Discrimination Law Association

Response to Government Equalities Office consultation: Proposal to repeal procedures for obtaining information: section 138 Equality Act 2010

1. The Discrimination Law Association ('DLA'), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

2. The DLA is a national association with a wide and diverse membership. The membership currently consists of some 300 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

3. We are responding separately to the consultation regarding two proposed reforms to the Equality Act 2010. This response deals with the proposal to remove from the Act procedures for obtaining information.

Introduction

4. We set out below the serious concerns of the DLA regarding the proposed repeal of s.138 of the Equality Act 2010, which provides the structure for the statutory questionnaire procedure that has operated successfully under equality legislation since 1975. In preparing this response we have received from DLA members examples of real cases in which the questionnaire has been used, and we include a number of these examples in paragraphs 42 - 45 below. We have also benefited from seeing the response to this consultation submitted by Sheila Wild and Sue Hastings which discusses in detail the implications for removing the questionnaire procedure in equality of terms (formerly equal pay) proceedings; we endorse their response and, with their consent, have included extracts in this DLA response.

5. Our response is in three parts. The first part challenges the government's stated reasons for proposing the repeal of s.138; the second part demonstrates from the experience of DLA members and decisions of the courts the value and importance of the questionnaire procedure; the third part includes the DLA's replies to the questions in the consultation document incorporating examples of real cases from our members which involve use of the statutory questionnaire.

Part I. Reasons for proposed repeal of s.138

6. The DLA is concerned that this present consultation is fundamentally flawed as both of the reasons stated (para. 3.12) for the government's proposed repeal of s. 138 are based on inaccurate and/or misleading information. We suggest that this put in doubt the responses of any individual or organisation who, in replying to the consultation questions, has relied solely or primarily on these reasons for the proposed repeal.

7. The government's two key reasons for repealing s.138 are stated (para.3.12) to be:

   - Failure of the procedure to achieve its intended purpose
   - Additional unintended burdens created by the provision

<u>"Failure of the procedure to achieve its intended purpose"</u>

8. The government states '*we have seen no evidence to suggest that the provision has had the intended effect of encouraging settlement of claims without recourse to tribunals or the courts, or has encouraged efficiency of the claims process for cases that reach a court or tribunal*'.

9. The DLA is unaware of the basis on which the government asserts that the above was ever the purpose of the procedure. It is contrary to what the legislation has stated since 1975 and contrary to case-law.

10. The government acknowledges that the questionnaire procedure originated in earlier equality enactments. What is not acknowledged or accurately stated is the intended purpose of the statutory provisions establishing such a procedure. We suggest that the appropriate starting point must be the official government policy statements which preceded enactment of the Sex Discrimination Act in 1975 and the Race Relations Act in 1976. The following extract from the September 1975 Home Office White Paper "Racial Discrimination" describes one provision of proposed new race relations legislation:

“85. Help will be given to a person who considers he may have been discriminated against unlawfully to decide whether to institute proceedings and, if he does so, to formulate and present his case in the most effective manner. Standard forms will be made available by means of which he may question the respondent on his reasons for doing any relevant act or on any other matter which may be relevant and by means of which the respondent may if he so wishes reply to such questions. The questions and replies will, subject to the normal rules relating to admissibility, be admissible as evidence in the proceedings …. In addition to helping the aggrieved person to ascertain the nature of the respondent’s case at an early stage by means of a simple, inexpensive procedure, this provision will also enable complaints which are groundless or based on misunderstandings to be resolved without recourse to legal proceedings.”

11. The Sex Discrimination Act 1975 (SDA) s.74 and the Race Relations Act 1976 (RRA) s.65 include the following:

“(1)With a view to helping a person ("the person aggrieved") who considers he may have been discriminated against in contravention of this Act to decide whether to institute proceedings and, if he does so, to formulate and present his case in the most effective manner, the Secretary of State shall by order prescribe—

(a) forms by which the person aggrieved may question the respondent on his reasons for doing any relevant act, or on any other matter which is or may be relevant;

(b) forms by which the respondent may if he so wishes reply to any questions.”

12. Similar wording was incorporated as s.56 of the Disability Discrimination Act 1995 (DDA). A new s.7B was added to the Equal Pay Act 1970 which provided, with very similar wording conveying the same purpose, a questionnaire procedure for potential equal pay complainants.

13. Of course there will be, and, in practice, there quite often are, beneficial side effects that cases are encouraged towards settlement by the early exchange of information or that the information provided by a questionnaire enables time to be saved at the ultimate hearing if there is no such settlement. But these were never the *purpose* of the questionnaire procedure.

14. The DLA is therefore very concerned that the government’s first main argument for repeal of s.138 is that it is failing to meet its “intended purpose” when that purpose has been inaccurately stated.

15. In fact, it is the experience of DLA members that s.138 does meet the purpose as stated in the 1975 White Paper and in s.75 SDA, s.65 RRA, s. 56 DDA and s.7B Equal Pay Act. There is nothing in the Equality Act 2010 to indicate that s.138 has a different purpose; the Explanatory Notes to the Equality Act 2010 (para 458) state that s.138 "is designed to replicate the effect of provisions in previous legislation."

"Additional unintended burdens created by the obtaining information provision"

16. This limb of the government's reasons to repeal s.138 appears to rely on data from two surveys, neither of which provide reliable evidence in support of the government's arguments.

17. The consultation document refers to the survey by the British Chamber of Commerce (BCC) survey, "The Workforce Survey - Micro Businesses".[1] This survey does not, however, provide any indication of the proportion of micro businesses (fewer than 10 employees) which have found responding to the questionnaires burdensome. There are statistical data on a number of aspects of regulation that may affect recruitment, and a main concern is the future impact on micro-businesses of pension reforms. In the report of this survey the BCC provides no data relating to the impact of the questionnaire procedure on micro-businesses. Where the BCC suggests areas in the review of employment law which could be explored for micro-exemption one example is the questionnaire procedure. The description of the burden micro-businesses may have in completing questionnaire forms, which is rehearsed fully in the consultation document, is not supported by any direct evidence from any of the micro-businesses involved in this survey. We therefore query the reliance on this non-randomised survey of one type of business only, lacking in reliable evidence, as the basis for radical reform of procedures for enforcement of rights to non-discrimination.

18. With reference to micro-businesses, we would add that it is the experience of DLA members that in most cases where an owner/manager knows very well all of their employees and the business's employment history, completing a questionnaire form will be neither difficult nor time-consuming

19. The Impact Assessment in the consultation document relies on a different source in an attempt to quantify the burden on businesses of replying to questionnaires. The study commissioned by the Government Equalities Office , while the Equality Bill was before parliament, "GEO Administrative Burden Reduction Study"[2], found that approximately 2% of the 811 businesses surveyed had completed an Equal Pay, SDA or RRA questionnaire in the preceding three years. It is from that figure that the

[1] August 2011. A survey of micro-businesses which are members of local Chambers of Commerce.
[2] IFF Research prepared for Government Equalities Office June 2009

government has estimated approximately 9,000 businesses per year completing one of these questionnaires. At the beginning of 2010 there were approximately 1.6 million private sector businesses with one or more employees;[3] of such businesses 9,000 represents a very small proportion - just over half of one percent. Of course the fact that the number of businesses replying to questionnaires is small would be totally irrelevant if this study indicated that the burden involved was significant. That is not what emerges from this study; generally this 2% sample “agreed that it was straightforward” to complete the questionnaire forms. A few raised specific concerns regarding particular forms, for example problems with the instructions on the equal pay form, difficulties in identifying appropriate comparators in the SDA form or lack of clarity in the instructions in the RRA questionnaire. Only one respondent, from a business employing 250+ employees, specifically disagreed that the SDA questionnaire was straightforward to complete because “it requires a lot of information, takes time and you need figures and specific data. It is a time-consuming exercise”. Respondents who had completed any of the forms were asked for suggestions to improve the forms on a prompted basis - with options for improvement to format, length, language used, instructions, guidance, number or type of additional questions an employee can ask, and most suggested shorter, clearer and simpler forms. It would appear that at that time the GEO was not considering repeal of the questionnaire procedure and the researchers did not offer this option to survey respondents; none is reported to have urged repeal.

20. The government also asserts (para. 3.12 and the Impact Assessment) without reference to any real evidence that employers are concerned about the ability of a court or tribunal under s.138, if proceedings are brought, to take into account the answers provided or lack of response and that this “may impose a disproportionate regulatory burden on business relative to any benefit”. What the government omits is that if, without a questionnaire, a claimant brings proceedings and applies for an order for disclosure or further information and such an order is made, the burden on the respondent is considerably greater. The court or tribunal will, of course, take into account the information the respondent provides; further, if the respondent fails to

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[3] 4.5 million private businesses, of which 64.2% were sole proprietorships http://www.bis.gov.uk/assets/biscore/statistics/docs/b/bpe_2010_stats_release.pdf

comply with such an order, the court or tribunal could strike out their entire case - a power which is not available if a questionnaire is ignored.

21. It is from the 2009 GEO commissioned survey that the approximate time to complete a questionnaire is taken; respondents who had completed a questionnaire in the preceding 12 months were asked how long this had taken and answers varied from 1 to 12 hours, with an average of five to six hours. The researchers found that approximately half of the survey respondents who had completed a questionnaire had sought independent or professional advice for this purpose, including solicitors, HR consultant, accountant, ACAS or their trade association. These figures are used in the Impact Assessment to monetise the “burden”.

22. The DLA considers that the Impact Assessment (Annex E) as a whole provides an incomplete and hence inaccurate picture of the ‘costs’ and benefits to individuals or employers/service providers of the questionnaire procedure. As we discuss more fully below, s.138 questionnaires comprise only one part of the procedure under the Equality Act 2010 for resolving potential complaints of discrimination. Therefore it is misleading to suggest, as in the Impact Assessment, that the time and costs incurred by businesses in reading questions and preparing replies can be isolated from the time and other costs which may be involved in a discrimination case as a whole. In many cases without the questions and replies the time and costs for all parties will be greater.

23. If a significant measure is the monetised time required for businesses to read and prepare a response to a statutory questionnaire, whatever that figure is, the benefit or burden on business cannot be measured by that figure alone. If, as is frequently the case, the exchange of information through the statutory questionnaire results in a settlement without the commencement of proceedings, which for the employer/service provider would normally involve far greater costs and manager/staff time, then the impact of the questionnaire procedure is a saving rather than an added cost; repealing this procedure may, in fact, result in overall greater costs to business.

Part II. The crucial importance of the s.138 statutory questionnaire procedure

24. Both parliament and the courts have recognised the difficulty of proving discrimination and that the necessary evidence is usually accessible to the employer/service provider but not to the employee/service user.

Shifting burden of proof - importance of statutory questionnaires

25. To comply with European law[4] the UK has incorporated into national equality legislation, now s.136 Equality Act 2010, the shifting of the burden of proof. UK courts have recognised that statutory questionnaires are an important part of the process of deciding whether an employer has discharged the burden of proof once the claimant has proved a prima facie case. For example:

26. In *Dresdner Kleinwort Wasserstein Ltd v Adebayo* [2005] IRLR 514, the EAT said:

> "The statutory amendments *[ie to introduce the shifting burden of proof]* clearly reflect the European emphasis on effective protection for those who are the victims of discrimination, and the need for the principle of equal treatment to be applied effectively.
>
> The shifting of the burden to employers means that tribunals are entitled to expect employers to call evidence which is sufficient to discharge the burden of proving that the explanation advanced was non-discriminatory and that it was the real reason for what occurred. Equivocal or evasive answers to legitimate queries in statutory questionnaires, failures to follow recommendations in relevant codes of practice, or the failure to call as witnesses those who were involved in the events and decisions about which complaint is made will all properly assume a greater significance in future, in cases where the burden of proving that no discrimination has occurred is found to have passed to the employer."

27. In *Igen Ltd and ors v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster* [2005], the Court of Appeal drew attention to the importance of questionnaires in the context of the burden of proof under section 63A of the Sex Discrimination Act.

> "(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant …..

[4] Including Directives 97/80/EC, 2000/43/EC, 2000/78/EC

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves ….

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal ….

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA."

Essential role of questionnaires in enabling individuals to prove discrimination

28. It cannot be over-stated how crucial statutory questionnaires are to enable people to prove genuine discrimination claims. They offer a structured, time-bound way for a potential claimant to find out the employer's/service provider's reasons for taking certain action and to gather evidence which the claimant cannot access in any other way.

29. Without the kind of information which individuals can only obtain through written questionnaires under s.138, in many cases it will be almost impossible to prove discrimination or breach of an equality clause.

30. Questionnaires are not a problem for employers who have nothing to hide: they are alerted at the earliest stage to the strengths and weaknesses of a possible discrimination or equal pay claim and generally take action swiftly to settle the case if need be. Conversely, repeal of the questionnaire procedure will mainly serve the interests of employers or service providers who do not wish to expose their potentially discriminatory policies and practices.

    To illustrate the value of the questionnaire procedure we would remind the government what is involved to prove discrimination:

31. At the heart of any claim for **direct discrimination** is the issue whether the employer/service provider has treated or would treat a comparator more favourably than the claimant. A comparator is someone of a different sex, different racial or religious group, different age etc. who has been or would be treated more favourably by an employer in comparable circumstances.

To begin to establish a case of direct discrimination it is essential to ask questions regarding the treatment of the potential claimant and appropriate comparators.

32. Two hypothetical examples illustrate this:

    a) in a recruitment/promotion case where a female worker was not even interviewed for a job that she thought she was well suited for, she could ask:

        - Who was interviewed for the job? (identifying candidates by number not name)
        - In each case, were they a man or a woman and what were their experience and qualifications?
        - Which of those was given the job and why?
        - Why was I not even interviewed for the job?
        - As at the date of my application, please state the number of staff you employed [in the case of a large employer defined to refer to the establishment, the type of work, etc.] by reference to gender and job title.

    b) In a case of a disciplinary warning which was thought to be race discrimination, a worker could ask:

        - Who decided to take the disciplinary action against me and for what reasons?
        - Please list all other employees who committed the same offence as me in the last 3 years and state in each case (i) what action was taken against them (ii) their ethnic origin.
        - With regard to Fred Bloggs, who is white and committed the same alleged offence as me 3 months ago, please state why no action was taken against him.

33. When considering whether an individual has simply been treated unreasonably or whether their treatment is part of a discriminatory pattern it is essential to be able to ask questions regarding statistical patterns in the workplace, eg statistics which reveal the status of BME or female or disabled workers in an organisation, or questions on how childcare requests or requests for religious observance are accommodated.

34. It is the experience of DLA members that the employer would be highly unlikely to give information regarding other candidates in response to an ordinary letter from the worker or their legal adviser. They would argue confidentiality or irrelevance. The statistical information regarding the

position of workers of different sex, race etc. in the organisation would almost certainly not be given voluntarily by the employer in response to informal correspondence nor would it be ordered by a tribunal through the normal, far more restricted processes, of disclosure and requested information.

35. To succeed in a claim of **indirect discrimination** it is necessary at the start to show that when an apparently neutral provision, criterion or practice is applied generally it disadvantages people of a particular sex, race, religion or belief, etc. compared to others. Gathering information to demonstrate indirect discrimination is difficult, and often statistics are essential for this purpose.

    For example in a redundancy situation in which part time workers, the majority of whom are women, are selected first for redundancy (applying the criterion of 'being a full-time worker') a female worker could ask:
    - How many men and how many women work part time?
    - How many men and how many women work full time?

36. The questionnaire procedure enables access to relevant statistics which may, or may not, disclose such disadvantage and is therefore of vital importance. It is the experience of DLA members that an employer/service provider would not provide such statistics voluntarily through ordinary correspondence. Further if statistical data have not been gathered previously and therefore do not form part of a document, a tribunal's powers to order disclosure would not apply. Without the questionnaire procedure such data, essential in determining whether indirect discrimination may have occurred, will remain hidden.

37. Similarly, to begin a claim under the **equality of terms** provisions of the Equality Act a woman will need to show that she is receiving less pay or other less favourable terms in her contract than a male comparator doing equal work. As Sheila Wild and Sue Hastings in their consultation response explain,

    > "The questionnaire procedure is particularly useful in claims in respect of the equality of terms provisions of the Act…. the way in which [pay] discrimination is effected is the result of systemic action by the employer. One example would be where the employer has introduced into the pay system incentive payments or bonuses that favour a predominantly male group of workers - the outcome impacts on individual women, but the decision is effected through the pay system as a whole.
    >
    > "Information about the reasons for such systemic decisions, and …the gender profile of the groups of workers involved is known to the employer, but may not be known to the prospective claimant. The reasons for the

systemic action may be legitimate, in which case the answers to the questions are likely to satisfy the prospective claimant; or they may be unpersuasive, in which case the claimant may wish to proceed with a claim, but with a greater understanding of the employer's position. And, as pay discrimination is seldom intentional, the questions can also serve to alert an employer to any unwitting discrimination inherent in systemic actions; where this is the case, the employer will in all probability take action to resolve the issue without the claimant needing to have recourse to the Employment Tribunal. The questionnaire can thus act as a prompt to put matters right."

38. Cases lodged in the employment tribunal are subject to a case management discussion, which is the most likely time when any order for documents or for the provision of information is considered. Before making an order the tribunal would need to be satisfied that information sought by the employee is evidentially relevant and that the order sought would assist the tribunal in dealing with the proceedings efficiently and fairly. However, without the statutory questionnaire, the employee would still be in the dark regarding the nature of the evidence in the hands of the employer. Further, case management discussions take place long after the legal proceedings have begun, while the cases we cite below illustrate the benefit to both sides of early exchange of information.

Part III. DLA replies to consultation questions and examples of cases involving use of the statutory questionnaire

39. **Question 9: Have you or your organisation been involved in a procedure for obtaining information about a situation involving potential discrimination, harassment or victimisation?**

    NO, the DLA has not been directly involved. However members of the DLA have been involved in such procedures and we refer below to relevant examples provided by DLA members.

40. **Question 10: Please provide details of your involvement in a procedure for obtaining information**

    Involved in other capacity: DLA has not been directly involved, but for the purposes of this consultation we include references to the involvement of DLA members as lawyers or advisers to employees/service users.

41. **Question 11: 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**

We refer below to examples under previous legislation and under s.138

42. **Questions 12 - 15**

In response to these questions, we set out below examples provided by DLA members of actual cases which illustrate various actions and outcomes where the procedure for obtaining information (the questionnaire procedure) was used by a potential complainant.

43. ***Service of questionnaire prompted settlement prior to a full hearing***

- A trade union member with learning difficulties (and approximately 9 years' service) was dismissed for failure to interact sufficiently with customers and for not meeting checkout scanning targets at a major supermarket. Her union argued that she was a disabled person who had been dismissed without consideration of reasonable adjustments (such as relocating her to duties on the shopfloor where no customer interaction was required); the decision to dismiss was upheld on appeal. Her union drafted and served a well-targeted Equality Act questionnaire early on, and, as soon it was received, the respondent's solicitors contacted the union admitting that they did not want to answer the questions and sought to settle the case immediately.

- A black Claimant was subjected to harassment from a non-black employee. Upon raising a grievance the Claimant was moved to a different job site and eventually given less and less work. Ultimately the Claimant resigned and lodged a claim for constructive unfair dismissal and race discrimination, after which a questionnaire was served; no proper response was received. The Respondent, however, made an offer to settle at a very early stage (before disclosure of documents) and the claim settled at a relatively early stage.

44. ***Replies to a questionnaire led to a reassessment of the merits of a claim***

- Mr A believed that race discrimination was the reason an NHS Trust had not recruited him to a senior management role for which he was qualified. His legal advisers served a detailed questionnaire with a letter of complaint. The response to the questionnaire showed anonymised evidence of a comprehensive recruitment exercise clearly following equal opportunities process; all answers to the set questions were documented as were the presentations. Mr.A's answers and presentation were clearly inferior to those of other candidates. His publicly funded legal advisers

advised him that the case showed no prospect of success and declined to act further.

- An employee alleged race discrimination because he was refused authorisation to take a period of annual leave of 3 continuous weeks, whilst noticing that others not of his ethnic origin were granted leave of such duration. The questionnaire procedure resulted in disclosure of information showing that other were indeed granted such leave, but this was following written requests for extended leave due to family illness or other special reasons. The information led to a re-assessment of the merits and the Claimant was advised not to proceed further.

- The employee believed his dismissal was on account of his disability and hence alleged disability discrimination. The questionnaire procedure produced no information to assist the claimant and the claimant was advised that there was insufficient evidence to shift the burden of proof, and accordingly advised not to proceed further.

45. ***Information provided in replying to questions prompted early out-of-court settlement***

- Mr S was sacked by a large hospitality company as an internal audit process showed "evidence consistent with the suspicion of fraud". His advisers sent a questionnaire asking who else was caught by this audit process; and what action was taken against them. The company responded by showing that of those "caught" different outcomes happened depending on ethnicity. If the employee was BME they were more than 4 times more likely to be sacked (rather than retrained) than if white British. This disclosure prompted the company to agree an out-of-court settlement which included them saying they would review their disciplinary process.

- The employee was dismissed just before reaching one year's service. He alleged that the act of dismissal was race discrimination. The questionnaire procedure was used to obtain statistics, and the replies revealed that a disproportionately high percentage of black employees failed probation in comparison to non-blacks. This was sufficient to shift the burden of proof onto the employer and this prompted settlement offers from the Respondent.

46. ***Questions by the complainant in a statutory questionnaire led respondent to recognise their acts of discrimination and offer to settle on the first day of the Tribunal Hearing.***

- Mr B was an agency worker at a multinational company. He was twice unsuccessful in gaining permanent employment with the same company doing the same role. He was told privately that the successful candidates were white and the friends and family of the union representative. His legal advisers sent a questionnaire asking questions about the two recruitment processes. This highlighted very suspicious-looking documentation of the interview processes in which successful candidates had been scored highly but their answers were not recorded. For one successful candidate the company replied with two totally different versions of apparently the same interview. The case did not settle until the first day of the Tribunal because the company was reluctant to make any disclosures, but it was clear from the paperwork evidence that they would lose.

47. **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**

    YES - DLA thinks there are further costs which need to be included in the impact assessment:

48. As we have discussed above, repealing the obtaining information provisions is likely to result in more rather than fewer claims in the courts and employment tribunals, which inevitably will increase the costs in terms of time and money for employers/service providers. One of the confirmed benefits of the obtaining information procedure under s.138 and previous legislation is that cases with little prospect of success can be identified and proceedings either never commenced or, depending on the timing of the questionnaire replies, withdrawn at an early stage. The costs to a business of any size of preparing for and attending a full hearing of a discrimination claim in the county court or employment tribunal will, in our experience, always far outweigh the costs of replying to a s.138 questionnaire.

49. Where replies to a questionnaire indicate that the respondent may have committed unlawful acts so a complainant is likely to lodge a claim in a court or tribunal, the information provided by the respondent will enable the complainant to prepare a claim that is more focused and specific, and the issues which the court or tribunal must determine will be clearer. Where a large amount of information can be established on paper at an early stage, it saves hours of questioning at the hearing itself, which is a far slower process. Information established by a questionnaire or avenues explored and discarded saves cross examination time at a hearing. Without s.138 businesses are likely to incur far greater costs than the assessed value of the 5 - 6 hours they claim currently to spend in replying to questions under the obtaining information procedure.

50. In addition, many of the questions raised under the statutory obtaining information procedure would need to be explored and answers found by a respondent facing a discrimination case in a court or tribunal. This is especially true in equal pay cases. So time spent gathering information for questionnaire replies is time saved on interviews of key witnesses in preparation for a full hearing, which would be necessary in any event. It is therefore misleading to suggest that replying to a questionnaire involves costs all of which could be saved if s.138 were repealed.

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

    NO - As explained above, we believe there are no real benefits to business which would follow the repeal of s.l38, and any benefits indicated in the impact assessment are based on inaccurate assumptions and are therefore misleading**.**

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

    As discussed in our general comments above, we disagree with the assumptions and approach that underpin this proposal and, as stated in our response to Question 21, we disagree with the basis on which cost estimates in the impact assessment have been calculated.

    The questionnaire procedure is of inestimable value to individual claimants and to repeal s.138 would significantly impair their ability to prove genuine discrimination claims.

    The DLA can see no benefit in removing a procedure which has proven to be essential to the fair adjudication of complaints of discrimination; to decide to repeal s.138 would raise severe doubts regarding the commitment of this government to the eradication of discrimination and to the principles of equality - equal treatment and equal opportunity - in its Equality Strategy.

53. **Question 24: Does the impact assessment for the obtaining information provisions accurately assess what the implications for equality is?**

    NO.

54. The DLA was surprised to read what is described as an equality impact assessment of the proposal to repeal s.138 Appendix A (pages 72 - 73). 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). The DLA submits that the material on pages 72-73 fails to demonstrate that such consideration has taken place.

55. It is, of course, correct that the questionnaire procedure is available to any person who complains of discrimination or harassment on any of the protected grounds and removing this procedure will apply to all of the protected grounds. As we have sought to demonstrate, the questionnaire procedure greatly benefits any person who seeks legal redress when they believe they have been discriminated against because of their sex, race, disability, sexual orientation, age or other protected characteristic. While it is unlikely that there are data showing the breakdown by sex, race, age, disability, etc. of people using the questionnaire procedure, it would, in our view, be realistic to assume that a breakdown of such usage would parallel the greater number of claims of discrimination by women than men, by people from ethnic or national minorities compared to white people, by disabled people, by more gay men and lesbians than straight people, by more older people than people under 40, etc. Overwhelmingly equal pay claims are brought by women. We therefore submit that to make it more difficult for potential discrimination claimants to secure legal redress will disproportionately disadvantage people who are more likely to experience discrimination and harassment, that is people with particular protected characteristics, ie women, people from ethnic minorities, disabled people, older people etc. This fact should have been recognised in the equality impact assessment, but it is not.

56. Having recognised disparate impact, the government would be expected to consider whether any mitigation is possible, that is any ways in which the described burden on business could be reduced without so significantly impairing the ability of people with particular protected characteristics to challenge unlawful discrimination. This too is not part of the equality impact assessment.

57. If the government's conclusion is that nothing short of repeal of s.138 will meet their concerns, then the equality impact assessment should state why, having had due regard to the elements of the equality duty and the risks of disproportionate impact on particular groups, the proposal will be implemented without modification.

Discrimination Law Association
3 August 2012