



EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

Review into increasing progression in the labour market for BAME workers: call for evidence

Response from the Employment Lawyers Association

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Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. Accordingly in this consultation we do not address such issues. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

The Legislative and Policy Committee of ELA set up a working party under the chairmanship of Kiran Daurka of Leigh Day to respond to the Government's review. The working party has responded to the questions set out within the review aims. Each of the six aims have been explored and, where possible, the working party has prepared an analysis with relevant examples. Based on these responses, the working party has extracted some recommendations which appear at the end of this consultation paper.

A list of the members of the ELA working party is at the end of this paper.

A. Benefits to employers and society when accessing the widest pool of talent

1. ELA, as a membership organisation representing the views of employment lawyers, is limited as to what it can meaningfully add to this issue. That is not to say that the benefits of diversity within the workforce is not an important factor to encourage and maintain economic prosperity and growth.
2. Workplace equality issues, which often fail to address race equality issues given the sensitivity of the subject, are not matters peripheral to workplace productivity and

well-being. Yet, in times of economic downturn, it is noted that equality issues are relegated to the back benches and seen as regulatory red-tape, burdensome to the employer.

B. Barriers faced by BAME groups within the labour market

The Equality and Human Rights Commission published an important report last week entitled “Healing a divided Britain” made the following findings in relation to BAME worker progression:

“Unemployment rates were significantly higher for ethnic minorities at 12.9% compared with 6.3 % for White people.

“Black workers with degrees earn 23.1% less on average than White workers.

“In Britain, significantly lower percentages of ethnic minorities (8.8%) worked as managers, directors and senior officials, compared with White people (10.7%). This was particularly true for African/Caribbean/Black people (5.7%) and those of Mixed ethnicity (7.2%).

“Black people who leave school with A-levels typically get paid 14.3% less than their White peers.”

In summary, the barriers faced by BAME workers are numerous and these are summarised below:

1. the culture of an organisation;
2. lack of executive team engagement and senior race equality champions;
3. executive search, selection, and shortlisting;
4. appraisals / managing performance;
5. lack of career development courses support, role models and mentoring;
6. lack of race monitoring data;
7. lack of accessible and effective race equality policies or impactful diversity and inclusion policies and toolkits;
8. lack of effective training;
9. lack of understanding and use of positive action;

10. lack of access to the Employment Tribunals to seek redress and lack of accountability and enforcement against persistent race discrimination; and
11. the law.

Exploring each of the above barriers in turn:

1. Culture

- a. 'Race' in common parlance and law encompasses colour, ethnicity, nationality, national origin, heritage, culture, language and more. Even within races there is inequality and are hierarchies – hence the acceptance that caste discrimination is included as an aspect of race discrimination.
- b. Section 9 of the Equality Act defines 'race' to include colour, nationality, ethnic or national origins. The sub-species of 'ethnic origins' is not defined in law but is intended to be given a wide meaning. As a consequence, 'ethnicity' embraces characteristics that are not 'immutable' or born into, and could include, for example 'converts', persons who marry into groups, and includes Jews, Sikhs, Romany Gypsies, Irish Travellers but not Muslims or Rastafarians who could be covered by religion or belief discrimination. The Scots and English are not distinct racial groups, but any discrimination against them would fall within discrimination on the grounds of national origin. In 2014, the Cornish were given protection as a national minority pursuant to the Framework Convention for the Protection of National Minorities which prohibits "any discrimination based on belonging to a national minority".
- c. The above reflects the difficulties in establishing at the outset whether a certain racial or ethnic group is protected, yet this provision has never been simplified.
- d. Whilst the legal formulation and common law tests may work and do not call for simplification, this issue evidences the first legal hurdle that a Claimant bringing a claim of 'race discrimination' must contend with in defining which sub-category(s) of 'race' they fall within and also feed into the complexity of

equality and inclusion training, and being able to create an open, educated dialogue around race in the workplace.

Talking about race

- e. Discussions regarding race are still taboo in the workplace. It's an uncomfortable and complex issue with "no one size fits all" approach as such discussions must reflect an understanding of the lack of homogeneity within and between races.
- f. Barriers cannot be recognised and action cannot be taken without being able to have an open, inoffensive, non-pejorative conversation about race. The latest research by YouGov and Business in the Community (*Race at Work 2015*) which surveyed 24,457 respondents nationally, suggests that racial harassment and bullying within UK workplaces is prevalent and people are less comfortable talking about race than they are about other issues such as age and gender.
- g. Some of the barriers below are unlikely to be addressed without open and honest dialogue and a willingness to progress change speedily from within an organisation. With reference to the success of Lord Davies' of Abersoch's report on 'Women on Boards', pressure from the public, media and senior individuals in public and corporate life is crucial, and a sufficient groundswell will need to be generated for change to follow.

2. Lack of executive team engagement and senior race equality champions

- a. As managers and leadership teams determine and uphold the culture of an organisation, if they cannot engage with race equality issues then such issues, when raised, are unlikely to be given the necessary priority and resolved equitably within a reasonable period of time in the organisation.

- b. The presence of a champion or senior leaders who actively promote race equality at work is strong evidence of a commitment to race equality, diversity and inclusion. Any race champion must be given the support, profile and the autonomy to speak openly within the organisation, provide thought leadership, and challenge the cultural change programme around race equality issues with individual managers.

3. Executive search, selection, shortlisting and recruitment

Job applications

- a. Studies have suggested that prospective BAME applicants can be disadvantaged in job searches by their names, in particular, those names that indicate someone is not from a white British background.
- b. Researchers from the National Centre for Social Research, commissioned by the Department for Work and Pensions (DWP), sent three different applications for 987 actual vacancies between November 2008 and May 2009. Nine occupations were chosen, ranging from highly qualified positions such as accountants and IT technicians to less well-paid positions such as care workers and sales assistants.
- c. The research found that an applicant who appeared to be white would send nine applications before receiving a positive response of either an invitation to an interview or an encouraging telephone call. Minority candidates with the same qualifications and experience had to send 16 applications before receiving a similar response.
- d. Ten big employers in the public and private sectors including the civil service, HSBC and Deloitte, have agreed to start recruiting on a “name-blind” basis in the UK. The BBC will also remove names and universities from job applications as part of a bid to increase social diversity among its workforce.

- e. If this practice were to be extended to other employers it could to some extent address the discrimination faced by direct applicants prior to the interview stage.

Executive search

- f. For more senior posts however, recruitment is usually via executive search agents, who shortlist candidates for interview.
- g. Research conducted by Harvey Nash (an executive search company) in July 2016 of 130 senior executive and board members found that 7 out of 10 senior executives felt that their ethnicity/cultural background had been a significant barrier to their progression. The top 3 measures they recommended to increase diversity on boards were to:
 - I. target recruiters to increase diversity on shortlists
 - II. educate CEO and leadership teams on the value of diversity
 - III. insist on transparency and reporting to include diversity on boards
- h. If the gateway to employment is not filled with the widest possible pool of candidates then the lack of racial diversity within the senior ranks of any organisation is likely to be perpetuated for many years.
- i. Companies have not required interview shortlists to be representative of the customer/client demographic of the areas in which they are located. Efforts should be made to ensure that where recruitment is global, international or from metropolitan areas that the widest pool of candidates is sought. Due to regional differences and demographic variations, establishing quotas for shortlisting targets may not be achievable through national policy, but regional or local demographics could be taken into account.

- j. A racial equality code of practice for search and selection companies could assist them to choose candidates for shortlisting from the widest possible pool.
- k. All selection panels could be trained with unconscious bias training and the legal aspects of equality law, including positive action. There should be clearer guidance available in all of these areas for employers, recruitment agents and executive search agents. The EHRC should be consulted, along with other interest groups and stakeholders, on the publication of guidance on positive action.

4. Appraisals / managing performance

- a. Research shows that for BAME employees, the story is of unfulfilled career aspirations and perception of a lack of support in their roles. The YouGov research suggested that racial discrimination is one of the most common reasons given for having been overlooked for promotion, in addition to favouritism, personal contacts (nepotism) and prejudice on the basis of gender or age.
- b. Appraisals are one of the most contentious areas where bias and subjective factors can influence an individual's pay, promotion and career development prospects and cause a breakdown of working relationships and a loss of trust and confidence between employees and line managers. A significant number of grievance cases and employment tribunal claims have been dealt with by employment lawyers in this arena.
- c. The impact on the organisation is the loss of a valued employee and role model, sickness absence cover, and management time and resources in dealing with a breakdown in relationships. For the employee, the appraisal process can lead to a loss of self-esteem and confidence, ill health and resignation.

- d. Very few appraisal systems have any form of appeal, independent review process or adequate redress of an adverse performance review that could thwart the career trajectory and sit on a personnel record throughout an individual's career. If an appeal is available, it is rarely dealt with by an individual who is independent of the line manager involved, who has no stake in the outcome, nor may have been trained in respect of unconscious bias or race equality.
5. Failure to be put forward for career development courses, lack of role models and mentors
- a. Part of being ready for senior roles or 'board ready' is achieved by having gained the required leadership skills and capabilities to progress and this is gained by a combination of experience and attendance on career development courses.
 - b. The processes for nomination for career development courses and the criteria that are required to be fulfilled by an individual could be equality impact assessed to assess whether barriers exist to entry and fulfilment of these courses.

Role models and mentors

- c. The lack of senior BAME role models mean that those individuals that are presently active carry a heavy burden to have to continually champion causes and issues, sometimes at cost to their own careers and reputations. In terms of critical mass, however, there needs to be more than one role model or figurehead so as not to count as the exception to the cultural norm, but a reflection of the cultural norm.

- d. Good practice would require creating and supporting a number of role models and mentors to be high achievers, and creating networks of senior leaders and champions from different companies.

6. Lack of race monitoring data

- a. The extent of race inequality, disparate impact and the effectiveness of policies and practices is difficult to measure without adequate monitoring data or completing equality impact assessments.
- b. Monitoring gender equality is comparatively straightforward, but monitoring in respect of race will need to take into consideration the various sub-species of 'race' in order for the data to be meaningful.
- c. For public authorities, the introduction of the race equality duty pursuant to the Race Relations Amendment Act 2000 was said to be a watershed. It required all listed public authorities in carrying out their public functions to have due regard to the need:
 - i. to eliminate unlawful racial discrimination; and
 - ii. to promote equality of opportunity and good relations between persons of different racial groups.
- d. The requirement of the main public authorities covered was to publish a race equality scheme stating which of its functions and policies the authority had assessed as being relevant to meeting the general duty and how it intended to comply with the general and specific duties.
- e. Further Specific duties were also imposed on schools, colleges and universities.
- f. Employment monitoring results were to be published annually.

- g. Part of the expectation on how a public authority would fulfil its duty, was a formal structured approach systematically to assess the impact of policies or proposed policies on racial grounds. It required advance consideration to issues of race discrimination.
- h. Where an assessment indicated potential adverse impact, in order to comply with the general equality duty the authority would either need to change the policy, to consider an alternative or to justify the adverse impact as reasonably necessary and proportionate in the context of the overall aim.
- i. The (former) CRE and Home Office jointly developed a guide to race equality impact assessments.
- j. In July 2008, the government announced its intention to create a 'Single Equality Duty' to include protected characteristics comprising one set of general and specific public sector duties. The corresponding Public Sector Equality Duty came into force on 8 April 2010 under Section 149, Part 11 (Advancement of Equality) of the Equality Act 2010.
- k. In so doing, aspects of the race equality duty were improved upon to make imperative the need to *advance* equality of opportunity and to *foster* good relations however this has not led to the courts having a wider interpretation of the obligations.
- l. However, under the new 'Single Equality Duty', the specific duties applicable to public authorities in England are far less onerous than those found in the preceding legislation as they abolished the need to produce a race equality scheme and this was replaced by a requirement on the public authority to set out the steps to be taken to achieve the objectives and implement such steps (unless there were exceptional circumstances).

- m. Given the dearth of data now being collected, the extent of discrimination faced by BAME individuals and the slow pace of change, consideration could be given to:
 - I. reintroducing the race equality scheme and statutory guidance;
 - II. providing clear guidance to private sector employers on conducting equality impact assessments;
 - III. introducing a similar race equality scheme requirement for companies with over 250 employees.
- n. The above will need to be supported by training and further guidance in this area.
- o. As corporate governance relates to what a company does and how it establishes the values of a company, the Financial Reporting Council should add "race" to the UK Corporate Governance Code in addition to 'gender' and prescribe the nature of the information that should be reported on. This requirement may need to be phased in over 3 years to enable companies to start to gather the relevant data required.

7. Lack of effective race equality policies or impactful diversity and inclusion policies

- a. The statutory Code of Practice on Employment 2011 which replaced the previous statutory Code of Practice on the Duty to promote Race Equality in employment published by the CRE in 2006 is less comprehensive than its predecessor and offers less practical guidance to employers.
- b. The CRE's code provided useful guidance on positive action, regional demographic variations and examples of policies.
- c. Draft policies and toolkits would be a useful resource for SMEs and employees in navigating race equality issues accompanied by training.

8. Lack of lack of effective training

- a. Race equality and unconscious bias training should be a part of the formal induction and training process for all members of management and leadership teams. This is to ensure that capabilities are developed, such that performance is assessed fairly and reported honestly and objectively.
- b. Given training budgets are often the first to decrease during a downturn or recession, cost effective race equality and unconscious bias training toolkits from BEIS or the EHRC could be made available to SMEs and all organisations. The toolkits could be tailored by the organisations in recognition that there is no 'one size fits all' approach. Such training needs to be embedded in an organisation in order to be meaningful and championed by senior leaders.

9. Lack of understanding and use of positive action

- a. Section 158 of the Equality Act 2010 is important in the context of the use of positive action regarding training.
- b. Section 159 of the Equality Act 2010 is concerned with the use of positive action during recruitment or promotion but does not extend more widely than that.
- c. There is much trepidation around the use of these enabling provisions, and consequently they are little used.

- d. Training and better signposting of resources on the EHRC website in respect of the use of positive action could assist to ensure sections 158 and 159 of the Equality Act are put to effective use by public and private sector employers of all sizes, as these are provisions that could lead to speedy demographic changes and race diversity.

10. Lack of access to the Employment Tribunals to seek redress and the lack of accountability and enforcement for persistent race discrimination

- a. When an individual wants to bring a claim of unlawful race discrimination, they are required (if practicable) to raise a grievance (if they are an employee), and if that grievance is not resolved they must commence mandatory early conciliation (EC) through the Advisory Conciliation and Arbitration Service (ACAS). If mandatory EC is ineffective in providing a resolution, that individual must pay a fee in order to lodge their claim, and have their claim heard at an Employment Tribunal. The combined lodging and hearing fee is £1200.
- b. If the Claimant pays for legal representation, the cost can often exceed the value of any eventual award (see the table below). This can be a deterrent to bringing the claim and challenging the unlawful race discrimination.
- c. Much has been said in relation to the huge drop in claims since the introduction of fees. It remains a serious concern that the fees have discouraged individuals from bringing claims and in turn has also impacted upon the way in which employers view litigation risk when managing internal complaints.

11. The law

Indirect discrimination

- a. Section 19 of the Equality Act 2010 (indirect discrimination) is perhaps one of the most important yet under-used provisions in our anti-discrimination law jurisprudence.
- b. It is the provision that deals with unlawful group disadvantage whereby an apparently benign provision, criteria or practice ('PCP') in employment causes disadvantage to an individual who belongs to a particular group compared to others in the workforce that do not belong to that particular group. The individual suffers unlawful indirect discrimination unless the PCP is proportionate in meeting a legitimate aim. Unlike direct discrimination, an employer may be able to justify the apparently discriminatory treatment to successfully defend a claim of unlawful indirect discrimination.
- c. There are many steps that are required to be proven in such claims, often supported by strong statistical evidence, industrial experience and sometimes, expert evidence. It is a complex provision to enforce in practice.
- d. Until recently, the Tribunals and Courts have generally agreed that the Claimant is not required to show *why* a PCP has caused him/her disadvantage, only *whether* it has done so. Then it is for the Respondent to seek to justify the disparate impact of the PCP.
- e. Since the Court of Appeal's decisions in 2015 in the cases of *Essop* and *Naeem*, an individual claiming indirect discrimination now needs to establish that the cause of their disadvantage is the same reason as the cause of the group's disadvantage, and that the reason for the disadvantage is because of the protected characteristic (i.e. race/religion). This is despite it not being within the statutory language of section 19 of the Equality Act 2010. A difficult provision in law has therefore become even harder for Claimants to navigate, and in tandem with the abolition of several useful legal provisions for Claimants seeking to establish race discrimination, has made it less likely for a Claimant to succeed in an indirect race discrimination claim. The corollary is that society will be less likely to know the extent of discriminatory practices at play within organisations, thus reducing transparency and accountability.

- f. The case of *Essop* is an interesting case, on the facts, related to barriers faced by BAME and older workers within the Department of Work and Pensions (“DWP”). The case was essentially that in order to progress within the DWP, workers are required to complete an exam. The Claimants argued that BAME and older workers fared worst and were less likely to progress – the statistical evidence indeed bore this out. However, the Court of Appeal held that statistics alone would not be sufficient to show that the requirement to pass the exam caused particular disadvantage to the individuals because of their race/age. The Court, therefore, created an additional hurdle for claimants despite the fact that the DWP may have defended its position by objectively justifying the need for the exam. The law relating to indirect discrimination does require simplification if it is to be effective.

- g. In the US, the concept of “systemic” or “structural” race discrimination is well known and understood. The same cannot be said in the UK. There have been very few successful challenges under the Equality Act (or previous discrimination legislation) in relation to indirect race discrimination. Given that it is accepted that BAME workers do not progress at work at the expected rate, and that they face other barriers preventing them from fulfilling their potential, it is surprising that more challenges have not been successful.

Intersectional discrimination and class

- h. Present discrimination law fails to recognise the lived experience of individuals who experience discrimination relating to two or more protected characteristics. It requires individuals to choose and effectively second guess which parts of their identity have caused them to suffer disadvantage. It is difficult to assert equality rights where two or more protected characteristics are involved.

- i. There is no effective legal remedy for black women, older BAME employees or BAME disabled employees.

- j. One of the key objectives of the Equality Act 2010 was to tackle the systemic discrimination that has been so difficult to combat under previous equality legislation.
- k. The provisions relating to both combined discrimination at section 14 of the Equality Act 2010 and the socio-economic public sector duty at Part 1, Section 1 of the Equality Act 2010 lie dormant and have never come into force (in England and Wales), although we understand that Scotland has committed to bringing the socio-economic public sector duty into force within the next five years.
- l. The socio-economic duty would have required specific public authorities, in the context of strategic decision making, to have due regard to the desirability of exercising their functions in a manner designed to reduce inequalities resulting from socio-economic disadvantage, (which is wider than race) but may well be a strong means of reducing inequality towards the white working class as well as other groups; an issue which has become more prevalent in the political discourse in recent times.
- m. In respect of the combined discrimination provisions, this should (if enacted) apply to two or more protected characteristics and also be extended in its present dormant form to apply to 'harassment' claims, not solely claims of direct discrimination.
- n. If the aim of the Government is to increase BAME progression in the labour market it is strongly recommended that there is no further de-regulation from the present provisions of the Equality Act, and that those provisions that are underpinned by Articles 19 and Article 10 of the Treaty of the European Union, the 'Equality Directives' and the EU Charter of Fundamental Rights are safeguarded.

Statutory discrimination questionnaires

- o. Section 138 of the Equality Act 2010 was repealed in April 2014. This was a proactive practical provision used by Claimants to obtain information to determine if an act of unlawful discrimination (including race) had occurred, and to what extent it could be proven to have occurred in advance of bringing a claim, or within 21 days of lodging proceedings. This was particularly important because the initial burden to establish a primary case of unlawful race discrimination rests with the Claimant.
- p. Questionnaires were an important means of obtaining data regarding comparators (in order to establish less favourable treatment) and statistical information to establish whether there was a pattern of discrimination, or the extent of disadvantage of otherwise neutral practices to support a claim of indirect discrimination.
- q. The questions and answers were admissible in evidence, and an adverse inference could be drawn from a failure to provide an answer within 8 weeks from the day the question was served, or from an evasive or equivocal answer.
- r. Whilst it was on occasions abused rather than limit or refine the questionnaire process, this useful tool was withdrawn completely from use for any acts occurring after 6 April 2014 ostensibly on the basis that it was burdensome to employers.
- s. It has been replaced with the ACAS Guidance: Asking and Responding to Questions of Discrimination in the Workplace. The Guidance is persuasive and not binding, and there are no reasonable time limits for responding to any questions, and no authoritative statement that any adverse inferences could be drawn from the failure to respond to the questions. As there was always the ability to ask such questions, this method is less effective for Claimants.
- t. The latest Employment Tribunal statistics for race discrimination claims brought from 2014 onwards show a 4% success rate for race discrimination claims. If a Claimant were to conduct a cost/benefit analysis of whether or not

to bring a claim of unlawful race discrimination, it would appear that even if the merits of that claim were very good, only high earners, and those with long-term future losses may wish to take the risk. Research however suggests that race discrimination is prevalent in the workplace.

	2014/15	2015/16
Total Race discrimination claims	1,850	1,699
ACAS conciliated claims	31%	33%
Withdrawn claims	28%	31%
Successful at hearing	4%	4%
Unsuccessful at hearing	21%	19%
Dismissed or struck out	14%	12%
Average compensatory award	£17,040	Not available

Employment Tribunal powers to make wider recommendations

- u. Section 124 (3) of the Equality Act 2010 extended the Employment Tribunal's powers to make recommendations to reduce the impact of any unlawful race discrimination on the successful Claimant and others in the workforce. The recommendation would require the unsuccessful organisation to take specific steps to ameliorate, reduce or prevent further unlawful discrimination, or the harmful impact of the discrimination in the future, within a specified time

frame. Such recommendations could include the introduction of wider workforce training, or a review of specific policies. These recommendations could be implemented even if the individual had left employment.

- v. This 'wider interest' provision, which was a proactive, positive step, was repealed in April 2014.
- w. Whilst the low success rate of cases means that this provision may not have been utilised frequently, the repeal seemed counter-intuitive to the prevailing climate of saving costs and preventing future claims.
- x. If the provision was to be re-introduced, the recommendations made, in addition to the successful claim could be monitored by the EHRC in order for there to be some accountability once the litigation process had ended. Such an approach would also sit well with the majority of successful Claimants who want to see lessons learned as a result of bringing their claims. In addition, where a statutory defence had been run and failed, recommendations to implement training could be made mandatory.

C. Impact that the barriers have on (a) individuals; (b) companies/employers; and (c) wider economy

- 1. The impact on an individual who brings a race discrimination claim is that they often experience financial hardship and their mental health invariably suffers. The employment relationship tends to be irrevocably damaged, leading to unemployment, (sometimes long-term) a loss of trust and confidence, self-esteem, worth, and isolation.
- 2. This loss of economic activity and potential dependence on health services and benefits creates an economic burden on wider society that may have been avoidable.
- 3. The barriers are also likely to lead to conflict within organisations which will inevitably lead to lowered morale and reduced productivity.

D. Data to illustrate scale of the issue

1. Data gathering on racial background is not straightforward and in our experience, it is not widely completed. We consider, as part of our recommendations, steps that may be taken to address this.

E. Best practice

1. In order to identify best practice, we looked at recipients of diversity awards (specifically, the Business in the Community Race Equality awards <http://race.bitc.org.uk/awards-benchmarking/race-equality-2015-awards-showcase>), press coverage and the practical examples of good practice on diversity and inclusion in large firms set out in the Law Society's website <https://www.lawsociety.org.uk/support-services/practice-management/diversity-inclusion/diversity-and-inclusion-case-studies-large-firms/>. We have also considered best practice in the area of social mobility as BAME individuals are more likely to come from socially disadvantaged backgrounds than White individuals <https://www.jrf.org.uk/blog/new-report-fails-highlight-most-important-fact-about-poverty-and-ethnicity>. We are therefore of the view that any activities directed towards improving social mobility are likely to indirectly assist those from BAME backgrounds.
2. From our research, we found that larger companies recognise and accept that diverse and inclusive teams perform better and that an inclusive workforce enables them to understand and meet the needs of diverse customers, clients and shareholders. There appears to be an acknowledgement that a diverse and inclusive population is not just good for their people but it also makes business sense.
3. We started by looking at best practice in sourcing and recruiting individuals from a BAME background as, in order to progress, BAME individuals need to be in the workplace in the first place. We then considered what steps companies are taking in order to retain the BAME staff they have recruited and facilitate their progression to senior level roles. Finally, we considered how some of these practices can be adopted by smaller companies.

Sourcing & Recruitment

4. Taking pro-active steps to ensure that candidates are sourced from a wide talent pool which includes those from socially disadvantaged and BAME backgrounds.
 - a. Law firm Wragge & Co (now Gowling WLG) purchased a Higher Education Statistics Agency report which provided a breakdown of the ethnicity of students studying at various universities. Following a review of this information, the firm has built stronger relationships with a couple of West Midlands based universities who have higher than average numbers of ethnic minority students. It has offered to sponsor their law fairs and is seeking to have a greater presence on their campuses.
 - b. Warwickshire Police and West Mercia Police hold recruitment events in areas with a high BAME density and advertise in media with high BAME audiences, using officers and cadets from BAME backgrounds as role models.
 - c. Teach First has established relationships with specialist diversity recruitment organisations such as Rare Recruitment and Elevation Networks, who identify roles for those from under-privileged and diverse groups. This increased applications from Black males, statistically the hardest to reach group, by 8% in 2015. We understand that a number of the organisations we have mentioned use Rare's recruitment software to assist them in recruiting candidates from diverse backgrounds.
5. Raising awareness amongst young people from less privileged backgrounds and BAME backgrounds of different career paths and attempting to raise their aspirations by directing work experience programmes and mentoring schemes towards them.
 - a. Global law firm Linklaters runs a 12 month apprenticeship scheme targeted at young people from disadvantaged backgrounds. The apprenticeship scheme was initially solely linked to the borough of Islington as it is the eighth most deprived borough in the country, with a large number of people out of work and dependent on benefits. The apprentices gain on the job experience and have one to one mentoring at the firm. They also complete work based learning qualifications such as the NVQ in Business Administration. The success of the apprenticeship scheme was instrumental in the firm being named by the government as Social Mobility Business Company Champion in November 2014.

6. Removal of a requirement for graduates to have achieved minimum academic achievement at A-level and/or degree level in order to be eligible for graduate opportunities.
 - a. EY is one of the UK's biggest graduate recruiters and has confirmed that it will no longer consider degree or A-level results when assessing potential employees. It has announced that it is scrapping the requirement for applicants to have a minimum 2:1 degree pass or Ucas point score of 300 (the equivalent of three B grades at A-level). Maggie Stilwell, EY's managing partner for talent, said she hoped the new policy would "open up opportunities for talented individuals regardless of their background and provide greater access to the profession".
 - b. PricewaterhouseCoopers has also announced it will no longer be using A-level grades as a means of selecting trainees.
7. Removal of references to applicants' schools and/or universities in documentation provided to interviewers.
 - a. Law firm Clifford Chance has adopted a "CV-blind" approach to recruiting graduates which means that interviewers will not be given any information about which university candidates have attended or whether they have come from state or independent schools. The intention behind this is to eliminate any unconscious bias and to neutralise any bias towards the independent sector or Oxbridge.
 - b. Gowling WLG also removes references to the applicant's school from the information given to interviewers.
8. Providing mandatory Equality & Diversity and/or unconscious bias training to all those involved in the selection and recruitment process:
 - a. Clifford Chance's graduate recruitment teams receive diversity, social mobility and unconscious bias training.

- b. Law firm Hogan Lovells delivers a programme of unconscious bias training to all partners involved in graduate recruitment interviewing.
 - c. PricewaterhouseCoopers requires all members of staff and partners to complete annual unconscious bias training. Barclays also requires all its managing directors and directors to undertake continuing, mandatory unconscious bias training.
- 9. Other widespread practices include:
 - a. Ensuring diverse role models are portrayed in recruitment marketing and on companies' websites;
 - b. Using BAME staff to act as ambassadors for the company and role models for prospective BAME applicants; and
 - c. Ensuring selection panels are diverse and include BAME people right through from the initial sifting of applications to interviews and assessment centres.

Retention & Progression

- 10. Regular and consistent monitoring of diversity information, specifically at recruitment, promotion and exit as the data collated informs recruitment & progression strategies, aids in understanding where the barriers might be and enables employers to assess their performance.
 - a. Law firm Bircham Dyson Bell conducts an annual diversity collection exercise of all current members of the firm in January of each year. In addition, diversity data is collected during the recruitment process of both experienced hires and graduates, as well as for those promoted and leavers of the firm. The HR department monitors all diversity statistics and reports notable trends or areas where action needs to be taken to its diversity and inclusion strategy group.
 - b. Gowling WLG has published its diversity monitoring information externally since 2010. The firm analyses recruitment, promotion, disciplinary and grievance trends and also analyses applications put forward by recruitment

agents to ensure candidates invited to apply for jobs are from a range of backgrounds.

- c. PricewaterhouseCoopers collates diversity information at recruitment, promotion and exit. In addition, it requests diversity information from all staff annually when they submit their choices for employee benefits and complete compliance training. As a result, it has a wealth of data to track how BAME staff are distributed throughout the firm's grades, whether they are progressing to senior levels and how well they are performing in comparison to their peers.
- d. Brent Council produces an Annual Workforce Equalities Report with data on BAME recruitment, retention, progression and development, which tracks performance against key performance indicators and feeds into their Equality Strategy Action Plan.

11. Establishing employee networks to contribute to an inclusive environment for employees and assist in meeting the specific needs of minority groups.

- a. The Bank of England Ethnic Minorities network empowers BAME staff in their roles and helps them develop, progress and realise their potential in their careers.
- b. At Clifford Chance, the Project 15% retention programme provides access to a support network for diverse trainees and newly qualified lawyers, and one-on-one executive coaching sessions with an ex-Clifford Chance lawyer.
- c. At the Department of Work and Pensions, the Inspire and Achieve Self-Help Network, formed in 2014, tackles barriers to progression for BAME staff. Activities include competency-based workshops, led by senior staff members, to help prepare BAME staff for promotion opportunities to middle management grades and awareness events to highlight learning and development programmes for BAME staff.

12. Setting aspirational targets to improve the representation of BAME staff in the organisation, specifically at senior level to focus activities towards the achievement of a specific goal:

- a. EY set a goal that at least 10% of all their new UK partners would be from black or minority backgrounds by 2015.
- b. The Bank of England has set itself a three year target to have 15% BAME staff in total headcount by 2017, with an aspiration for 9% of senior management staff to be of a declared BAME background by 2017.
- c. Channel 4's Diversity Charter pledges that 20% of all staff will be BAME by 2020. The BBC's target is for 14.2% of its workforce to come from BAME backgrounds by 2017.

13. Having and being seen to have senior level support/buy-in for diversity issues:

- a. At law firm Eversheds, diversity and inclusion has been written into the three year strategy for the firm, meaning it is now a core objective for the board, the executive and senior management team.
- b. At Hogan Lovells, the primary responsibility for delivering the diversity agenda rests with office managing partners and their nominated partner level diversity champions. Regional managing partners are responsible for overseeing this.
- c. At the Foreign Office, three board members have been appointed to oversee their campaign to increase BAME representation both at graduate intake and in the Senior Management Service.

14. Setting individual diversity targets for senior leaders to ensure they see achieving diversity as a priority and take personal responsibility for achieving diversity goals:

- a. At Barclays, senior leaders have diversity performance targets. Law firm Ashurst also sets diversity objectives for its partners which are reviewed at the year end appraisal.

- b. Thomson Reuters holds managers accountable for diversity and inclusion through their annual performance review and they set goals for both quantitative and qualitative measures.
 - c. At Channel 4, they have targets for BAME people to be given leading roles across all of their programmes and commissioning guidelines require dramas and comedies to include at least one BAME, LGBT or disabled main role. Channel 4 executives have their bonus payments cut if they do not meet their targets.
- 15. Putting in place sponsorship or mentoring schemes for BAME staff to introduce BAME individuals to different networks and actively promote their skills and talents in order to open doors and facilitate progression:
 - a. At Barclays, BAME employees have mentorship circles, and are mentored by business managers to develop their interview and networking skills.
 - b. At Deloitte, they undertake leadership mentoring to support BAME colleagues' career progression by expanding their skills, knowledge and personal networks.
 - c. The Department of Energy and Climate Change's Religion and Ethnic Minority Network has a mentoring scheme and provides monthly coaching sessions involving role models sharing career journeys, workshops on competency performance requirements, and one on one support reviewing applications and carrying out mock interviews.
- 16. Delivering fast track leadership programmes, specifically for those from a BAME background.
 - a. EY has a Black and Minority Ethnic Leadership Programme (BMELP) which provides routes to leadership together with development courses and meetings to engage senior partners. EY has reported that BMELP participants

are more likely to be promoted and more likely to receive higher performance ratings when compared to their high performing peers, both white and BAME.

- b. The Northern Trust runs a Diverse Leaders' Programme, aimed at redressing BAME under-representation at Vice President and 2nd VP levels across EMEA. The aim is to increase participants' confidence and authenticity as a diverse leader whilst positioning them for the next step in their career. Participants benefit from 1:1 coaching, a mentor, seminars and access to additional opportunities to meet senior managers.
- c. The Civil Service runs a year-long development programme called "Levelling the Playing Field". It is designed to enable under-represented groups in the Civil Service to realise their full potential and achieve career progression. There is a launch event involving line managers and business sponsors; a development event to identify development needs; access to a Coach or Mentor; "on the job" learning; and a Graduation Event involving participants, line managers and business sponsors. Civil Service Diversity Champions at Permanent Secretary level actively support the programme by speaking at the launch and graduation events. Senior Civil Servant role models from under-represented groups also speak at these events to share their own career journeys.

Replication

- 17. From an employment law perspective, there is limited legislation currently in place which would assist in ensuring that SMEs and smaller companies replicate the practices identified above. Prior to 1 October 2015, Employment tribunals had the power to make recommendations for the benefit of the wider workforce in relation to discrimination claims under the Equality Act 2010. Had this power still been in existence, it could have been used to make recommendations that employers should undertake unconscious bias training and put in place mentoring, networking and/or training schemes to assist those from BAME backgrounds.
- 18. Where a claim of discrimination is made, section 109(4) of the Equality Act 2010 provides a defence to any employer which can prove that it took all reasonable steps to prevent discrimination from occurring i.e. the employer will avoid liability if it can show that it took all reasonable steps to prevent its employee committing a particular

discriminatory act or committing that type of discriminatory act. In assessing whether all reasonable steps were taken, the Employment Tribunal will have regard to the Equality Act 2010 Code of Practice on Employment produced by the Equality and Human Rights Commission (the Code). Guidance under the Code, suggests that reasonable steps might include:-

- Implementing an equality policy
- Ensuring workers are aware of the policy
- Providing equal opportunities training
- Reviewing the equality policy, as appropriate and
- Dealing effectively with employee complaints.

19. There is therefore some incentive on SMEs to have an equality policy in place, implement that policy and provide training on its implications as it may enable the employer to avoid liability for discriminatory acts. However with the number of tribunal claims being brought in decline, it is arguable that there is less pressure on employers to take proactive steps to protect themselves against potential discrimination claims.

F. Cost-effective recommendations

Building on the points raised above, ELA makes the following recommendations to recognise, obviate and reduce the impact of discrimination in the workplace:

1. Mandatory diversity reporting - the Government could build on the work that has already been done in relation to mandatory gender pay gap reporting. The new gender pay gap regulations could be amended, so that organisations with over 250 employees would have to do the same calculations for BAME / race. This could be cost-effective, as a lot of the work has already been done in relation to gender pay gaps. ELA understands that gender pay gap reporting will be a requirement after April 2017 (with the first publication of gender pay gaps likely to be in April 2018) and we recommend that the same is extended in respect of BAME employees twelve months after the introduction of gender pay gap reporting.
2. Reintroducing the race equality scheme and statutory guidance; providing clear guidance to private sector employers on conducting equality impact assessments;

and introducing a similar race equality scheme requirement for companies with over 250 employees.

3. The Financial Reporting Council should add "race" to the UK Corporate Governance Code in addition to 'gender' and prescribe the nature of the information that should be reported on. This requirement may need to be phased in over 3 years to enable companies to start to gather the relevant data required.
4. Re-consider the Equality Act 2010 Code of Practice on Employment. Examples of issues to be addressed in the revised Code could include:
 - a. Extended guidance on what constitutes "reasonable steps" under section 109(4) of the Equality Act 2010 to include the regular monitoring of diversity data; putting in place initiatives to increase the representation of minorities where the data shows they are under-represented in the organisation generally or at specific levels of the organisation. The examples set out above under response D e.g. setting up networks, providing mentors, taking on work experience students / interns from socially deprived areas could be included in the guidance as the type of steps that employers are encouraged to take;
 - b. A new Code of Practice to deal with positive action, to clarify and encourage use of positive action in recruitment practices; and
 - c. A racial equality Code of Practice for search and selection companies could assist them to choose candidates for shortlisting from the widest possible pool.
5. A joint effort both publicly and within organisations to encourage discussions about race and the use of language around race.
6. Better training for individuals dealing with grievances needs to be implemented with additional focus on allegations of racial bias/preference.
7. Aspirational, but realistic, targets for large companies to increase diversity within senior leadership.

8. Consultation on the simplification of indirect discrimination law – the recent Court of Appeal decisions demonstrate how difficult it is to establish indirect race/religious belief discrimination under the existing laws. There have been no significant indirect race claims within Great Britain, yet it is evident that BAME employees face systemic barriers within the workplace.

ELA Working party members

Chair: Kiran Daurka, Leigh Day

Charlene Brown, BNY Mellon

Arpita Dutt, BDBF LLP

Tilly Harries, PwC Legal LLP

Sonal Khimji, Reading Council

Paul McFarlane, Weightmans LLP

Doreen Reeves, Slater and Gordon (UK) LLP