

Impact Assessment of removing the provisions in the Equality Act 2010 which give employment tribunals the power to make wider recommendations

Title: Review of the need for employment tribunals to have the power to make wider recommendations IA No: GEO 1032 Lead department or agency: Home Office (Government Equalities Office)	Impact Assessment (IA)		
	Date: 16 August 2012		
	Stage: FINAL		
	Source of intervention: Domestic		
	Type of measure: Primary legislation		
Contact for enquiries: Jay Begum 020 7035 8115			

Summary: Intervention and Options

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£0.1m	£0.0m	£0.0m	Yes OUT

What is the problem under consideration? Why is government intervention necessary?

Under previous discrimination law, where a discrimination claim was successful, an employment tribunal had the power to make recommendations to the employer concerned. This was with a view to preventing or reducing the adverse effect on the claimant of the discriminatory treatment he/she had been subjected to. The Equality Act 2010 ("the 2010 Act") extended this power so that employment tribunals could make such recommendations for the benefit of the employer's wider workforce, not just the individual claimant. We refer to these as "wider recommendations". We understand that employers continue to have fears about inappropriate or excessive recommendations although we are only aware of a handful of such recommendations (in 4 employment tribunal cases) since this provision came into force in October 2010. Given that many employers will make changes following a tribunal anyway, and because recommendations are non-binding, we feel that these provisions are not having a significant impact on employer behaviour.

What are the policy objectives and the intended effects?

The policy objective is to reduce any regulatory burden on employers that the power of employment tribunals to make wider recommendations may impose. The intended effect, in line with the outcome of the consultation, which shows that this power has not been used as often as anticipated, is to repeal this power, so as to ensure that it does not become an unnecessary burden on business. The power to make recommendations relating to individual claimants will however remain.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 1 – **Do nothing.** Keep the power of employment tribunals to make wider recommendations in force
 Option 2 – **Repeal the provisions in the Equality Act which empower employment tribunals to make wider recommendations** (preferred option).

Option 2 is the preferred option as this will achieve the policy objective of reducing any potential unnecessary burdens on employers. We have consulted on this, and there was only anecdotal evidence about the extent to which this power is being used and the extent to which it deters employers from subsequently breaching the equality rights of other employees.

Will the policy be reviewed? It will not be reviewed. If applicable, set review date: N/A

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: N/A		Non-traded: N/A

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

[signed copy held by GEO] Date: August 2012

Summary: Analysis & Evidence

Policy Option 2

Description: Repeal the provisions in the Equality Act which empower employment tribunals to make wider recommendations

FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 0.5	Best Estimate: 0.3

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	0	0
High	N/A	0.02	0.2
Best Estimate	0	0.01	0.1

Description and scale of key monetised costs by 'main affected groups'

Wider recommendations leading to changes in employer practices and policies may have helped prevent future discrimination cases, a cost to repealing these provisions is a possible rise in future cases. The estimated annual cost of 0-1 (5% of 0-17 wider recommendations made per annum – see Evidence Base for more detail) employment cases being brought because wider recommendations were not made is £0-0.02million, including £0-0.01million to private and voluntary sector employers.

Other key non-monetised costs by 'main affected groups'

There would not be any significant familiarisation costs associated with repeal. Employers currently only need to know wider recommendations can be made in the event of a successful claim against them and therefore in the event of repeal, employers would simply need to know that this is no longer the case. It was assumed that wider recommendations would increase compliance and lead to changes to discriminatory policies and practices, potentially preventing future cases. If the provisions are repealed it could lead to continuing instances of workplace discrimination, and other non-financial negative effects of disputes to both employers and individuals. Any increase in instances of workplace discrimination could have indirect costs for employers.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	0	0
High	N/A	0.08	0.70
Best Estimate	0	0.02	0.20

Description and scale of key monetised benefits by 'main affected groups'

The annual benefit of employers no longer receiving wider recommendations in an estimated 0-3% of all successful discrimination cases at hearing (0-17 cases) is £0-0.08million, including £0-0.01m to private and voluntary sector employers.

We have represented the benefits of repeal based on a low estimate of zero cases per year and a high estimate of 17 cases per year (based on assumptions used in the Equality Act 2010 Impact Assessment. Our best estimate reflects 4 cases per year, because we are aware of 4 cases being brought since the wider recommendations power came into effect in October 2010. (See evidence base).

The high estimate for benefits arising through removing wider recommendations is indicative of scale only.

Other key non-monetised benefits by 'main affected groups'

Repeal of the provisions would reduce employers' concerns that wider recommendations could be inappropriate or excessive.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
<ul style="list-style-type: none"> The average annual number of discrimination jurisdiction employment tribunal cases accepted (excl. equal pay) is 21,800 per annum. 2.5% (or 550 cases) are on average successful at tribunal per annum. A high estimate of the likelihood of recommendations being made in successful cases is 3%, or 17 cases per annum. However, the best estimate is 4 cases per year, as we are aware of 4 cases in the previous year. 5% of employers have discrimination cases brought against them on the back of other claims. This indicates that 0-17 recommendations per annum would possibly prevent 0-1 cases each year being brought. 10% of wider recommendations would require staff within an organisation to undergo training. There will be no significant transitional costs as an impact of this policy. 		

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:	In scope of OIOO?	Measure qualifies as
Costs: 0.0	Yes	OUT
Benefits: 0.0		
Net: 0.0		

Direct Costs and Benefits to Business (One-in, One-out)

For the purposes of One-In-One-Out scoring we calculate the direct costs and benefits to business and voluntary sector organisations as a result of this proposal in 2009 prices. The figures here are deflated using HM Treasury GDP deflator series.¹

The best estimate of the Equivalent Annual Cost² to business and the voluntary sector of the preferred option is less than £10,000 in 2009 prices, which we round to £0.0m, and this measure is therefore considered to be an OUT.

¹ Consistent with series last updated 25 October 2011

² Equivalent Annual calculations use formula: $NPV / [1 - 1 / (1 + r)^n]$ for 10 year time period, where r is the standard social time preference discount factor (3.5%)

Evidence Base (for summary sheets)

Introduction

Under previous discrimination law, where discrimination claims were successful, employment tribunals had powers to make recommendations to the employer concerned to take specific actions to prevent or reduce the adverse effect on the claimant of the discriminatory treatment he or she had been subjected to. In cases where the employment tribunals made recommendations, as many as 72% of claimants in discrimination cases were no longer working for the respondent by the time of a hearing, so in those cases, such recommendations had no effect³. It was estimated that recommendations would be made in about 1-3% of successful discrimination cases.

The Equality Act 2010 extended the power of employment tribunals to make recommendations in discrimination cases so that they could benefit the employer's wider workforce, as well as the individual claimant. This was done to ensure that the employer's wider workforce would be in a position to benefit when an individual claimant is successful in bringing a discrimination case, and the employment tribunal makes an appropriate recommendation. An appropriate recommendation is one that requires the employer to take particular action which would reduce or eliminate the discriminatory conduct which the tribunal ruled unlawful, regardless of whether the individual claimant is still employed by that employer.

Previously, employment tribunals had been able to make recommendations, in discrimination cases where the claimant was successful, that the employer should take specific action in relation to the successful claimant. Such action might include, for example, introducing a phased-in return to work for an applicant who may have been on sick leave as a result of a long campaign of bullying and harassment. It was hoped that a wider recommendation in such a case could include for example, the company introducing a harassment policy and referring to guidance or taking advice (e.g. from the Equality and Human Rights Commission) when doing so.

Wider recommendations are not compulsory. However, if the employer fails to comply with a wider recommendation, it is open to the tribunal, should a similar case subsequently occur involving the same employer, to take that failure into account in coming to its judgement.

It was envisaged that there was scope to reduce the incidence of repeat offending as the wider recommendations would also help employers to take the necessary steps to avoid future discrimination claims being brought against them.

The introduction of these provisions was never expected to result in a significant increase in the use of the power to make recommendations; In the Equality Act 2010 impact assessment, this was estimated at around 3-5% of successful discrimination cases.⁴

Problem under consideration and rationale for intervention

It was originally considered that the power to make wider recommendations would be a 'light touch' tool to help employers learn from their mistakes and take the necessary steps to avoid discrimination claims being brought against them in the future. The Survey of Employment Tribunal Applications 2008 suggests that as many as 5% of employers who have discrimination claims brought against them, have subsequent claims brought on the back of the first claim. Wider recommendations could help such employers and limit their exposure to further claims in this regard, whilst suggesting beneficial change for their workplace and employment practices.

However, responses from business representatives to the *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (June 2007)⁵ in relation to the issue of extending the power of employment tribunals to make wider recommendations indicated employer fears of excessive or inappropriate recommendations.

³ Survey of Employment Tribunal Applications, 2008 – where discrimination was the primary jurisdiction

⁴ Annex J, Equality Act Impact Assessment, Final Version (Royal Assent), April 2010; <http://www.equalities.gov.uk/pdf/Equality%20Act%20Impact.pdf>

⁵ <http://webarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/PDF/DLRCconsultation.pdf>

We are also aware that findings of discrimination can trigger changes to employer policies and practices without any employment tribunal recommendations, perhaps highlighting that employers do learn from the process without the need for explicit recommendations made by a tribunal. For example, see the findings from the Survey of Employment Tribunal Applications 2008 in the table below. This shows the fraction of all employers who experienced a discrimination case who made specific changes. 54% of all employers who faced a case made at least one change.

Changes made by employer as a result of a discrimination case (without recommendations)	Percent of employers making change
Introduce/review formal disciplinary and grievance policies	16%
make sure procedures are followed	46%
Revise terms and conditions in employee's contracts	13%
Take insurance out against further claims	6%
Join an employers association for legal services	4%
Seek professional advice prior to taking disciplinary action	19%
Made at least one change	54%

Source: SETA 2008

We are aware of 4 cases in which wider recommendations have been made by employment tribunals since the power came into force in October 2010. There is therefore very little evidence to show that the extended power is necessary or that it is an appropriate or effective remedy. We have consulted on this and we have not received any empirical evidence that our assumptions about the use of the power are unfounded.

Policy objective

The policy objective is to reduce any potentially unnecessary regulatory burdens that the power of employment tribunals to make wider recommendations may impose on business.

Description of policy options

Option 1 – **Do nothing**. By leaving the power in force, this could leave the Government open to criticism for implementing ineffective or disproportionate legislative measures, thereby imposing unnecessary potential regulatory burdens on businesses.

Option 2 – **Remove the provision entirely**. This is our preferred option as there is very little evidence that the power to make wider recommendations is an appropriate or effective legal remedy. We are unaware that any such recommendations have been made since the commencement of the Equality Act in October 2010. We consider that by removing these provisions we will reduce unnecessary burdens on business without affecting the other legal remedies currently available (for example, where a claimant wins his/her case, the tribunal will still be able to make claimant-specific recommendations; and to order compensation to be paid). Employment tribunals could still make claimant-specific recommendations, such as training for managers, which would also clearly be of value to the wider workforce, where the claimant continues to be employed by the respondent. Furthermore, it will still be open to employers to seek advice on their practices and policies from organisations such as Acas. To this extent, this constitutes an alternative non-legislative remedy to the problem of employers failing to learn from discrimination cases they have lost.

We are not aware of further viable alternative non-legislative remedies at this time. The consultation we carried out on this did not reveal any further remedies. However, the Government is aware that there is a lack of awareness about equality law. In order to address this problem, the Government intends to engage with business through industry-led national programmes to enable Ministers to promote a better

understanding of the regulatory intent of the 2010 Act. This initiative will be underpinned by government developed support and guidance in business-friendly formats to promote non-legislative approaches.

Micro business and start-up exemption

It is intended to repeal the wider recommendations provisions for all enterprises, including micros and start-ups. For all employers to benefit from the removal of this provision, all enterprises will be covered by this proposal.

Costs and benefits

Note: Throughout this Impact Assessment all prices have been inflated to 2012 prices using HM Treasury GDP Deflator Series last updated 25 October 2011 unless stated otherwise

Option 1 – Do nothing

In this Impact Assessment, the costs and benefits of doing nothing are those which would be incurred were the provisions to remain in force, and the baseline against which the impact of other options are assessed. The Equality Act Impact Assessment, April 2010 assessed the impact of widening the powers of tribunals so that they can make recommendations that benefit the wider workforce before commencement. The estimated costs and benefits associated with the wider recommendations provisions have been reassessed here.

Number of recommendations per annum

The Equality Act 2010 Impact Assessment suggested that under the new power 3-5% of successful discrimination cases would lead to wider recommendations.

The estimate of the number of discrimination cases expected at employment tribunal per annum is 21,800.⁶ Over the same period, an average of 2.5% or 550 discrimination cases were successful at hearing.⁷ We are aware of only 4 cases where the power to make wider recommendations has been used since it was implemented in October 2010. Given the very low number of claims, the lowest estimate of recommendations per annum is zero. A high estimate of the number of discrimination cases where recommendations are made is 3%, or 17 per annum, in line with the lower estimate when the measure was commenced in the Equality Act. The high estimate of 3% (17 per annum) simply gives an indication of the potential benefits and costs should any wider recommendations be made. On the basis of the number of claims made in the past year, we must consider our best estimate to be 4 wider recommendations made per year.

Table 1 – Breakdown of recommendations by sector of employer, per annum

	Percentage of Cases ⁸	Estimated Number of Cases with Wider Recommendations		
		Low	High	Best Estimate
Private Sector	52%	0	9	2
Public Sector	36%	0	6	1
Voluntary Sector	12%	0	2	0
Total	100%	0	17	4

Source: SETA 2008, GEO estimates. Figures may not sum due to rounding (unrounded figures are used in cost calculations).

⁶ Average over the last 3 years, adjusted by a factor of 1.72 to account for number of jurisdiction claims per case; Employment Tribunal Annual Statistics (GB), 2008/09-2010/11

⁷ 2.54% x 21,798 = 554

⁸ Where discrimination is the primary jurisdiction, Survey of Employment Tribunal Applications 2008

Impact of wider recommendations

As stated in the Equality Act Impact Assessment, one of the principal policy objectives of allowing tribunals to make wider recommendations was “to improve compliance with the law and help respondents to avoid future claims, thereby reducing the number of employment tribunal cases.” The original Impact Assessment assumed that 25-35% of employers receiving wider recommendations were possible re-offenders, and that in 50% of such instances, a case would be avoided.

The Survey of Employment Tribunal Applications 2008 provides evidence on the non-financial negative effects incurred by an employer after a discrimination claim. Of those employers who identified such effects, 5% stated that another claim was brought on the back of the original discrimination case.⁹ This is considered to be a reasonable estimate of the likelihood that wider recommendations would avoid future offences. We are also assuming here that all recommendations would be complied with, in line with Better Regulation Executive guidance that 100% compliance should be assumed without evidence to the contrary. Therefore, we estimate that 0-1 (5% of 0-17) cases would be avoided as a result of recommendations being made.

Cost of wider recommendations

The Explanatory Notes to the Equality Act 2010 (paragraph 406) anticipated that wider recommendations might involve, for example, recommending that the employer should:

- introduce an equal opportunities policy;
- re-train staff; and,
- make public the selection criteria used for transfer or promotion of staff.

As there have been very few wider recommendations made, it is not known what they would typically involve. However, we use the assumptions previously made in the Impact Assessment for the Equality Act given that the 4 cases that we are now aware of do not contradict these assumptions. Every single one of these cases included wider recommendations that managers should undergo appropriate diversity training.

Respondents to the recommendation, typically corporate managers, would take on average two days (14 hours) to undergo training or implement changes. It is possible that employers would need to retrain all staff. For this requirement, we have assumed that 10% of recommendations would require all staff to undergo a day of relevant training. The median hourly wage costs for a corporate manager and for all UK employees are £49.25 and £13.49 respectively.¹⁰ The average number of employees in private, public and voluntary sector organisations is estimated to be 12, 927 and 28 respectively, using the Business Population Estimates for the UK and Regions 2011.¹¹ The total expected cost of wider recommendations made is estimated at **£0-67,000** per annum, with the best estimate being **£16,000**.

Non-monetised costs

The issue of wider recommendations was consulted on as part of the Dispute Resolution Review consultation in March 2007.¹² The consultation *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (June 2007)¹³ did not explicitly consult on wider recommendations. However, a significant number of responses provided views on this issue. A number of business representative responses argued that a tribunal would not understand the workings of a firm on the strength of an individual case; that a scenario where different tribunals make contradictory recommendations would lead to confusion; and that it would be inappropriate for a tribunal to “recycle” a recommendation related to a similar case for another different organisation. Under this option, to do nothing, employer fears of excessive or inappropriate recommendations will continue.

⁹ Survey of Employment Tribunal Applications 2008, BIS

¹⁰ ASHE 2011 –111 & All, incl. 21% uplift for non-wage labour costs – Note: uplift derived from European Labour Costs Survey (2007)

¹¹ Business Population Estimates for UK and Regions, BIS, <http://www.bis.gov.uk/analysis/statistics/business-population-estimates>

¹² <http://www.bis.gov.uk/files/file38516.pdf>

¹³ <http://webarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/PDF/DLRConsultation.pdf>

Benefits of recommendations

The cost of a discrimination case

Exchequer

The average cost of an accepted employment tribunal claim is calculated using the Employment Tribunals Service Annual Accounts and Report 2005/2006¹⁴; net operating cost divided by the number of claims accepted. On this basis, the average cost to the exchequer per claim accepted is **£711** in 2012 prices

Individuals

The average costs to individuals are calculated using SETA 2008, and reflect average values where the primary jurisdiction of a claim was discrimination for advice and representation, and travel and communication costs¹⁵. The cost to the individual of market work foregone as a result of claiming is represented by loss of earnings, which is also taken from SETA 2008. The overall average cost of a discrimination case is **£1,867**.

Table 2 – Cost of a discrimination case to the individual

Cost for Advice and Representation	£905
Costs incurred from travel and communication	£31
Loss of Earnings	£9.31
Total	£1,867

Source: SETA 2008 adjusted for zero values and converted to 2012 prices

Employers

The average costs to employers are calculated using SETA 2008. This is calculated as the cost of advice and representation, time spent by corporate managers and senior officials, and time spent by other employees, namely dedicated personnel, training and industrial relations managers, on the case. The median hourly wage excluding overtime is assumed to be £44.18¹⁶ and £28.25¹⁷ respectively for these two roles. The overall average cost to an employer of a discrimination case is **£5,417**.¹⁸

¹⁴ Employment Tribunals Service Annual Accounts & Report, 2005/2006: <http://www.employmenttribunals.gov.uk/Documents/Publications/ARA0506.pdf>; More recent accounts for the former Employment Tribunals Service are not available as annual reports are now published under HM Courts & Tribunals Service as a whole, which are not considered as indicative of the true actuarial cost

¹⁵ Note, all cost figures taken from SETA 2008 in this Impact Assessment are adjusted from median figures to account for zero values

¹⁶ ASHE 2011 –111, incl. 21% uplift for non-wage labour costs – Note: uplift derived from European Labour Costs Survey (2007)

¹⁷ ASHE 2011 –1135, incl. 21% uplift for non-wage labour costs

¹⁸ Assumes 7 hour day

Table 3 – Cost of a discrimination case to the employer

Time spent on case by directors & senior staff	£1,867
Time spent on case by other staff	£593
Cost for advice and representation	£2,956
Total	£5,417

Source: SETA 2008 adjusted for zero values, ASHE 2011

Settlements and compensation

Where a claim is brought against an employer who has reoffended, the likelihood that a claimant would subsequently agree to a settlement in respect of a discrimination complaint with that employer is low. Therefore, it is very probable that employers in these circumstances will have to pay further compensation. The average compensation awarded in a discrimination case is **£14,865**.¹⁹

Non-monetised benefits

Tables 4 and 5 show some of the non-financial, negative effects of being involved in discrimination cases.

The majority of claimants report negative effects of bringing discrimination cases. Almost half of these report that the experience is stressful/emotionally draining/depressing, and 7% have difficulty in finding subsequent employment. 38% of employers also experience negative non-financial effects on their organisation as a result of a claim being brought against them. Where wider recommendations increase compliance and prevent reoffending these other negative impacts of disputes would be avoided.

Table 4 – Percentage of claimants in cases where discrimination was the primary jurisdiction reporting non-financial negative effects

	Percent of claimants reporting negative effect
Stressful/emotionally draining/depression	48%
Physical health problems	16%
Difficulty in getting re-employed	7%
Loss of confidence/self-esteem	12%
Financial problems	5%
Lost hope/faith/trust in the system	5%

Source: SETA 2008

¹⁹ Employment Tribunal Statistics 2010/11

Table 5 – Did discrimination case have any non-financial negative effects on employer’s organisation

	Percent reporting negative effect
Yes	38%
No	60%
Don’t know	2%

Source: SETA 2008

The Impact Assessment for *Equality Act 2010 – employer liability for harassment of employees by third parties: a consultation*²⁰ describes illustrative indirect benefits to employers of reducing instances of workplace discrimination more widely, not just in the form of cases. Such non-monetised benefits should also be considered here if recommendations should lead to increased compliance and improved working practices of employers found to have broken discrimination law and individuals within the wider workforce would similarly benefit from such changes to discriminatory policies and practices.

Benefits summary

The total expected benefits from wider recommendations leading to greater compliance and reduced risk of reoffending is estimated at **£0-23,000**.

Note: The compensation avoided by an employer is a transfer payment²¹, and therefore leads to an equivalent cost to individuals of **£0-15,000**.

Appeals

Under this option to do nothing, employers would continue to face potential costs incurred by any subsequent appeal cases and associated legal costs. However, given the number of recommendations discussed above, this cost is considered to be minimal.

Settlement behaviour

A number of business representatives suggested that some potential respondents would seek to settle in order to avoid a recommendation being made against them. We have no evidence that this is happening as a result of the extension to the power, but under this option it remains a possible factor affecting settlement behaviour. The consultation was only able to reveal anecdotal evidence that settlement behaviour would be affected by repealing this provision.

Option 2 – Remove the provisions (repeal the power of Employment Tribunals to make wider recommendations - preferred option)

The costs and benefits under the previous option (option 1, do nothing) provide the baseline against which the impact of option 2 (remove the provisions) is assessed. Therefore, benefits can be referred to as ‘savings.’

Costs

Transitional Costs

The Equality Act 2010 Impact Assessment did not assume any familiarisation costs when this provision was commenced.

Currently, in the relatively uncommon eventuality that employers have a successful discrimination case brought against them, they will subsequently need to be aware that the tribunal could (please note that

²⁰ This consultation can also be found on the Home Office website

²¹ Better Regulation Executive guidance on Impact Assessments is that transfer payments should be scored as both benefits and costs

employment tribunals do not have a duty to) make wider recommendations if that case is successful at hearing.

If the power to make wider recommendations is removed, it is therefore expected to be a minimal familiarisation cost on employers and as a result is captured within the overall cost to an employer of a case being brought against them.

There will be no obligations placed on HM Courts & Tribunals Service as a result of repealing these provisions. They would have to inform tribunal judges that they could no longer make wider recommendations, but there would not be a significant burden, as this could be done through already established mediums that are used to communicate with judges.

Therefore, there will be no significant transitional costs as an impact of the option to repeal the power.

Annually recurring costs

0-1 additional cases per annum would be brought because wider recommendations are not made. The costs of option 2 (repealing the power) are those incurred where benefits as described under option 1 (do nothing) are no longer realised following removal of the provisions, and are set out below in table 7.

Non-monetised costs

Under option 1 ('do nothing') we described the non-monetised benefits of wider recommendations. We assumed that they could reduce some of the negative effects of discrimination cases being brought for individuals and employers. These benefits would not be realised under option 2 (if the provisions are removed).

Benefits

Annually recurring benefits

The savings from removing these provisions, and there no longer being 0-17 cases per annum where wider recommendations are made, are the same as the costs described under the do nothing option. This would also include benefits to individuals in the form of compensation awarded from the 0-1 cases where additional cases are brought. These savings are set out in table 6 below.

Non-monetised benefits

Removing the power of employment tribunals to make wider recommendations will reduce employer fears of excessive or inappropriate recommendations.

Appeals and settlement behaviour

The impact of option 2 on appeals and settlement behaviour would be the opposite as described under option 1, with possibly fewer respondents choosing to settle through fear of what wider recommendations could mean, and fewer appeals. However, there is currently no evidence for these impacts nor would they be considered significant.

Summary

The overall net impact of option 2 is an annually recurring impact of **£0- £59,000**, with a net impact of **£0 - £506,000** over ten years. Our best estimate of the net impact is **£253,000** for all affected groups. The range described above should therefore be treated as illustrative of the scale of impact should any wider recommendations be made. The consultation did not reveal anything to contradict our assumptions on this.

Table 6 – Summary of costs and benefits of option 2 by key affected groups (£000s)

	Benefits (annually recurring)			Costs (annually recurring)			Net Present Value		
	Low	High	Best Estimate	Low	High	Best Estimate	Low	High	Best Estimate
			e			e			e
Private and Voluntary Sector Employers	0	8	2	0	-13	-6	0	-40	-39
Exchequer and Public Sector Employers	0	58	14	0	-8	-4	0	434	84
Individuals	0	15	7	0	-2	-1	0	112	56
Total	0	82	23	0	-23	-11	0	506	101

Note: Figures may not sum due to rounding

Risks and assumptions of preferred option

- The consultation on whether or not to repeal the power for employment tribunals to make wider recommendation did reveal a lot of anecdotal evidence that support the continued use of this power. However, there was very little empirical evidence of the power's usage and the positive impact that it may have had on reducing subsequent cases by employees and/or positively changing the behaviour of employers towards their employees.
- We have used available data and evidence to estimate the number of potential wider recommendations and avoidances of reoffending which we would expect if the provisions were to remain in place. The consultation has not revealed any evidence to contradict our assumptions.
- We are aware of only 4 employment tribunal cases where wider recommendations have been made since the Equality Act 2010 was commenced. This is our best estimate of any future impact the provisions may have had also. Therefore the estimated costs and savings from removing the provision are very small.

Direct Costs and Benefits to Business (One-in, One-out)

For the purposes of One-In-One-Out scoring we calculate the direct costs and benefits to business and voluntary sector organisations as a result of this proposal in 2009 prices. The figures here are deflated using HM Treasury GDP deflator series.¹

The best estimate of the Equivalent Annual Cost² to business and the voluntary sector of the preferred option is less than £10,000 in 2009 prices, which we round to £0.0m, and this measure is therefore considered to be an OUT.

¹ Consistent with series last updated 25 October 2011

² Equivalent Annual calculations use formula: $NPV / [1 - 1/r + 1 / (r \times (1+r)^9)]$ for 10 year time period, where r is the standard social time preference discount factor (3.5%)

Wider Impacts

Equality Impact

A policy equality statement is set out in Annex 1.

Justice Impact

We consider that the preferred option to repeal the power of employment tribunals to make wider recommendations will have minimal impact on the justice system as there will be no need for specific judicial training. Nor do we envisage any new employment tribunal or court procedures, rights of appeal, further changes to primary and/or secondary legislation, or an increase demand for prison places.

Monitoring and review

As the preferred option is to remove the wider recommendation powers, there will not be a dedicated review of this action. GEO is committed to reviewing the Equality Act as a whole, for a Post Implementation Review in 2015. Part of this review will aim to establish if individuals are protected by the Act, and whether organisations feel that the Act has helped simplify legislation and it is more consistent.

Summary and implementation

Our preferred option is to repeal the provisions in the Equality Act which empower **employment tribunals** to make wider recommendations **as there is little or no evidence that this power** is an appropriate or effective legal remedy. We are only aware of 4 such recommendations having been made since the commencement of the Equality Act in October 2010. We consider that by removing these provisions we will reduce any unnecessary burdens on business, removing any unnecessary concerns they have about what wider recommendations may entail, without affecting the other legal remedies currently available to those claiming they have been discriminated against, thereby maintaining strong and effective enforcement.

Policy equality statement

Review of the power of employment tribunals to make wider recommendations

Introduction

We have considered the impact of the provisions in the Equality Act 2010 relating to the power of employment tribunals to make recommendations that benefit the employer's wider workforce, on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation i.e. the protected characteristics set out in the Act.

The aim of this consideration is to ensure that the implications for equality for all the protected characteristics have been properly assessed during the development of the policy, taking account of views expressed, and to provide assurance that changes needed to mitigate any potential adverse impacts have been identified.

Since discrimination cases may involve any of the protected characteristics, the impact of removing the power of tribunals to make wider recommendations can be assumed to affect people with those characteristics, potentially according to the proportion of claims in each category of characteristic. We want the law to provide appropriate remedies for the harmful discrimination people experience. However, we are only aware of 4 employment tribunal cases where the power to make wider recommendations has been used since extending the power of employment tribunals in October 2010. The consultation that we have undertaken on this has only revealed anecdotal evidence that supports keeping these provisions

Methodology

A full Equality Impact Assessment of the Equality Act was published in April 2010 covering the impact of extending the power of tribunals to make recommendations that benefit the wider workforce on all those with protected characteristics (age, disability, gender reassignment, race, religion or belief, sex, sexual orientation). We consider that the impact of repealing the provisions is the reverse of the potential impact identified by the earlier published Equality Impact assessment.

Without these provisions tribunals will no longer be able to make recommendations that benefit the wider workforce. However, because only a handful of wider recommendations have been made to date, plus the fact that the power to make recommendations for the benefit of the individual complainant will remain in place, we consider that effective remedies for employees who do experience discrimination are not affected in relation to each of the protected characteristics.

The Provision

Under previous discrimination law, where a discrimination claim was successful, an employment tribunal had the power to make recommendations to the employer concerned to take specific actions to prevent or reduce the adverse effect on the claimant of the discriminatory treatment he or she had been subjected to. The Equality Act 2010 extended this power so that employment tribunals can make such recommendations for the benefit of the employer's wider workforce, not just the individual claimant (wider recommendations).

OPTION 1 – do nothing

General impact

Extending the power, so that employment tribunals can make recommendations for the benefit of the employer's wider workforce, not just the individual claimant (wider recommendations) provides a remedy which will benefit not only the individual claimant but also others who may be affected by the act of discrimination. These wider recommendations could be made following findings of discrimination across any of the protected characteristics. Complying with a recommendation to improve policy or practice could encourage a reduction of discriminatory practices within organisations across any or all protected characteristics and help to achieve a fairer and more equitable workplace for all. In the earlier published Equality Impact Assessment, it was considered that the biggest positive impact might initially be seen in the areas of race, sex and disability where most employment tribunal cases occur, but any positive impact would apply proportionately to all characteristics depending on the number of cases brought to tribunals.

OPTION 2 – repeal the power of employment tribunals to make wider recommendations

General impact

It was assumed, in the earlier published Equality Impact Assessment that wider recommendations would increase compliance and lead to changes to discriminatory policies and practices across all protected characteristics, potentially preventing future cases. If these provisions are to be repealed these changes may not be triggered following cases brought against employers.

However, we are only aware of four wider recommendations being made to date. Further, evidence suggests that employers do make changes following a finding of discrimination against them, without a wider recommendation having been made by an employment tribunal. We therefore anticipate no significant impact on any of the protected characteristics following removal of the power to make wider recommendations.