RESPONSE FROM THE EMPLOYMENT LAW BAR ASSOCIATION COMMITTEE TO CONSULTATION PAPERS ON THE EQUALITY ACT 2010

A. INTRODUCTION

1. This response is submitted by the Committee of the Employment Law Bar Association ("ELBA"). ELBA is the professional association for employment barristers practising in England and Wales. ELBA members act both for employees and for employers.

2. The objects of ELBA include ascertaining and representing the views of its members and the protection and promotion of the efficiency and standing of Courts and Tribunals hearing cases involving employment law. That is the purpose of this response. It does not necessarily represent the views of all ELBA members.

B. OVERVIEW

3. The Committee opposes the proposed removal of sections 40 (third party harassment), 124(3)(b) (power to make recommendations), and 138 (procedure for obtaining information) because they are important anti-discrimination provisions:
   - the third party harassment provisions provide protection for individuals who would not otherwise be adequately protected and is in accordance with EU law;
   - the power to make recommendations gives employment tribunals the opportunity to propose steps to avoid/reduce future discrimination and should be retained in order to give tribunals the flexibility which this power provides;
   - the procedure for obtaining information can be an invaluable tool for individuals who suspect they have been discriminated against in order to better understand the basis on which particular decisions were taken before deciding whether or not to bring a claim but also in assisting claimants by providing material from which tribunals may draw adverse inferences in appropriate cases; on the other hand, the Employment Tribunal already has the power to prevent the abusive use of this procedure by a claimant or prospective claimant..

C. SECTION 40(2)-(3) THIRD PARTY HARASSMENT

Question 4: Do you agree or disagree that the third party harassment provision should be repealed? Please explain your answer.

4. Harassment prohibited by the EqA 2010 is specifically defined as unwanted conducted *related to a relevant protected characteristic* which has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
5. Sections 40(2) provides that A is to be treated as harassing B for the purposes of the EqA 2010 where a third party harasses B in the course of B's employment and A failed to take such steps as would have been reasonably practicable to prevent

the third party from doing so. Sub-section (3) provides that the above does not apply unless A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion. A third party is defined as a person other than A or an employee of A's.

Important purpose and proportionate approach

6. The effect of the House of Lords' decision in *Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937 was to disapprove *Burton v De Vere Hotels Ltd* [1997] ICR 1, where the EAT had held that an employer was liable under the Race Relations Act 1976 for exposing members of staff to the racist jokes of Bernard Manning. Failure to protect from third party harassment did not amount to "less favourable treatment on racial grounds" unless the failure to protect was itself discriminatory. That left a gap in the protection of the anti-discrimination legislation in relation to harassment by third parties.

7. In *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry*, the EAT held the effect of the Equal Treatment Directive 2002/73 was that an employer could be held liable for failing to take action where there was a continuing course of offensive conduct by a third party, such as a supplier or customer, that the employer knew of but failed to act against.

8. As a result, the Government amended the Sex Discrimination Act 1975 to allow a claim in respect of third party harassment, but only where the employee could show that the employer had been made aware that the employee was subjected to harassment by a third party on at least two previous occasions. None of the other anti-discrimination legislation was amended in this way. The decision not to amend the Race Relations Act in the same way as the SDA 1975, despite the existence of the Race Directive 2000/43/EC proscribing racial harassment in substantially the same terms as the amended Equal Treatment Directive, was recently described by Underhill J as "*odd*" in *Sheffield City Council v Norouzi* [2011] IRLR 897. In that case, which was a pre-EqA 2010 claim, the EAT held that the Council was liable for third party harassment by a child in its care who racially harassed one of its employees, a social worker. This liability was found under the Race Directive which could be directly enforced against the Council as a public authority.

9. Sensibly, the Equality Act 2010 extended potential liability for third party harassment to the other protected characteristics. Such liability only applies where the employer is aware of two previous occasions of harassment by the third party.

10. Removal of this protection from third party harassment from the EqA 2010 would, it seems, be contrary to EU law and lead to a deficiency in the structure and scope of the anti-discrimination legislation.

11. It is desirable and appropriate and in accordance with EU law that employers be held liable for failure to take reasonably practicable steps to protect their employees from harassment related to protected characteristics by third parties.

12. Given that, for example, secondments are increasingly common in the workplace, such protection from harassment related to protected characteristics by third parties has become increasingly important. For example, if an employee is seconded to a company, complains to their employer that they are being sexually harassed by their manager at the host company and their employer does nothing about this, the employee ought to have the protection of the EqA 2010.

13. Section 40 of the EqA 2010 only currently provides for liability after two instances of harassment which is a rather artificial way of providing for liability, and also probably contrary to EU law, but is better than no such protection.

Not already sufficiently protected

14. The suggestion that someone suffering third party harassment can resign and claim constructive dismissal hardly amounts to providing them with protection from harassment. Requiring someone to take the step of leaving their employment in order to avoid third party harassment is most surprising. Further, compensation for discrimination is uncapped, unlike compensation for unfair dismissal.

15. As to the protection said to be in place in other legislation, such as the Protection from Harassment Act 1997, that legislation does not provide specific protection for harassment which is related to a protected characteristic which can and should have a special stigma attached to it and claims under such other legislation would have to be brought in the civil courts rather than in the employment tribunals.

16. The third party harassment provision should not be removed from the EqA 2010.

D. SECTION 124(3)(b) POWER TO MAKE RECOMMENDATIONS

Question 4: Do you agree or disagree that the wider recommendations power should be repealed? Please explain your answer.

17. The power to make recommendations is contained in section 124(2(c) which provides that a tribunal may make an "*appropriate recommendation*" if it finds there has been a contravention of the EqA 2010. It is a separate power from the tribunal's power to make a declaration and its power to order a respondent to pay compensation to a complainant. Section 124(3) provides that an appropriate recommendation is "*a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant or on any other person*".

18. The previous strand anti-discrimination legislation had included a power for tribunals to make recommendations but only in respect of claimants. It was not a particularly widely used power. However, the new wider power is likely to be more frequently used and of more importance in avoiding further discrimination.

19. A tribunal would be required to consider practicality and proportionality when deciding whether to make any proposed recommendation. There is nothing to

suggest that the use of this power by tribunals has or will result in an undue burden on any employer, bearing in mind that the employer must necessarily have been found to be liable for at least one past act of discrimination before the power can be used. Nor is there any evidence that the past or prospective use of this power by tribunals will have any adverse impact upon business generally; rather, its use in any particular case will seek to promote the achievement of appropriate equal opportunities practice by a particular employer who is not meeting the necessary standards. This can only enhance that business.

20. Recommendations cannot be specifically enforced but failure to comply, without reasonable justification, can lead the tribunal to increase the amount of compensation to be paid or to make an order for compensation if one has not previously been made: section 124(7) of the EqA 2010.

21. The provision gives the tribunal the flexibility to go beyond declaring that past discrimination has occurred and awarding compensation for such past discrimination by enabling it to make recommendations to avoid future discrimination. This is an important step in the prevention of discrimination. Even if the power has not been frequently used by tribunals (and since the power only came into force on 1 October 2010 and discrimination claims often take a year or more to reach a final hearing, it is probably too soon to judge how frequently tribunals will use the power), it is important that tribunals should have the flexibility to make such recommendations in an appropriate case, having heard evidence about the particular employer's approach to equal opportunities.

22. The power to make recommendations should not be removed from the EqA 2010.

E. SECTION 138: PROCEDURE FOR OBTAINING INFORMATION

Question 12: 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.

23. Section 138 of the EqA 2010 provides a mechanism by which a person can obtain further information to determine if an unlawful act has occurred by way of a form of questionnaire or some other form.

24. In summary, section 138 of the EqA 2010:
    - provides P, a person who thinks that a contravention of the EqA 2010 has occurred, with an opportunity to ask questions of R, a person who P thinks has contravened the EqA 2010, "*on any matter which is or may be relevant*";
    - questions by P and answers by R are admissible as evidence in proceedings under the EqA 2010;
    - a tribunal may draw an adverse inference from a failure by R to answer a question by P within 8 weeks and/or from an evasive or equivocal answer.

25. This process for obtaining information is the equivalent of the statutory questionnaire process under the previous strand anti-discrimination legislation and

has been a very important tool for potential claimants and claimants. The importance of this provision is not just to enable a potential claimant to assess the merits of their claim but, more importantly, to enable a claimant who obtains helpful information, to support their claim before the tribunal given that direct evidence of discrimination is rare and material from which adverse inferences may be drawn can be crucial in some cases.

26. The importance of the questionnaire process to claimants who proceed with their claims should not be underestimated.

27. It is too late and too risky for a claimant to ask questions for the first time in cross-examination about, for example,
    - previous allegations of discrimination;
    - previous discrimination claims;
    - equality and diversity training;
    - monitoring;
    - promotion statistics.

28. Enabling a potential claimant to ask these questions prior to pursuing a claim, in circumstances where answers are admissible in evidence and an adverse inference may be drawn from an equivocal or evasive answer assists them to obtain a response from the potential respondent.

29. Indeed, some claims are impossible to establish without an understanding of facts which no claimant would be able to secure, or secure with any accuracy, without this process; for example, the relative gender balance within work groups for the purpose of establishing a claim of indirect sex discrimination.

30. Moreover, the pre-action use of a questionnaire may prevent a claim where, for example, an individual incorrectly believes that she has been paid less than a man or where in fact the gender composition of the workforce demonstrates that an indirect discrimination would be bound to fail.

31. It is well-recognised that there are cases in which individuals serve unnecessarily lengthy and complicated questionnaires which are time-consuming and costly to provide responses to. However, Employment Judges already have the power to direct that R not be required to answer any particular question on grounds of relevance/proportionality, and more rigorous case management by employment judges is the answer to this problem in any particular case where the questionnaire is unnecessarily lengthy or complicated.

32. The procedure for obtaining information should not be removed from the EqA 2010.

ELBA Committee
6 August 2012