality disorders or learning disabilities, who because of that disability find it impossible or unreasonably difficult to give evidence, should be eligible for protections to enable them to give their best evidence in civil proceedings.
18. A disabled person, due to their disability, may experience heightened stress and anxiety and may, for example, have

difficulty in understanding tribunal rules and procedures or communicating their evidence.

19. It is essential that courts and tribunals, when considering the nature and effect of a person's disability when deciding what special measures should be introduced, should take into account the needs of people with multiple disabilities; for example, a person may have both physical and mental disabilities that impact on their ability to give evidence.
20. Account should also be taken of the additional needs of disabled children, who due to a combination of the effects of their age and disability, require special measures when giving evidence in civil proceedings.
21. The NILC will be aware that on 8 July 2009, the UK Government ratified the UN Convention on the Rights of Persons with Disability ('UN Disability Convention'); the Optional Protocol to the Convention, which allows individuals to complain to the UN, being ratified on 7 September 2009 .
22. Article 13 of the UN Disability Convention indicates that state parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
23. The UN Disability Convention, therefore, specifically places an obligation on the UK Government to ensure that disabled people have effective access to justice and that 'accommodations' are made in order to facilitate their role as parties to the proceedings and as witnesses. It is also clear that these obligations apply to 'all legal proceedings'; i.e. both civil and criminal proceedings.

Additional factors- sexual orientation

24. The NILC has asked whether there are additional factors that the court must take into account when considering whether an adult witness is eligible for special measures on the basis of fear and distress. The Equality Commission notes that the Scottish model adopted for witnesses in civil proceedings, contains the additional factor of a witness's sexual orientation, if that is considered relevant by the court.
25. The Equality Commission recommends that a witness's (or a party to the proceedings) sexual orientation is taken into account, where it is relevant.
26. As indicated in the consultation document, special measures can include giving evidence in private, or giving the court power to restrict the press from reporting details of a case. The NILC is also considering the need for additional measures in relation to witness anonymity. In the Equality Commission's view, for the reasons set out below, in certain circumstances, it may be appropriate, due to the sexual orientation of the witness (or party), to avail of these types of special measures.
27. We enclose for your attention a copy of the Northern Ireland Court of Appeal decision in *JR5 v Department of Agriculture and Rural Development* delivered on the 30 May 2007¹. The case in question was brought by a male-to-female transsexual who alleged discrimination contrary to the Sex Discrimination Order (Northern Ireland) 1976. The applicant alleged that she was unable to proceed with the complaint without protection from publicity, as she was fearful that it could lead to intimidation and physical attacks on her and her home.
28. The question for the Court concerned the Industrial Tribunal's power to make an Order to delete the names of the Claimant and the Respondent from the public register. The NILC will note that at paragraph 22, the Court states as follows:-

¹ [2007] NICA 19, available at <http://www.bailii.org/nie/cases/NICA/2007/19.html>

“Member States are required by the Directive² to ensure that procedures for the enforcement of obligations under the Directive are available to all persons who consider themselves wronged by failure to apply the principles of equal treatment to them. If it is established by the evidence that the appellant will be unable to enforce an obligation because of the risk to her physical safety, unless the procedure can afford her sufficient protection as to allow her to do so, the obligation under the Directive will not be met. In our view, without any distortion to its meaning, rule 59 can be read so as to permit a tribunal to make an Order that it is in such terms as may be necessary to omit from the register or to delete from it any material likely to lead any member of the public to identify her as the claimant.”

29. The Court also added that where it is decided that the power should be exercised, this should be limited to the extent necessary to omit anything likely to lead any member of the public to identify the particular claimant.
30. The NILC will be aware that under rule 59 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005, a tribunal has a wide discretionary power to regulate its own procedures. As highlighted in the extract above, the NI Court of Appeal were of the view that this rule permitted a tribunal to make a register deletion order, in such terms as were necessary, in order to prevent members of the public identifying the claimant.
31. In the Equality Commission’s response to the Department for Employment and Learning’s consultation on resolving workplace disputes, the Commission recommended that there is an express power for tribunals to make a register deletion Order, a restricted reporting Order and/or a restricted attendance Order in circumstances where the applicant would otherwise be deterred from proceeding with his or her case.³

² Equal Treatment Directive (Directive 2002/73/EC)

³ Response available at www.equalityni.org.

32. The Equality Commission is of the view that this power should not be restricted solely to circumstances where the individual's 'physical safety' is at risk; as individuals can be subjected to non-physical abuse, including ostracisation, if, for example, their sexual orientation is disclosed as a result of bringing proceedings.
33. The Department for Employment and Learning, in its response to the consultation, has confirmed that it is of the view that it would be helpful to expressly empower tribunals to make discretionary orders to restrict publicity in sensitive cases and propose to take forward legislation to this effect.⁴
34. Independent research commissioned by the Equality Commission and the Equality Authority, highlights that a key barrier to lesbian, gay and bisexual individuals in taking a tribunal case is that anonymity cannot be secured.⁵ The report stressed that "LGB individuals in organisations consistently flagged anonymity as a crucial factor in decisions to pursue cases". It also highlighted that a decision to seek redress involved "outing" oneself in the immediate context where discrimination was encountered and that many individuals were reluctant to take that step.
35. The Equality Commission is of the view that there may also be circumstances in which *witnesses* are reluctant to give evidence in civil proceedings if, as a result, they are "outed" to family, friends, potential employers, etc. As a result of their sexual orientation being disclosed, the witnesses may be of the view that their physical safety is at risk or that they can be subjected to non-physical abuse.
36. In summary, the Equality Commission recommends that courts and tribunals, when considering whether an adult witness is eligible for special measures on the basis of fear and distress, take into account the additional factor of a person's sexual

⁴ *Disputes in the workplace: a systems review, policy response, Dept for Employment and Learning*, www.delni.gov.uk.

⁵ *Enabling Lesbian, Gay and Bisexual Individuals to Access their Rights under Equality Law*, J Walsh, C Conlon, B Fitzpatrick, and U Hansen, commissioned by the Equality Commission and the Equality Authority, November 2007, available at [http://www.equalityni.org/archive/pdf/RESKM050603SOFINAL200308\(1\).pdf](http://www.equalityni.org/archive/pdf/RESKM050603SOFINAL200308(1).pdf)

orientation, where relevant; in particular, in circumstances where the witness is of view that, as a result of appearing as a witness, his/her sexual orientation may be disclosed to the wider public and as a consequence of this, s/he will be subject to physical or other abuse.

37. Special measures available in such circumstances could include, for example, the giving of evidence in private, giving the court the power to put reporting restrictions in place or ensuring witness anonymity.

Types of special measures

38. The NILC has sought views on the types of special measures which could be made available to certain groups of witnesses in civil proceedings.
39. In general, the Equality Commission supports the broad range of special measures proposed by the NILC. The Commission notes that one of the special measures proposed is the removal of wigs and gowns by the judge and legal representatives during the giving of a witness's evidence in order to reduce the formality of the proceedings and to put the witness at greater ease.
40. It is of note that recent research into the experiences of tribunal users in Northern Ireland has highlighted that the formality of the hearing was found to be "off putting" for appellants/claimants/respondents.⁶ The report indicated that Industrial Tribunals and the Fair Employment Tribunal, as well as the Special Educational Needs and Disability Tribunal ('SENDIST'), were most likely to be viewed as more formal than was anticipated, even for those with professional experience of court proceedings and representation.
41. It also confirmed that formality could be a problem for all tribunal users, and contribute to their feelings of alienation from the proceedings.

⁶ *Redressing users' disadvantage proposals for tribunal reform in Northern Ireland*, Grainne McKeever, Brian Thompson, Law Centre (NI), June 2010, www.lawcentreni.org

42. In relation to the Commission's experience of the operation of the SENDIST, as regards to advising disabled children with disability discrimination complaints, the Commission has concerns about the physical arrangements made at SENDIST's hearings. In particular applicants supported by the Commission have found that arrangements at the SENDIST hearing (for example, room lay-out) have contributed to increased stress when giving evidence in relation to their complaint.
43. In addition, the research into the experiences of users of the tribunal system in Northern Ireland has noted that SENDIST's appellants felt that the "process of the hearing meant that there was a lack of focus on the child, from both the tribunal and the board, which left appellants feeling that the child gets lost in the process".
44. It is of note that the research also recommended that the tribunal environment "should be user friendly and appropriate to the hearing of the dispute, and users should be consulted on what may be considered to be user friendly tribunal accommodation".
45. In summary, in addition to the specific special measure of removing wigs and gowns, the Equality Commission recommends that court and tribunals should have a power to make a range of other special measures designed to reduce the formality of the proceedings and to put the witnesses (and parties) at ease.
46. In addition to ensuring the availability of special measures for vulnerable witnesses, the Equality Commission recommends that steps are taken by tribunals to reduce levels of fear and stress associated with either giving evidence or seeking redress at a tribunal. This could be done, for example, by the provision of additional information on what users can expect in terms of the tribunal procedure and to explain processes and terminology.
47. Finally, the Commission also agrees with the proposal that there is merit in including the use of supporters as another special measure for eligible witnesses in civil proceedings. This would

allow “supporters” to attend court with the vulnerable witness in order to lend support. We note that the use of supporters is a feature of criminal proceedings in Northern Ireland with support being provided by a range of organisations including Victim Support Northern Ireland or the National Society for the Prevention of Cruelty to Children.

Additional issues

Training for judiciary, etc.

48. The Equality Commission also recommends that specific guidance and training is given to judges, tribunal chairpersons and members, and other relevant court personnel in order to ensure that they understand the needs of vulnerable witnesses, including disabled people and children.
49. It will be noted that the UN Disability Convention in Article 13 states that “in order to help to ensure effective access to justice for persons with disabilities, state parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.
50. The need for training for tribunal members covering generic judge-craft and jurisdiction specific knowledge and skills was also recommended in the recent research report on the experiences of tribunal users. It is of note that the research report highlighted that there appeared to be a limited training focus on diversity and equality issues, with most training being either based on legal developments or generic judge-craft skills.

Research

51. The Equality Commission notes that the research into users’ experiences of the tribunal system clearly indicated that there was a considerable body of further research needed to better understand users’ experience; such research to include establishing the extent to which tribunal hearings are accessible,

enabling and participatory. In the Commission's view it is essential that research is carried out on the degree to which special measures introduced for vulnerable witnesses are effective in meeting the needs of those witnesses.