Police Federation
Of England and Wales

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Established by Act of Parliament

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GENERAL SECRETARY'S OFFICE

Our Ref: IR/SG/VP

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Enforcement Consultation Responses
Government Equalities Office
Equality Law and Better Regulation Unit
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By email and post: enforcement@geo.gsi.gov.uk

Dear Sirs

CONSULTATION – WIDER RECOMMENDATION PROVISIONS

I am writing on behalf of the Police Federation of England and Wales ("the Police Federation") to respond to the Consultation Paper on the above subject dated July 2012.

General

The Police Federation of England and Wales ("the Police Federation") is the staff association for all police constables, sergeants, inspectors and chief inspectors in the 43 home office police forces of England and Wales. It was created by the Police Act 1919, with a statutory responsibility to represent and promote the interests and welfare of its members. The Police Federation has approximately 136,000 members and provides support in respect of litigation in accordance with its fund rules.

Our members hold the office of constable and do not have contracts of employment. Police officers are able to utilise the Employment Tribunal service for limited purposes, namely, in order to bring discrimination claims under the Equality Act 2010, detriment and dismissal claims for making public interest disclosures under the Public Interest Disclosure Act 1996, Working Time Regulation claims and part-time worker discrimination claims under the Part-time Workers (Prevention of Less

Favourable Treatment) Regulations 2000. Occasionally our members may be named as respondents to discrimination claims as well.

Our Response

We have responded separately to the consultation regarding two proposed reforms to the Equality Act 2010 namely removing employment tribunals' power to make wider recommendations and the procedure for obtaining information. This response deals with the proposal to remove Employment Tribunals power to make wider recommendations.

Given the pressures of our members' office, it is a vital part of our members' collective and individual interest that they have access to justice when legally wronged. Not only does this provide redress to individual members whose legal rights are breached, it also encourages safer and non-discriminatory systems of work throughout the Police Service in England and Wales.

We therefore strongly believe that wider recommendation power of the Employment Tribunal is an important provision of the Equality Act protecting the interest of our wider membership and other workforces.

As the Government knows, before the Equality Act 2010 a Tribunal's power to make recommendation was limited to the actions the Respondent should take to reduce the adverse effect of the discriminatory act on the Claimant. In A Fairer Future (June 2008), consultation on what should be contained in the new Equality legislation, it was pointed out that 70% of employees involved in discrimination claims leave the organisation and the tribunals' hands were often tied by the limited power to make recommendations (page 20). To remedy this Section 124 of Equality Act 2010 was introduced which allows ET to make recommendations for the benefit of wider workforce. We are very much concerned that if this provision is repealed, the Employment Tribunals hands would be tied up again.

Below we have considered the justifications the Government has relied on for the proposed removal and answered the specific questions in the consultation document.

Justifications in the Consultation document

Five broad justifications are given for the proposed removal of the power to make wider recommendations. These justifications are that wider recommendations:

(1) add little to the tribunals' existing powers
(2) may be of no direct benefit to the claimant
(3) are merely discretionary on the employer
(4) create uncertainty for the employer as to how and when a Tribunal may make such recommendations
(5) are not feasible or affordable for employers to comply

We respond to these five justifications as below:

Adds little to the tribunals' existing powers

In deciding whether this adds anything to the existing powers, it is important to consider whether such powers are effective. Consideration should be given to the

fact that quite often employment tribunal claims are brought after a breakdown in the employment relationship. In such situations very little can be achieved by making recommendation for a particular Claimant. However, the wider recommendation power under Section 124(3) (b) allows Employment Tribunals to make recommendation affecting the whole workforce eg, a change in policy or practice. Such wider recommendations prevent further discrimination happening at the workplace, thereby reducing the number of future claims and providing a discrimination-free workplace. We consider that this provision adds significantly to the Tribunal's powers. Different remedy provisions in the Equality Act 2010 enable the Tribunal to provide redress in different circumstances.

May be of no direct benefit to the claimant

We believe that the Claimants do benefit from wider recommendations as it enables them to see that the treatment they suffered would not happen again. Also, wider recommendations are of significant benefit to employers as it reduces the possibility of further claims, improves the workplace environment, morale and worker satisfaction.

Are merely discretionary on the employer

The third justification is that complying with the recommendation is purely discretionary. This fails to recognise that a Tribunal makes recommendations in order to improve equality within an organisation. An employer who implements good equality practices reaps more benefits than simply complying with the law. Equal opportunities make good business sense. We know that there are no real winners at an Employment Tribunal; they can ruin lives and reputations and be extremely costly. The opportunity to make a recommendation can turn a negative experience into a positive outcome for all parties.

We consider that whilst Tribunals are adept at making relevant recommendations the implementation should continue to be discretionary on the employer as circumstances may change and a particular recommendation may be inappropriate. However, we consider that failure to implement a just and appropriate recommendation should be taken into account in any subsequent Tribunal action.

We further believe that recommendations should be available to the Tribunal to make in cases that are lost by the Claimant as well as cases that they win. There are cases where the Claimant may lose on the particular circumstances but where the procedures followed by the Respondent were questionable.

Uncertainty to the employer as to how and when a Tribunal may make such recommendations

We do not think there is any uncertainty as to when and how an Employment Tribunal is going to make recommendation as it has become a usual practise of Tribunals to ask the Claimants to explain what remedies they are seeking both in the ET1 (claim form) and case management agenda, both of which are available to the employer from an early stage.

Whether it is feasible or affordable for employers to comply

Considering the cases where recommendations were made by the Employment Tribunals both before and after the Equality Act 2010 came into force, we believe that the Tribunal has exercised its power only after assessing whether it is feasible and affordable for the employer to comply. The consultation has not mentioned a

single case where this was not the case. Further the British Chamber of Commerce's observation that voluntary compliance (ie, changes to practices and policies) is undertaken by the employers shows that they do not believe that recommendations are unfeasible and unrealistic.

Below we have responded to the specific questions in the consultation document

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: Yes

It is significant to note that the wider recommendation provisions under Equality Act 2010 have only been in force after October 2010, and judgments are only recently beginning to come through, especially because remedies hearings are often listed sometime after a finding of liability. We have identified 4 cases (below) where recommendations were made under the Equality Act 2010. We have also identified more than 10 cases where recommendations were made in 2010 under previous legislations.

Cases with wider recommendations under Equality Act 2010 are:
Crisp v Iceland Foods – ET/1604478/11 & ET/1600000/12 (Direct Disability Discrimination case) The Employment Tribunal made recommendation that the HR managers should undergo training on mental health disability.

Why v Enfield Grammar School - 3303944/2011- pregnancy discrimination – The Employment Tribunal made recommendation that the senior management team and all heads of department have training on equal opportunities employment law within 6 months, including the position on women on and returning from maternity leave

Austin v Samuel Grant (North East) Ltd [2012] EqLR 617 - The Tribunal made a wider recommendation, pursuant to s.124(2)(c) of the Equality Act 2010, that the Respondent updates its policies on discrimination taking account of the Equality Act 2010 and diversity training for managers and directors.

Mrs Katharine Keohane v The Commissioner of Police of the Metropolis (ET/3300265/2011 & ET/3300293/2012) – The Employment Tribunal upheld a claim of unlawful treatment because of pregnancy under the Equality Act 2010 and made recommendations that within three months the Respondent take actions to obviate the adverse and discriminatory effects of their policy under question.

It is clear that from just these four cases that Tribunals were prepared to make suitable recommendations that fitted the circumstances of the case and were designed not to "punish" the employer, but to help them get it right in the future.

Question 2: If yes, please provide details of the case(s) concerned, 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.

Response
Mrs Katharine Keohane v The Commissioner of Police of the Metropolis (ET/3300265/2011 & ET/3300293/2012)

The Claimant in this case is one of our members. The employment tribunal upheld her claim of pregnancy discrimination. The Claimant was a dog handler and the Force re-allocated her dog to another dog handler after she became pregnant. The Employment Tribunal held that once the dog was re-allocated to another dog handler, there was a serious risk that on her return to work she would return to working conditions which were different from those which had pertained before she ceased operational duties on notification to her employers of her pregnancy. The Tribunal also found that this could affect her career prospects and loss of opportunities to earn overtime on her return to operational duties after maternity leave.

The Tribunal made three specific recommendations in this case mainly to obviate the adverse and discriminatory effects of policy of retention, re-allocation and withdrawal of police dogs and its impact on pregnant workers.

Question 3: Please say whether you consider the use of the power in this case or cases has been effective (closely linked to the act of discrimination to which complaint relates) and/or proportionate (tribunal took account of employer's capacity to implement the recommendation). Please provide further details.

Response: We believe that the wider recommendations in *Keohane's* case are both effective and proportionate. It is important to remove any discriminatory treatments in workplace and to protect the right of women officers to return to same or similar working conditions after their maternity leave. The recommendations were made against Metropolitan Police Force, a large force which has capacity to implement the recommendations. In this case, the ET not only awarded compensation but also made a declaration which again reinforces the actual need for employment tribunals' involvement in making wider recommendations.

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: We strongly disagree that the wider recommendations power should be repealed, for the reasons set out above.

Question 13: Do you think that there are further benefits and/or costs to repealing the wider recommendations provision which have not already been included in the impact assessment? If so, please give details.

Response : We believe that the Government has not considered the cost of the number of potential discrimination claims that will not be brought as a result of wider recommendation which would remedy the circumstances that resulted in the first claim. The costs involved in those potential cases that could be saved are both to the business (Respondent) and also to the Tribunals. Another set of costs the business would have to pay if discriminatory circumstances continue in their work place is "good will" and other negative impacts on their business.

Question 14: Do you have any comments on the assumptions, approach or estimates we have used in the wider recommendations provision impact assessment?

Response: Firstly, the impact assessment is based on an incorrect assumption that the wider recommendation powers have not been used. This is in fact contradictory to what is stated in the consultation document, where it is stated, that the power was used only once in the case of *Stone*.

The impact assessment also assumes that employers change their policies and practices even without ET recommendations. We believe this cannot be considered as a reason to remove an effective remedy as there are grievances with similar set of facts against same employer. Therefore, recommendations are inevitable to prevent repetition.

Further, the impact assessment has used only the number of claims actually brought to the Tribunal and not the number of complaints or grievances. Many cases gets settled before they are brought to the Tribunal and the power of an ET to award particular types of remedy is also an important consideration for settling a case.

Also, the impact assessment has considered only the number of claims where recommendations were made which could appear as a low figure whereas in reality the recommendation in those cases is a remedy for hundreds or thousands of employees depending on the size of the Respondent employer.

Question 15: Does the impact assessment for the wider recommendations provision properly assess the implications for equality? Please give details.

Response: No, primarily because it is based on the incorrect assumption that no wider recommendations have been made under the Equality Act 2010.

Further, 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.

Conclusion

Contrary to what the Government has assumed in the consultation paper we have in this response paper provided names and details of cases where wider recommendations were made under the Equality Act 2010. We have also provided evidence to prove that this wider recommendation power of ET is an effective and appropriate remedy. We strongly believe that removal of these provisions will only increase the burden on the employers both money-wise and efficiency-wise. Finally, effective remedy is as important as right to bring a claim and removal of this effective remedy would only reduce the significance of right to bring a claim.

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Dear Sirs

CONSULTATION – Procedures for obtaining information: section 138 Equality Act 2010

I am writing on behalf of the Police Federation of England and Wales ("the Police Federation") to respond to the Consultation Paper on the above subject dated July 2012.

General

The Police Federation of England and Wales ("the Police Federation") is the staff association for all police constables, sergeants, inspectors and chief inspectors in the 43 home office police forces of England and Wales. It was created by the Police Act 1919, with a statutory responsibility to represent and promote the interests and welfare of its members. The Police Federation has approximately 136,000 members and provides support in respect of litigation in accordance with its fund rules.

Our members hold the office of constable and do not have contracts of employment. Police officers are able to utilise the Employment Tribunal service for limited purposes, namely in order to bring discrimination claims under the Equality Act 2010,

detriment and dismissal claims for making public interest disclosures under the Public Interest Disclosure Act 1996, Working Time Regulation claims and part-time worker discrimination claims under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

Our Response

We have responded separately to the consultation regarding two proposed reforms to the Equality Act 2010 namely removing employment tribunals' power to make wider recommendations and the procedure for obtaining information. This response deals with the proposal to remove procedures for obtaining information under Section 138 of the Equality Act 2010.

Given the pressures of our members' office, it is a vital part of our members' collective and individual interest that they have access to justice when legally wronged. Not only does this provide redress to individual members whose legal rights are breached, it also encourages safer and non-discriminatory systems of work throughout the Police Service in England and Wales.

The statutory questionnaire procedure has been in existence since 1975 and is considered as an essential tool under equality legislation. As mentioned above discrimination claims are one of the limited types of claims police officers can bring to employment tribunals. We are of the strong view that it is difficult to prove a discrimination claim unless a questionnaire is served.

The questionnaire procedure has a vital role in discharging burden of proof in discrimination claims and it is through the questionnaire procedure the UK Government gives effect to the burden of proof provisions in the Equality Directives. This is mainly due to the difficulty in obtaining evidence in any other way to discharge burden of proof. Further, a questionnaire submitted at a very early stage can help decide whether a case should be pursued at all and, if so, how it should be formulated.

Many UK courts and tribunals have recognised and referred to a questionnaire reply in articulating their judgment (*Dresdner Kleinwort Wasserstein Ltd v Adebayo* (2005) IRLR 514; *Igen Ltd and ors v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster* (2005) EWCA Civ 142). In one of the cases we funded, *Dolan v Chief Constable of Avon and Somerset Constabulary (1402819/06 ET)*, the Employment Tribunal cited the statistics that were obtained via the questionnaire procedure in considering whether it was disproportionate to apply attendance management proceedings.

We strongly believe that the statutory questionnaire procedure is an essential provision to enforce rights under the Equality Act 2010 thereby protecting the interest of all workers including our members. Below we have considered the justifications the Government has relied on for the proposed removal and answered the specific questions in the consultation document.

Reasons for repeal in the Consultation document

The Government has provided two specific reasons for the proposed removal of statutory questionnaire procedure namely:

(1) Failure of the procedure to achieve its intended purpose

(2) Additional unintended burdens created by the provisions

We respond to these reasons as below:

Failure of the procedure to achieve its intended purpose

We are very concerned that the Government apparently wants to remove an essential tool of the equality legislation. In paragraph 3.12 of the consultation document it is stated that "*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*".

The explanatory notes to the Equality Act 2010 clearly states that Section 138 is designed to replicate the effect of provisions in previous legislation. The previous equality legislation, in particular the Sex Discrimination Act 1975 (SDA - one of the predecessors of Equality Act 2010) where the statutory questionnaire was first introduced set out the intended purpose of statutory questionnaire procedure. Section 65 of the SDA clearly stated the intended purpose of the statutory questionnaire procedure. Section 65 of SDA reads as:

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

Albeit, we agree that in practice quite often settlements are encouraged by an early exchange of information primarily through questionnaire procedure, we do not agree with the Government that encouraging settlement is the intended purpose of Section 138. As stated above, the intended purpose of questionnaire procedure is for the Claimant "to decide whether to institute proceedings and, if he does so, to formulate and present his case in the most effective manner".

Additional unintended burdens created by the provisions

We believe that completing a questionnaire cannot be burdensome for employers as most of the information is relating to their employees and their business with which they would be very familiar. Further, if the Claimant brings a claim without serving a questionnaire and asks for a disclosure order from the Employment Tribunal, the burden on the employer to comply with such an order is considerably higher due to the time constraint to comply and serious sanctions (strike off) for not complying with the order.

The Government has stated in the consultation document that in a survey carried out by the British Chambers of Commerce (The workforce survey - micro business August 2011) concerns were raised by businesses that the process is used as a "fishing exercise" by potential claimants even if they do not have any cause for complaint. Reading the actual survey we could not find any reference to the percentage of micro businesses that raised these concerns. Given that there are various statistical data provided in that survey document on various aspects and no data is provided on the burden of the questionnaire procedure, we are concerned that such sparse evidence is apparently used as the basis to suggest removing the questionnaire procedure.

If there is a genuine concern that the questionnaire procedure is used as a phishing exercise it is important to note that the Equality Act 2010 does not give a person serving a questionnaire any right against the alleged perpetrator of discrimination either to compel him to complete the questionnaire or to have him publicly examined on account of his failure to do so. Therefore, we believe if the employer considered that the questionnaire was purely used as a phishing exercise and not for obtaining any relevant evidence for a potential claim under the Equality Act 2010, the employer has the option not to answer such questions. Also, there is no automatic adverse inference drawn by the Tribunal for not answering the questionnaire and the only sanction is that the Tribunal "may" (emphasis added) draw an inference from the failure to reply. Furthermore, a Tribunal may strike out any or all questions if they are considered too onerous for the employer to answer.

Below we have responded to the specific questions in the consultation document

Question 9 to 11: Have you or your organisation been involved in a procedure for obtaining information about a situation involving potential discrimination, harassment or victimisation? Please provide details of your involvement in a procedure for obtaining information. 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

Response: Yes, through our Force Equality Liaison representatives and our retained solicitors. We have used the procedure under the Equality Act 2010 and the preceding equality legislation.

Question 12 to 15: Please indicate what action was taken by the potential complainant after using the procedure for obtaining information. If a claim was taken to an employment tribunal or court after using the obtaining information procedure, what was the outcome of that case? 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. Please use the space below to provide any additional details about your experience of the procedure for obtaining information. How far do you agree or disagree that the procedure for obtaining information in section 138 of the Equality Act 2010 should be repealed?

Response: Below we have provided examples of actual cases we funded which show various outcomes of using statutory questionnaire procedure.

- Age discrimination case – This is a case brought by one of our members who was told that there was a blanket ban on training in a particular specialist area being provided to officers over a certain age, for health reasons. After our retained solicitors served a questionnaire the force reconsidered and changed its position, introducing individual medical assessment rather than a blanket ban.

- Sex discrimination/equal pay case – One of our members suspected, based on anecdotal evidence that more male officers were in receipt of a particular allowance than females. A questionnaire was served and from the response received it was found that that there was no gender disparity in the way the allowance was paid. The member decided on this basis not to pursue the matter, so this avoided the need for tribunal proceedings.

- Disability discrimination case - In a reasonable adjustments claim where the officer was seeking a particular shift pattern, information provided in the questionnaire about demand patterns enabled the parties to discuss and agree a suitable shift pattern which suited the officer's needs and met the demand pattern.

- Indirect sex discrimination case – One of our members challenged a promotion process where a psychometric test appeared to disadvantage those with caring responsibilities. After more detail about the test being provided in the questionnaire response the parties were able to settle the case.

- In a case lodged against the Police Federation, where we were the Respondent, we were able to satisfy the Complainant that no discrimination had occurred in her employment and the case was withdrawn.

Based on the examples provided above and reasons provided in this response paper, we strongly disagree that the procedure for obtaining information should be repealed.

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

Response: Yes, we think there are further costs to be included.

If the questionnaire procedure is repealed then there would be an increase in the number of claimants bringing discrimination cases because they are unable to find out the reason for an unlawful decision in any other way. A greater number of unfounded claims are likely. In the consultation document (Page 65, paragraph 6) it is acknowledged that if this provision is repealed there would not be any other non-

legislative mechanisms to obtain information. So it is obvious that the repeal of the questionnaire procedure disproportionately affects the Claimants (who are genuine and wants to know the reasons of their treatment) and increases financial burden on employers defending such claims. The costs for defending such claims are likely to be far more than 5 – 6 hours of work.

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?

Response: No, we do not think there is any benefit to employers by repealing the questionnaire procedure. As explained above, the repeal would only increase the costs and disproportionately affects Claimants who would otherwise benefit from the questionnaire reply in formulating their case cost effectively.

Question 23 to 24: 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?) Does the impact assessment for the obtaining information provisions accurately assess what the implications for equality are?

Response: As stated in this report we disagree on the assumptions, approach or estimates used in this consultation.

We cannot see adequate information in the equality impact assessment which shows that the Government had due regard to the need to eliminate discrimination, advance equality of opportunity or foster good relations with respect to all protected characteristics. Our view is that the repeal of the questionnaire procedure will disproportionately affect females compared to males and people from ethnic minorities compared to white people (based on statistics of successful cases mentioned in *Compensation Awards 2010 Part 1 & 2 Equal Opportunities Review, June 2011*) bringing discrimination claims. Further, it is a matter of fact that equal pay claims are mostly brought by female employees and to prove an equal pay case the Claimant needs an "actual comparator" which is usually obtained through the questionnaire procedure. Removal of the questionnaire procedure inevitably means that it will be more difficult for female and ethnic minority Claimants to bring successful discrimination claims and secure a legal remedy. The Government failed to consider this disproportionate and discriminatory effect in the impact assessment.

<u>Conclusion</u>
Without obtaining the information held by the employer it is difficult for a claimant to bring a successful discrimination claim. Considering the unsubstantiated reasons provided by the Government in the consultation document we believe that the proposal to remove the questionnaire procedure will reduce the Claimants' access to justice and ability to bring successful claims. We further believe it would not benefit employers who would inevitably face greater costs defending claims further down the line.

Thank you for considering our response.

Yours faithfully

General Secretary