



**THE LAW SOCIETY
of SCOTLAND**
www.lawscot.org.uk

**Government Equalities Office Consultation:
Equality Act 2010, removing**

- (a) employment tribunals power to
make wider recommendations in
discrimination cases**
- (b) the procedure for obtaining
information**

The Law Society of Scotland's Response.

August 2012.

INTRODUCTION

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession.

Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Law Society of Scotland (the Society) welcomes the opportunity to consider and respond to the Governments Equalities Office Consultation: Equality Act 2010 removing the employment tribunal power to make wider recommendations in discrimination cases and the procedure for obtaining information.

The Society has the following comments and responses to put forward:

Proposal to repeal section 124(3)(b) of the Equality Act 2010

The Society is concerned with the proposal to repeal section 124(3)(b). As this was only enacted a relatively short time ago, in October 2010. The Society is of the view that there has been insufficient time to measure, review and consider the benefits that may have resulted from the provision of the new power to employment tribunals to make wider recommendations. The Society would encourage the Government to give further time before consideration is given to the repeal of this section.

Question 1: Do you know of any other 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?

Response: The Society suggests that the Government, instead of asking for additional cases related to the power under section 124(3) (b), should consider asking and considering if there has been any beneficial effect of the power since its enactment. The Society believes that it is not until a power such as this has been in existence for some time, that agents are likely to request the exercise of such a power.

The Society also believes that there have been few cases which have progressed before Employment Tribunals where it would have been appropriate to request the exercise of this power.

Question 4: Whatever your answer to Question 1, do you agree or disagree that the wider recommendations power should be repealed? Please explain your answer.

Response: As stated in the response to question 1 (above) the Society is of the view that there has been insufficient time passed since enactment to fully evaluate section 124(3)(b). Currently, there may only be a few examples, but those that do exist show that the Act added a useful function to the Tribunals repertoire.

Proposal to repeal section 138 of the Equality Act 2010

In relation to the proposal to repeal S138. The Society has no settled view and recognises that the questionnaire brings benefits to claimants, at times helping to focus on the issues in question, but it also often causes inconvenience and problems for respondents.

The Society understands that at times, the forms may be used to carry out fishing exercises, to identify further issues for action, and the forms themselves can often be very lengthy containing irrelevant questions and probing for matters going back many years beyond the period of the basis of the claim.

The Society notes the Government's assumption that the question forms can often result in earlier settlement, and although not disagreeing with this, the Society suggests that the forms can often over 'legalise' and over complicate matters, increasing early legal costs.

However, the Society also recognises that much of the information is in the control of the employer and the form is perhaps the best method for the claimant to access this information. The use of the form promotes the equitable principle of equality of arms.

The Society suggests that the proposals and consultation paper appears to fail to recognise that in many instances the forms, questions and related answers help cases to settle pre hearing or help to identify other matters and circumstances which may not have been previously apparent and in this regard, the information questionnaire could be considered to be a useful tool and to remove this would effectively make it more difficult for claimants to obtain relevant and necessary information. If the forms were to be removed, then claimants may seek to use the Tribunal's powers to grant orders for additional information, which may be objected to by respondents and can result in interlocutory hearings, and the associated costs, which would otherwise have been unnecessary.

However, as with the proposal to repeal S124(3)(B), The Society suggests and believes that it is too early for consideration to be given to the repeal of section 138 and further time must be given to allow a true measure of the effectiveness of this section.

Question 12: Whatever your answer to question 5, do you agree or disagree that the procedure for obtaining information in section 138 of the Equality Act 2010 should be repealed? We would welcome reasons for your answer.

Response: See previous comments. It is too early to decide whether Section 138 should be repealed. Evidence of discrimination is hard to obtain, particularly for employees in the private sector. It is suggested that those who consciously discriminate against others will naturally seek to avoid any evidence of such discrimination being seen by employees. Those who subconsciously discriminate against employees may find their actions are not subjected to sufficient scrutiny because the underlying facts are not sufficiently known by the

workforce. In each case it is a proportionate burden for employers to be required to answer the questions of an inquisitive employee.

Impact Assessment.

In the Society's view, the cost of impact will be the continued risk of discrimination and the proposals will increase the likelihood and cost of litigations. It may also result in additional, otherwise unnecessary, interlocutory hearings.

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