Government
Equalities Office

Putting equality at the heart of government

Equality Act 2010: employment tribunals' power to make wider recommendations in discrimination cases and obtaining information procedure

Government response to the consultation

October 2012

Contents

Foreword

This Government's commitment to promoting economic growth means that we must tackle unnecessary or over-burdensome red tape and bureaucracy that holds businesses back.

That is why, in a consultation in May, we set out proposals to repeal two measures in the Equality Act 2010: (a) employment tribunals' power to make wider recommendations in discrimination cases; and (b) the procedure for obtaining information.

We are grateful to everyone who contributed their views. Those views and our reaction to them are set out in this document. Overall, we do not think that responses to the consultation have provided arguments to persuade us that our proposals were wrong. Wider recommendations by tribunals, to the extent they have been made, appear to be basic common-sense actions – usually staff training. The procedures for obtaining information – including the Government's role in them – are prescriptive and potentially threatening to employers. The consultation provided evidence of the procedures operating as intended, but also of abuse. In both these areas we think that ultimately an employer should be free to decide on whether to act or to take the risk of not acting. We have therefore decided to proceed with the repeal of these provisions where a suitable opportunity arises in each case.

We do however recognise the intention behind these provisions. We want to encourage employers to tackle weaknesses in their equality policies and practices; and we want those who think they may have been discriminated against to be able to explore the facts with the employer or service provider without going to court or an employment tribunal. While we do not see the benefit of using prescriptive legislation to achieve those aims, we are keen to consider alternative non-legislative approaches, and these are described in this document.

Executive summary

1. The Government is committed to striking the right balance between protecting people from discrimination and letting businesses get on with the job and this has led us to question whether the existing legislation is a proportionate way of dealing with the enforcement of discrimination law. In our consultation document "Equality Act 2010 Removing: (a) employment tribunals' power to make wider recommendations in discrimination cases; and (b) the procedure for obtaining information", we proposed the repeal of these two provisions in the Equality Act 2010 ("the 2010 Act").

2. In our consultation, which ran from 15 May to 07 August 2012, we proposed to repeal subsection 124(3)(b) – the power of employment tribunals to make wider recommendations and section 138 – the obtaining information provisions of the 2010 Act.

3. We received a total of 157 responses to this joint consultation. Of those, 18 (12%) were in favour of repealing the wider recommendations provisions and 125 (79%) were opposed. 24 (15%) were in favour of repealing the obtaining information provisions and 130 (83%) were opposed. All business representative organisations supported repeal.

4. Responses which agreed to the proposed repeals came mostly from private and not-for profit sector employers and business representative organisations. Responses which disagreed with our proposals were mainly on behalf of unions, equality lobby groups, staff associations, the judiciary and members of the public.

5. Very few of the responses, both those opposed to and those in favour of repeal have offered significant quantifiable evidence or specific evidence based on actual situations and outcomes, to support their views.

6. In the light of this response, the Government will seek an opportunity to repeal both the wider recommendations provisions and the obtaining information provisions.

7. The Government recognises however, the validity of the intention behind these provisions – respectively encouraging employers to tackle more general shortcomings in the management of their workforce (wider recommendations); and enabling alleged discrimination to be explored in communication between an individual and an employer or service provider rather than through immediate recourse to a court or tribunal (procedures for obtaining information). Our objection is to the regulatory and prescriptive approach of trying to provide for these things in legislation. Therefore, while we intend to proceed with the repeals as outlined in the consultation, we will want to consider whether there are non-legislative ways of enhancing the transparency of employment tribunal outcomes, further promotion of conciliation, mediation and arbitration services as alternatives to taking claims the courts and employment tribunals, and encouraging employers to recognise the potential benefits and savings of early where there is a possibility of a discrimination claim being brought.

Consultation responses

8. The consultation[1] on our proposal specific exceptions ran from 15 May to 07 August 2012. We received:

   A total of 157 formal responses to this consultation;

   - 59 from individuals, one from the President and Regional Employment Judges of Employment Tribunals in England and Wales, 95 from organisations and 2 anonymous responses.
   - A mini campaign of 19 letters opposing our proposals.

The questions in the consultation

- Questions 1 to 4 in the consultation sought personal details about respondents, and the organisations they might be representing.
- Questions 5 to 7 in the consultation sought information about experiences and knowledge of wider recommendations from the point of view of employees, employers and those who have advised or acted for employees or employers.
- Question 8 in the consultation sought views on whether the wider recommendations provisions should be repealed or not.
- Questions 9 to 15 in the consultation sought information about experiences of the obtaining information procedure from the point of view of employees, employers and those who have advised or acted for employees or employers.
- Question 16 in the consultation sought views on whether the obtaining information procedure should be repealed or not.
- Questions 21 to 24 in the consultation sought information about the cost, benefit and equality impacts of the proposal to repeal the obtaining information procedure provisions.

What we proposed

9. In our consultation document, we proposed to repeal two provisions in the 2010 Act. Subsection 124(3)(b) gives employment tribunals a power, when an employee wins a discrimination case, to make recommendations to the losing party – the employer. Section 138 provides for a specific procedure for the collection of information by someone who thinks that he or she may have been unlawfully discriminated against, harassed or victimised, from the person (for example an employer or service provider) who is thought to be responsible for the unlawful treatment.

[1] Equality Act 2010: (a) employment tribunals' power to make wider recommendations and (b) the obtaining information procedure

Concerns about dealing with enforcement of discrimination law

10. Our concerns about the power of employment tribunals to make wider recommendations are that the power adds little to the powers that tribunals already have, may be of no direct benefit to the claimant and is, in any case, merely discretionary on the employer. Employers have no way of knowing how or when a tribunal may make such recommendations or whether it is feasible or affordable for them to comply.

11. Our concerns about the procedures for obtaining information provisions are that they had not succeeded in increasing pre-hearing settlements and reducing tribunal loads, and that they had resulted in a burden for employers amounting, in the only quantified evidence available, to some 45,000-60,000 employee hours a year[2]. This led us to question whether legislation was a satisfactory way of helping to establish facts before a hearing and therefore propose to repeal the obtaining information provisions from the 2010 Act.

Wider recommendations

Q5 & 6: What we asked and what respondents said

12. Question 5 & 6: Do you know of any discrimination-related case in which the wider recommendations power under section 124(3)(b) of the Equality Act 2010 has been used since October 2010? If you answered yes, please provide further details, such as nature of the claim, type of organisation involved in the case, whether the organisation is a large, small or medium sized enterprise or other.

13. A total of 29 respondents, two employers/business organisations and 27 employees/trade unions/ staff associations and equality lobby groups indicated some knowledge of, or involvement in, cases where a wider recommendation was made by an employment tribunal. The remaining 128 respondents either said 'no', 'don't know' or did not specify ether way. Not all respondents who answered 'yes' to this question provided specific details of the case/cases concerned.

14. When we went out to consultation, we were aware of one employment tribunal wider recommendation[3]. By the time the consultation closed, we had become aware of three further wider recommendations[4]. One respondent drew our attention to the appeal case, 'Lycée Français Charles de Gaulle v Delambre' (UKEAT 0563/10). Although the case demonstrates an employment tribunal making broad recommendation to the employer, these recommendations were made in January 2010, under previous legislation, prior to the wider recommendations provisions in the 2010 Act coming into force[5].

[2] GEO Administrative Burden Reduction Study, IFF Research prepared for Government Equalities Office, June 2009

[3] 'Stone v Ramsay Health Care UK Operations Ltd' ET/1400762/11

[4] 'Crisp v Iceland Foods' ET/1604478/11 & ET/1600000/12; 'Why v Enfield Grammar School' ET/ 3303944/2011; and 'Austin v Samuel Grant' (North East) Ltd [2012] EqLR 617

[5] Regulation 38(1) in the Employment Equality (Age) Regulations 2006, SI 2006/2408

15. A summary of the wider recommendations made in the four cases mentioned above are as follows; In the 'Crisp v Iceland Foods' case, the wider recommendations made to the employer was to provide equal opportunities training for sections of its HR and senior management staff in mental health issues. In the 'Why v Enfield Grammar School' case, a wider recommendation was made to the effect that the senior management team and all heads of department had training on equal opportunities employment law within six months. This included the position on women returning from maternity leave and the head teacher was invited to write to the tribunal and claimant when the training had taken place.

16. In the 'Austin v Samuel Grant' case, the employment tribunal recommended that the respondent updated its policies on discrimination taking account of the Equality Act 2010 and that the directors and managers of the Samuel Grant Group received diversity training from a reputable provider: both recommendations were to be complied with no later than six months from the date of the judgment. In the 'Stone v Ramsay Health Care UK Operations Ltd' case, the employment tribunal recommended that the employer provide training for its managers and HR team on maternity rights.

Our assessment

17. The Government considers that the types of recommendations made so far under the wider recommendation making power, could still be made using the employment tribunals existing power under subsection 124(3)(a) of the 2010 Act, to make claimant-specific recommendations where an employer loses a discrimination case. We do not propose to repeal this provision. Employment tribunals will still be able to make recommendations where applicable, which may as a consequence benefit another person in cases where the employee in question is still in the employ of the respondent in an employment tribunal case.

Q7: What we asked and what respondents said

18. Question 7: Please say whether you consider the outcome of the use of the power in this case or cases has been effective (closely linked to the act of discrimination to which the complaint relates) and/or proportionate (tribunal took account of employer's capacity to implement the recommendation).

19. Fifteen respondents, mainly employees/trade unions/staff associations and equality lobby groups specifically stated that they thought the wider power used in the specified case/s, were proportionate and/or effective. One respondent answered no.

20. Comments on the use of the power included that the recommendations for diversity and equality training were appropriate for the case/s and beneficial for both employer and employees and that the types of wider recommendations made demonstrate that often there is a lack of knowledge by employers in both employment and equality law practices.

Specific comments include:

21. "Any recommendation that individuals undergo training must be beneficial for that employee and for the business." Thompsons solicitors

22. "We believe the use of wider recommendations will assist in changing the approach of organisations that have been judged to have neglected or ignored their duties to ensure that unlawful discrimination does not occur." Transport Salaried Staffs' Association (TSSA)

Our assessment

23. The Government considers that while there is no evidence to suggest that the wider recommendations made so far are disproportionate or ineffective in the absence of evidence of follow up action on whether a wider recommendation has been implemented, we cannot reach any conclusions on this.

24. The types of wider recommendations made in the four cases identified since the launch of this consultation are in our view, common-sense straightforward recommendations. These wider recommendations all relate to improving an employer's human resource practices or providing equality training to staff and in the Government's view, these are basic remedial actions which we would expect most employers at the sharp end of a tribunal finding to undertake in any case. We believe that any employer who is not observant enough to make a connection between the two may well not take notice of the tribunal's recommendation and will therefore run the risks associated with that in any event.

Q8: What we asked and what respondents said

25. Question 8: How far do you agree or disagree that the wider recommendations power should be repealed?

26. A sliding scale was used in this consultation for respondents to indicate whether they agree/ disagree with the proposal to repeal the wider recommendations power. Of the 157 responses to the consultation, 18 (12%) were in favour of repeal and 125 (79%) were opposed.

27. The judiciary, several unions and a number of equality groups, charities, non-governmental organisations and employees were amongst those who opposed the repeal of the provisions. Employers, business and business representative groups, were amongst those in favour of repeal.

Our assessment

28. Although this question goes to the heart of the consultation, very few of the responses either for or against, were directly based on evidence. Those in favour of repeal provided a variety of general arguments. The views of those against were based mainly on principles as opposed to any real quantifiable evidence. These included the need not to act prematurely before the

provision had a chance to demonstrate effectiveness. Those in favour of repeal considered that the power is rarely used and is therefore unnecessary and that employers often put right flawed employment practices of their own accord following a tribunal finding against them and therefore the power is unnecessary. However, there was no quantifiable evidence to support the latter view. Evidence is discussed in detail later in this Government response.

Q17 & Q18: What we asked and what respondents said

29. Question 17: Do you think that there are further costs to repealing the wider recommendations provision which have not already been included in the impact assessment? Please provide details.

30. Question 18: Do you think that there are further benefits to repealing the wider recommendations provision which have not already been included in the impact assessment? Please provide details.

31. A total of 35 respondents, largely employees/trade unions/staff associations and equality lobby groups indicated that they thought there are further costs to repealing the wider recommendations provisions to those stated in the Impact Assessment which was published alongside the consultation. On the whole, it was considered that the further costs of future discrimination claims against the same respondent as a result of not taking any remedial action following a tribunal finding had not been factored in. Specific comments on that basis include:

32. "One of the purposes of discrimination remedies has always been to attempt to assist in the adjustment and betterment of the equality policies within employment. The wider power will provide this additional facility to employment judges such that it is hoped such recommendations if followed will improve equality provisions and reduce the number of claims to the Employment Tribunals in the future from such employers." President and Regional Employment Judges of Employment Tribunals in England and Wales.

33. "An employer that goes to the length of defending a claim may not be quick to recognise the failings within their own organisation and address them without some prompting by the Tribunal in its judgement. The benefit of the recommendations to employers is that they are given clear guidance on what needs to change and a timeframe for making those changes." Women's Resource Centre.

34. "We do not consider sufficient consideration has been given to the cost of dealing with additional discrimination claims that could have been avoided had changes been made by the employer following previous successful discrimination complaints, including the cost of pursuing and defending the claim for both parties and the cost to the tribunal system – as well as the cost of dealing with internal grievances, including the cost of management time." Scottish Discrimination Law Association.

35. The Communication Workers' Union (CWU) further commented on the Impact Assessment, as follows; "No evidence of a burden on business is provided beyond the claim that employers continue to have fears that inappropriate or excessive recommendations may be made. No consideration for the counter position of the fear that successful discrimination cases will have little influence on employers' behaviour."

36. Of the 157 responses to the consultation, 24 considered that there are no further costs to repealing these provisions/all costs have been included already and eight respondents stated that they thought there are further benefits to repeal which had not been factored into our Impact Assessment. The EEF specifically stated; "power is seldom used and therefore suggests it is unnecessary. Repeal will have limited effect."

37. Thompsons solicitors stated in their response to this question that, "where an employer acts on wider recommendations, it is likely to have the benefit of avoiding the type of discrimination for which the employer has been held liable."

38. The Institute of Directors (IoD) stated "where an Employment Tribunal makes recommendations to an employer, the employer will then have to decide whether to act upon them, knowing that if it does not, a future Employment Tribunal could take an adverse inference from such failure. The employer will have to weigh up the risks against the value of otherwise that it puts on the Tribunal's recommendations. All of this contributes to uncertainty and risk for the employer, which is unhelpful and unnecessary."

39. British Retail Consortium (BRC) stated that "provision seems unnecessary given many employers will make changes to their policies and practices due to a tribunal finding without the need for a recommendation. For a large business where a failure has resulted from human error rather than the policies that are already in place, a recommendation would also serve no additional value."

Our assessment

40. Government notes the points made on additional possible costs and benefits of repeal.

41. We note that the original Impact Assessment did not take account of the four wider recommendations discovered during the course of the consultation. These four cases have now been taken into account but do not bring about any significant change to the costs and benefits set out in the Impact Assessment.

Q19: What we asked and what respondents said

42. Question 19: Please provide any comments you have on the assumptions, approach or estimates we have used in the wider recommendations provision impact assessment (e.g. do you agree with the estimates, assumptions/approach, such as our assumptions that employers may settle a case in order to avoid a wider recommendation; or that wider recommendations would avoid a future case against the same employer for the same discriminatory practice; or the likelihood of wider

recommendations being used in the future? Or are there any estimates or assumptions we have missed out which you think should be included).

43. A wide variety of comments were made on the assumptions, approach and estimates in the Impact Assessment. A number of respondents pointed out that given the Impact Assessment was produced at a time where there had been no reported wider recommendations, the assumptions, approach and estimates are incorrect. The FDA specifically stated, "a major problem with the impact assessment is that it was drafted at a time when there had been no reported cases where a tribunal had used the power. Therefore, many of the assumptions and estimates in it no longer apply."

44. A few respondents considered that the Government's assumption that employers would settle a case to avoid a wider recommendation is incorrect. One response specifically stated "We do not agree that an employer would settle a case to avoid a wider recommendation where the Tribunal has made a wider recommendation to introduce an Equal Opportunities policy, for example, we do not consider that this will avoid a future claim."

45. The Open University stated "we do not believe that employers will settle a case simply to avoid a wider recommendation. Employers will want to settle cases to avoid cases going to employment tribunal, which may lead to damage to reputation. This is the primary factor affecting employers' decision to settle, and the wider recommendation power is unlikely to have any bearing on this."

46. A few respondents disagreed with the Government's view that the power is a burden on business, such as Thompsons solicitors, who stated in their response "If there are so few cases in England & Wales where an employment tribunal has exercised its wider recommendations power then we do not understand how the government can draw any conclusions on the benefits to the employer by repealing this provision. This simply does not make any sense and can only have been based on anecdote and assumptions about burdens on business rather than evidence."

47. The IoD stated in their response to this question, "powers add little to existing tribunal powers, and are not an appropriate role for an employment tribunal to be carrying out. The members of an employment tribunal may not know enough about a company's culture and way of working, or about good practice in equality and non-discrimination policies and practices, to be able to make relevant and appropriate recommendations to the company's management."

48. This view was supported by Mercer, who stated in their response, "power is unnecessary and potentially increases the burden on employers and/or trustees. Before the wider power came into effect most employers/trustees of occupational pension schemes would normally have decided to change the scheme rules to avoid further, similar non-discrimination claims in any case. It is more appropriate and effective to leave employers/trustees with some discretion as to how best to adjust their circumstances in order to avoid future cases."

49. Network Rail stated in their response that "the cost of a discrimination case to an employer is higher than £5,528" - the estimated cost given in the Impact Assessment.

Our assessment

50. The Government notes the wide ranging comments provided in response to this part of the consultation and have taken them into account in a revised Impact Assessment. Whilst we note the view that employers are unlikely to settle a case in order to avoid a wider recommendation, employers still show considerable concern about the potential for inappropriate recommendations.

Q20: What we asked and what respondents said

51. Question 20: In your view, does the impact assessment for the wider recommendations provision accurately assess what the implication for equality is? Please explain your answer.

52. A total of 54 respondents considered that the Impact Assessment did not accurately assess what the implication for equality is and 25 thought that it did.

53. Those who considered that the Impact Assessment did not accurately assess the implications for equality provided a range of comments. The Police Federation of England and Wales stated, "the Government failed to consider the percentage of workers compared to the wider population who are likely to bring such claims because of their protected characteristics. We could not find any information of specific impact on each protected characteristics. It appears to us that the Government has incorrectly taken the view that as the removal of wider recommendation powers will equally affect all protected characteristics and therefore it does not have to consider specific impact on each protected characteristics."

54. A number of respondents stated that a more accurate assessment of the impact of the proposal on equality is to take account of those with a protected characteristic who are in employment and not simply those with a protected characteristic who make a claim to an employment tribunal. The Discrimination Law Association (DLA) stated, "it only considers the equality impact in terms of people who are bringing claims. The real comparison should be between people who are more likely to bring a claim because of their protected characteristic, compared to the population at large."

55. The Trades Union Congress (TUC) further added, "it assesses only the impact on people with protected characteristics who are tribunal claimants. This is wrong. It should also consider the impact on people with protected characteristics who are in workplaces where there is non-compliance with the Equality Act 2010 and a lack of understanding or care on the part of senior management and HR to ensuring equal treatment."

Our assessment

56. We are currently examining the features of the cases that went to tribunal to assess whether there are common characteristics emerging that would demonstrate a particular trend for individuals with protected characteristics. However, none of the responses provided evidence that the equality impact of removing these provisions to the wider workforce would be

significant. We are inclined to think that the correct model, in principle, would need to take into account a group similar to that suggested by the TUC – employees in companies which are statistically most likely to be found in breach of equality law by a court or tribunal. However, the very limited numbers of cases on the one hand, and the lack of any data defining the features of such companies on the other, restrict this to a theoretical model at the present time.

Obtaining information

Q9 – 15: What we asked and what respondents said

57. Q9: Have you or your organisation been involved in a procedure for obtaining information about a situation involving potential discrimination, harassment or victimisation?

58. Q10: Please provide details of your involvement in a procedure for obtaining information.

59. Q11: Please indicate whether the procedure for obtaining information was set in motion under previous equality legislation or under section 138 of the Equality Act 2010.

60. Q12: Please indicate what action was taken by the potential complainant after using the procedure for obtaining information.

61. Q13: If a claim was taken to an employment tribunal or court after using the obtaining information procedure, what was the outcome of that case?

62. Q14: If the potential complainant did not lodge a claim with an employment tribunal or court, please indicate the outcome of using the procedure for obtaining information.

63. Q15: Please provide any additional details about your experience of the procedure for obtaining information (e.g. details of time/costs involved, whether the forms assisted with the efficiency of the claims process in a tribunal or court etc).

64. Sixty five respondents answered 'yes' to Q9, 30 answered no and the remaining respondents either did not address this question or stated 'don't know' or 'prefer not to say'. Those who answered 'yes' mainly indicated that they were involved in a professional capacity, including as a representative organisation, as advocates, as a union representative or an adviser. Some indicated that they were involved as an employer/service provider and a few as employee/customer. Forty-nine respondents specifically indicated that the procedure they were involved in was set in motion under the Equality Act 2010 or previous legislation or both.

65. Of those who indicated what action was taken after using the procedure, 36 stated that a claim was lodged to a court or employment tribunal and 24 stated that a claim was not lodged. The outcome of the cases lodged to an employment tribunal varied, but most indicated the claim was settled prior to hearing and a large number of responses also indicated that the complainant won the case. The most common outcome indicated by respondents who said the obtaining

information procedure did not lead to a case being lodged to an employment tribunal, was that the issue was resolved directly with the employer/service provider.

66. In response to Q15, Prospect specifically stated in their response, "the questionnaire procedure is a crucial tool to help a worker decide whether or not to bring a case to a tribunal". Another respondent stated "section 138 Procedure provides the platform for mediation and should remain".

67. The Equality and Diversity Forum (EDF) stated in response to this question, "if a person did decide to commence proceedings it enabled them to do so in the most effective way".

Our assessment

68. The Government considers that based on the responses to the questions about individual experiences of the obtaining information procedure, the mechanism appears to be popular, reflecting the long standing nature of the process which has been in legislation since the mid-1970s.

69. The Government has no objection to the collection of pre-claim information to assess the strength of a possible claim and its chances of success at tribunal. But, we are not convinced that this process needs to be set in law. The law encourages undesirable micro-management of the process by Government, including prescribing the nature of the forms to be used and the time limits involved, which we consider undesirable.

Q16: What we asked and what respondents said

70. Question 16: How far do you agree or disagree that the procedure for obtaining information in section 138 of the Equality Act 2010 should be repealed? Please explain your answer.

71. A sliding scale was used in this consultation for respondents to indicate whether they agree/disagree with the proposal to repeal the obtaining information procedure. Of the 157 respondents 24 (15%) were in favour of repealing the obtaining information provisions and 130 (83%) were opposed.

72. Extensive views for retaining the provisions were provided by the judiciary, several unions, and numerous equality groups, charities, non-governmental organisations and individuals. Views included: the procedure helps identify potential discriminatory treatment; it is helpful in collating equal pay related data; it helps identify baseless cases; it is helpful for claimants to make a prima facie case of discrimination before the burden of proof shifts to the employer or service provider; it can lead to settlement pre-action; and it can help save time and money and aid the employment-related dispute process. The key messages however, from bodies such as the Equality and Human Rights Commission, UNISON and RNIB, are that the procedure provides a useful framework to present information in a case in an effective way, and the process helps focus on the facts in a discrimination case which can help save time and money and aid the employment-related dispute process.

73. These views were supported by many other responses such as the EDF which stated in their response to the consultation; "without forms, there would be more speculative litigation. Outcome of case would then depend heavily or entirely on the cross-examination of the key person against whom the allegation was made".

74. The TUC stated in their response, "in unions' experiences, the questionnaire procedure has had the beneficial effect of encouraging the early settlement of claims and it has resulted in time being saved at tribunal".

75. The Employment Lawyers Association (ELA) further stated in their response to this part of the consultation, "with the proposed introduction in 2013 of fees for issuing a claim, it will be increasingly important for individuals to be able to evaluate their prospects of success prior to issuing a claim."

76. Concerns about the process were raised by respondents such as, EEF, the British Retail Consortium (BRC) and employers both in the public and private sectors. Concerns included: the procedure was time consuming, onerous and cumbersome and questions could be too broad and sought disproportionate amounts of data. The eight-week time limit for employers and service providers to respond is also considered a burden.

77. The EEF stated in their response to the consultation, "forms can add very little benefit and repeat what is already contained in the claim form, which adds nothing to the proceedings to the benefit of either party".

78. The Association of Convenience Stores (ACS) added, "most importantly the removal of this section does not prevent access to justice for the claimant. They are still fully able to make requests verbally and in written form – currently there is no requirement to use the forms. The courts ability to make an inference from failure to respond is unfounded and needs review. ACS fully supports the Government's commitment to remove unnecessary regulatory burdens in employment regulations."

79. The Local Government Association further added, "the process places administrative burdens as well as requiring costly input from legal advisers".

80. The IoD were amongst those who stated that "we would support the BCC in its assessment that the questionnaires are used as part of a "fishing exercise" by potential claimants looking for incriminating evidence."

Our assessment

81. A number of respondents took issue with the suggestion that this provision was never intended to encourage settlement of claims without recourse to tribunals or courts. These respondents, which included the EDF and the TUC pointed out that it was always intended as a mechanism to help individuals determine the strength of a possible claim. The Government does not dispute

this point. However, we consider that the law encourages undesirable micro-management of the process by Government, including prescribing the nature of the forms to be used and the time limits involved. We consider a more effective approach is to leave businesses free to decide how and whether they respond to enquiries of this sort, with any attendant balance of risk that may be involved. However, non-legislative actions may have a part to play in preserving the useful aspects of the obtaining information process – see "Conclusions and next steps" section below.

Q21 & 22: What we asked and what respondents said

82. Question 21: Do you think that there are further costs to repealing the obtaining information provisions which have not already been included in the impact assessment?

83. Question 22: Do you think that there are further benefits to repealing the obtaining information provisions which have not already been included in the impact assessment?

84. A total of 41 respondents, largely employees/trade unions/staff associations and equality lobby groups indicated that they thought there are further costs to repealing the obtaining information provisions beyond those stated in the Impact Assessment which was published alongside the consultation. The additional costs identified by respondents include the cost of responding to less organised questions from potential claimants, cost of increase in Freedom of Information Act requests and Disclosure Orders by employment tribunals and cost to claimants in presenting their case effectively without the forms as an aid.

85. One respondent stated "removing the standard questionnaire for obtaining information in relation to a tribunal claim under the equality act will make the process of pursuing and responding to a tribunal claim longer and more time consuming. Removal of the questionnaire will lead to claimants asking questions in a less organised manner and it is likely that respondents will frequently have to take legal advice regarding the requirement to answer the questions asked".

86. Another respondent indicated that for equal pay claims "forms are considered the most efficient tool in gathering information".

87. CWU state in their response to this part of the consultation, that "in assessing the savings to business of removing the proscribed (sic) forms the impact assessment should compare the cost of responding to such forms with the cost of responding to non-standardised requests for information".

88. The Women's Resource Centre further add, "a claimant will need to bring proceedings and apply for an order for disclosure or further information and so the burden on the respondent is considerably greater".

89. Of the 157 responses to the consultation, 27 considered that there are no further costs to repealing the obtaining information provisions/all costs have been included already and 7 respondents stated that they thought there are further benefits to repealing the obtaining information provisions which had not been factored into our Impact Assessment.

90. An employer specifically states in their response, "the consultation document significantly underestimates the time and cost burden on large organisations in completing such questionnaires. However, complainants may decide to use Data Protection and Freedom of Information legislation to obtain such information."

91. IoD further state "(the obtaining information procedure) imposes a massive administrative burden on employers, which could only be justified if they were having a clear benefit in terms of reducing discrimination. There seems to be no evidence that this is the case. They are not required by any EU directives, and so is an example of gold-plating of EU law which the Government has said it will not do. They are also an example of over-prescriptive regulation".

92. The Asian Fire Service Association states in their response; "the form can be seen to be very bureaucratic and time consuming."

93. A law firm states in their response, "we favour a simpler process that avoids duplication of work and does not impose self-defeating time limits".

94. A further law firm stated, "the best approach to managing such requests is to narrow down the information that is provided and exclude anything that is not relevant to the potential claim. There is genuine concern that the process allows employees to simply fish for information, increasing the time, effort and cost needed to fully respond".

Our assessment

95. Government notes the points made on additional possible costs and benefits of repeal and where appropriate these have been reflected in a revised Impact Assessment – the cost and benefits have not significantly changed as a result of these responses and no quantifiable evidence has been provided to help us reassess the possible burden of maintaining the provisions. The only quantifiable evidence we have is the some 45,000-60,000 employee hours a year[6] spent on completing forms. The Government is keen to remove this burden as well as the burden of the eight week time limit for employers to respond.

[6] GEO Administrative Burden Reduction Study, IFF Research prepared for Government Equalities Office, June 2009

Q23: What we asked and what respondents said

96. Question 23: Please provide any comments you have on the assumptions, approach or estimates we have used in the obtaining information provisions impact assessment (e.g. do you agree with the estimates, assumptions/approach? Are there any we have missed out? Can you identify any benefits to individual claimants receive in using the forms?)

97. Few respondents provided comments in response to this question. TUC stated in their response, "the impact assessment is based on an extremely limited evidence base. It cites the BCC survey of micro businesses as providing evidence of concerns that the questionnaires are used as "fishing exercises" by employees and as reflecting concerns about having to complete lengthy and technical questionnaires……..the survey does not provide any direct evidence from micro businesses in relation to the questionnaires and it is not clear whether they were even asked about the questionnaires or any respondents to the survey mentioned them."

98. A law firm provides counter-balance arguments to TUC's views. It states in their response, "there is genuine concern that the process allows employees to simply fish for information, increasing the time, effort and cost needed to fully respond."

Our assessment

99. In the Government's view, in the absence of any further evidence on the burden on business the obtaining information provisions may have, the independent research carried out on behalf of GEO is the only reliable data source available.

100. No relevant evidence emerged from the consultation to show what effect use of the obtaining information procedure actually has on the number of discrimination and equal pay claims made to courts and tribunals each year. However, estimates from research suggest that about 9,000-10,000 employers are needing to use the forms each year[7], whereas around 77,000 claims are accepted in the discrimination field (from some 218,000 claims made to employment tribunals on all grounds[8] so we doubt that the process plays any major role in helping to weed out unmeritorious claims. While several respondents criticised the Government data on business burden mentioned above, no alternative evidence on this was presented.

[7] See footnote 1

[8] http://www.justice.gov.uk/statistics/tribunals/employment-tribunal-and-eat-statistics-gb

Q24: What we asked and what respondents said

101. Question 24: Does the impact assessment for the obtaining information provisions accurately assess what the implication for equality is?

102. A total of 54 respondents considered that the Impact Assessment does not accurately assess what the implication for equality is and 21 thought that it does.

103. Those who considered that the Impact Assessment does not accurately assess the implications for equality provided a range of comments. The Disabilities Charities Consortium stated in their response, "we are not reassured that access to justice will not in fact be undermined by repealing this provision". This view was also shared by the Lesbian & Gay Foundation, who commented in their response, "the repeal of s.138 will adversely affect access to justice because without the information employees will shy away from going to the Tribunal and/or have difficulty securing legal representation".

104. The Law Society state in their response to this question, "race discrimination claims are more likely to be brought by black and minority ethnic claimants and sex discrimination claims by women. In most of the protected characteristics there will be a clear body of individuals who are both more likely to suffer discrimination and to bring claims. This is particularly the case in disability discrimination, where only people with disabilities are able to bring claims. It follows that in respect of each protected characteristic there is likely to be a body of individuals sharing a protected characteristic who will be disproportionately affected by the withdrawal of the questionnaire procedure". This view was also shared by many other respondents who responded to this part of the consultation. For example, a further response stated, "it gives no consideration to the impact on the individuals who are most likely to have a protected characteristic".

105. DLA added, "the equality impact assessment should demonstrate how the Home Office and/or the Government Equalities Office in proposing repeal of s.138 has had due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations in respect of the protected characteristics listed in s.149(7)".

Our assessment

106. The Government has noted all comments and considers that removal of the legal provisions will not prevent any individual from any protected characteristic group from seeking pre-claim information through a more informal route. We are mindful that removal of the provisions, including the prescribed forms, may be thought to create a risk of hindering access to justice, but we consider that in such cases, certain representative or advice groups may have a role in advising on formulating appropriate questions to seek information.

Conclusions and next steps

107. Wider recommendations are discretionary on employers. In our view, the types of recommendations made in the tribunal cases so far show that in practice, wider recommendations have tended to be obvious and non-technical – in particular that an employer's human resource practices should be improved or that staff be given equality training.

108. The Government considers that whilst the types of recommendations made highlight wider issues around lack of awareness and knowledge by employers of equality and employment law, the wider recommendations provision is not the right way to address this issue. We think a better approach is through the practical non-legislative measures proposed by the Government in May 2012 as part of the Red Tape Challenge equalities package announcement. We intend to work with businesses, particularly small businesses and their representative organisations to increase understanding of compliance and best-practice in avoiding risk of adverse tribunal decisions; and through very short, straightforward web-based guidance for small businesses on equality law areas known to be particularly difficult for them.

109. The 2010 Act procedure for obtaining information is a regulatory process where mandatory and voluntary elements are mixed together with confusing and burdensome results: employers are not legally obliged to respond, but in practice face an in-built statutory risk if they do not do so, and within a fairly short timescale. It is of course an option for the claimant – and would remain so, even without any underpinning legislation – to seek information from an employer or service provider about an alleged breach of the 2010 Act. We do not see why it should be a function of Government to try and micro-manage this interaction between the parties through the prescribing of template forms and time limits, which those parties are in any case free to ignore or substitute if they wish. This seems an inappropriate state function.

110. We intend therefore to repeal the provision, leaving businesses free to decide how and whether they respond to enquiries of this sort, with any attendant balance of risk that may be involved.

111. We acknowledge though that the original aims of these provisions included useful and valid intentions. Wider recommendations were intended to encourage employers to tackle more general shortcomings, in particular a lack of equality and anti-discrimination awareness in the management of their workforce, even though the original claimant had severed their links with their former employer. The procedures for obtaining information, at their best, enable alleged discrimination to be explored in communication between an individual and an employer or service provider rather than through immediate recourse to a court or tribunal. Our objection is not to these aims, but to the regulatory and prescriptive approach of trying to provide for those aims in legislation.

112. Therefore, while we intend to seek opportunities to take forward the repeals as outlined in the consultation, we will want to consider whether there are alternative and better non-legislative ways of pursuing these aims. We will consider whether there are ways of enhancing the transparency of employment tribunal outcomes. Through the requirement that we are introducing for all potential tribunal claims to be lodged with Acas in the first instance, and through the new Equality Advisory Support Service which started on 1 October this year, we intend to encourage and promote the use of conciliation and arbitration services rather than claims being taken to the courts and employment tribunals. And through engagement with business, including consideration of guidance, we will be seeking to encourage employers to recognise the potential benefits and savings of early disclosure where there is a possibility of discrimination claims being made.

Annex 1
Organisations which responded

Organisations which provided formal consultation responses were as follows:

Acas
Asian Fire Service Association (AFSA)
Association of Scottish Police Superintendents (ASPS)
Association of Teachers and Lecturers (ATL)
Association of Women of Solicitors
BLS
British Retail Consortium
Citizens Advice Bureaux (CAB)
Capability Scotland
Chesterfield Borough Council
Cloisters
Croydon Area Gay Society
Communication Workers' Union (CWU)
Disability Charities Consortium
Disability Law Service (DLS)
Discrimination Law Association (DLA)
Diversity Network for Cornwall
Equality and Diversity Forum (EDF)
EEF
Equality and Human Rights Commission (EHRC)
Employment Lawyers Association (ELA)
Employment Law Bar Association (ELBA)
Equanomics
FDA
Gender Identity Research and Education Society (GIRES)
GMB
Hearing Dogs for Deaf People
Institute of Directors (IoD)
Law Society
Law Society of Scotland
Lesbian & Gay Foundation
LGBT Consortium
Local Government Association (LGA)
Lyons Davidsons Solicitors
Mercer
Metropolitan Police Service's (MPS) Directorate of Legal Services (DLS)
National AIDS Trust
National LGB&T Partnership
National Union of Teachers
NHS Employers
Nottinghamshire Fire and Rescue Service
Odysseus Trust
Prospect
Police Federation of England/Wales
President& Regional Employment Judges of ETs of England & Wales
PCS
Regional Equality and Diversity Partnership (REDP)
Reformed Churches Caucus of the Lesbian and Gay Christian Movement
Royal College of Nursing Midwives
RNIB
Royal College of Nursing
Scottish Discrimination Law Association
Squire Sanders (UK) LLP
Scottish Trades Union Congress
Travers Smith
The Association of Convenience Stores (ACS)
Trades Union Congress (TUC)
Thompsons Solicitors
The Open University
Transport Salaried Staffs' Association (TSSA)
UNISON
University of Leicester
Unite – the union
Women's Budget Group
Working Families
Women's Resource Centre

Note:

The list excludes organisations that asked for their names not to be made public or for their response to be in confidence and some organisations which used the online SMART survey tool to respond and did not specify the name of their organisation.

In addition to the above list of organisations there were also a number of responses from individuals.

Government Equalities Office
3rd Floor Fry Building
2 Marsham Street
London
SW1P 4DF

Email: enquiries@geo.gsi.gov.uk

Tel: 020 7035 4848

www.homeoffice.gov.uk/equalities/

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