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Consultation response

Equality Act 2010 – consultations on:

- 1) employer liability for harassment of employees by third parties**
- 2) removing:**
 - (a) employment tribunals' power to make wider recommendations in discrimination cases; and**
 - (b) the procedure for obtaining information.**

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1. Introduction

Age UK welcomes the opportunity to respond to this Home Office consultation on the Equality Act 2010, specifically on employer liability for harassment of employees by third parties and removing employment tribunals' power to make wider recommendations in discrimination cases and the procedure for obtaining information.

Age UK is working for a better later life today and tomorrow. We celebrate ageing and work to create opportunity in later life. And we fight and challenge disadvantage and unfairness wherever we find it.

Every day Age UK is in touch with thousands of people who we support to speak up for themselves. We understand the change that is needed to transform people's lives for the better. We have a positive, forward looking vision for our ageing society.

Age UK supported the vision of the Equality Act as it passed through parliament, and in particular the inclusion of the age discrimination ban in the provision of goods, facilities, services and public functions, which we believe the Government should implement as soon as possible.

The aim of the Equality Act 2010 was to prevent harmful discrimination. Age UK is concerned that the proposals in the two consultations serve to reintroduce the prospect of greater discrimination against individuals, with what appears to be limited overall benefit to individual businesses of the type the Government is trying to effect.

2. Key Points and Recommendations

- 2.1. The Government should wait until it conducts its full post implementation review of the Equality Act before it makes changes to its provisions, particularly where there is no clear evidence that there has been any negative impact on business.
- 2.2. The central aim of the Equality Act 2010 to harmonise equality legislation across all the key protected characteristics wherever possible, should not be undermined.
- 2.3. Employees should retain the right to reasonably obtain information that may be pertinent to their case from a former employer and therefore Section 138 should be retained. If section 138 is abolished, the Government needs to explain how individuals can gather the evidence to support their case, and how this is expected to affect the Tribunal procedure.
- 2.4. If section 138 is retained, the Government should provide a clearer definition of what constitutes a vexatious or clearly burdensome request so that employers can better justify any refusal to provide information.

3. Specific points on consultation 1 - employer liability for harassment of employees by third parties

- 3.1. Age UK does not agree that now is the right time to repeal this provision.
- 3.2. The Government's consultation sets out that it "is aware of only one case of the third party harassment provisions having been ruled on by an employment tribunal." It is therefore unclear on what basis the Government claims business, especially small

businesses, have concerns about this provision. Given the absence of a clear evidence base for on whether or not this protection is a burden on business, Age UK believes it is advisable that it remains on the statute book and is reviewed after a more reasonable time-frame to assess its impact on claimants and business. This could take place as part of the post implementation review of the Act that the consultation suggests the Government Equalities Office has planned for 2015.

- 3.3. The Government admits in its consultation that it “does not have full information from which to draw conclusions” on the impact of this protection on cases, as the majority of employment tribunal claims do not reach a hearing. The impact assessment, also states that, “we intend to review sub-sections 40(2)-(4) and collate views by way of public consultation in late 2011”, suggesting that it was drafted at least 6 months before publication of the consultation. It is disappointing that no further effort appears to have been made to improve the evidence base in this period. As well as the consultation process, Age UK would recommend that the Government engage pro-actively with ACAS, who it states help to resolve well over a third of claims, to conduct a case file study to see if there is any further evidence available before it reaches its conclusion.
- 3.4. Age UK does not support the third option suggested in the Government’s impact assessment, which would see this protection remain in place in respect to sex and gender only. This would work directly against the central principle of the Equality Act, which aimed to harmonise existing equalities legislation across all relevant protected characteristics, including age. We would not support any move that would see older people receiving less protection than others in society, particularly where there is no evidence to suggest that this would be a proportionate policy decision.

4. Specific points on consultation 2 – removing employment tribunals’ power to make wider recommendations and the procedure for obtaining information

- 4.1. Age UK does not have strong views on the repeal of an employment tribunal’s power to make wider recommendations. However, as with the first consultation covered in this response, we are concerned that this decision is being made without evidence. The impact assessment for the consultation states that “we are unaware that any such recommendations have been made since the commencement of the Equality Act in October 2010.” We again believe therefore that it would be sensible to postpone any decision until the full post legislative scrutiny of the Act has been performed, rather than taking the proposed piecemeal and unevidenced approach.
- 4.2. We are more concerned about the second proposal in the consultation, namely amending the procedure for obtaining information. Given that this is already a voluntary exercise, it is unclear why this represents an unfair burden on business. As long as a request for information is proportionate, and can be shown to be an important part of an individual’s case, it is reasonable that an employer should comply with it or that they should have to explain the Tribunal why they have not acceded to the request. This is a proportionate mechanism to strengthen access to justice for claimants.
- 4.3. By removing the statutory procedural mechanisms which outline the methods and timescales by which information may be obtained, an employee’s ability to obtain the information necessary to support his or her case will be weakened. If it is not explicit at the outset that information can be sought with a clear process for doing so defined in statute, it is likely that fewer employees will respond. Furthermore it is currently

explicit that the court or tribunal may draw an inference if an employer either fails to answer or gives equivocal or evasive answer the court or tribunal within a defined time limit. It is not helpful to either side to remove this clarity.

- 4.4. Where a request for information is obviously vexatious, the employer can already refuse it and set out their reasoning to the Tribunal. A better solution may perhaps be to define more clearly what constitutes a vexatious request or 'fishing expedition' than to remove this provision altogether. Employees, particularly those from larger firms with significant legal resource, often face a daunting task in challenging a former employer. To ensure that an individual can properly access justice we would support the retention of this protection.
- 4.5. It is worth noting that the survey referred to at paragraph 3.12 and cited as evidence for change, was undertaken only nine months (approximately) after the relevant forms were introduced and then only amongst micro businesses. To propose changes after such a short period of time and on the basis of limited evidence seems unwise. Again Age UK believes that any changes should only be introduced on the basis of sufficient and solid evidence.
- 4.6. Finally, Age UK is concerned that this repeal could open the door to other policy changes in employment tribunals that could adversely affect older workers' ability to properly challenge their former employers. It is essential that this right is not undermined. The Government should set out exactly how the individual claimant will be able to evidence their case in situations where the employer holds the relevant information.