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Mr Trevor Phillips
Chair
Equality and Human Rights Commission

6th April 2010

Dear Mr Phillips,

RE: ELA Submissions on the EHRC Draft Guidance and Codes

I am writing to set out the views of the Employment Lawyers Association ("ELA") on the draft Consultations on the Non Statutory Guidance, Equal Pay Code and the Employment Code. We welcome the opportunity to comment on these Consultations.

ELA is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

Three sub-committees were set up by the Legislative and Policy Committee of the ELA to respond to the EHRC Codes of Practice and Non Statutory Guidance comprising 30 plus members of ELA.

ELA fully appreciates the sheer scale of the task which the EHRC had to undertake, particularly given the fluid nature of the Bill. However certain common themes emerged which are outlined below. Most members of the committee came to the conclusion that they would have to restrict their comments and observations to certain specific examples, as they would otherwise have become engaged in re-writing substantial parts of the text. Our overall impression, however, is that the drafts are disappointing and ought to be substantially rethought and redrafted if they are to become authoritative and of any real practical use to those we advise. In our view the Codes should be providing something more than a summary

of the contents of the Bill and related case law. We also think the Guidance could usefully have contained more to help the reader gain practical insight into how best to utilise and adopt the legislation and the Codes.

Those commenting had regard to the rather rigid consultation questions, which appeared to be the same, or very similar for each chapter. However they did not limit their comments to these questions. The format of the questions did not seem, to us, to be suited to an exercise of this kind and access to the questions via the online guidance was, in our view, somewhat cumbersome.

Our overall comments comprise the following:

- Examples are often described in stark terms when a more nuanced response would be appropriate. For example, typically a scenario is described and followed by a comment that this would be discrimination when it might be preferable to say that this may be held to be discrimination by a Tribunal.
- Most of the examples outline situations where discrimination has taken place. Greater balance would be achieved by describing more situations where discrimination has not taken place.
- There are scant, incomplete or inaccurate references to other areas of law e.g. relevant definitions of worker and employee. Similarly, the right to be accompanied is mentioned in relation to grievance but not disciplinary matters in p.246 Employment Code (Employee version). Reference is made to the need to consult when ‘planning’ redundancies. The duty is triggered when an employer ‘proposes’ to dismiss 20 or more employees.
- The documents appear to assume that litigation is inevitable when dealing with matters of equality.
- There may be a case for putting sections relating to non mainstream issues in appendices. The introductory section of the Employment Code contains passages dealing with barristers, office holders and qualification bodies etc. These passages break up the flow of the document.
- The Guidance is felt to be significantly less useful than the codes. The guidance paraphrases the law rather than guiding employers and employees.
- The format of the codes is more logical than that of the Guidance. There are no paragraph numbers.

- The Codes and Guidance are broken into unwieldy and lengthy sections. Shorter sections would aid the reader.
- Introductory sections are both lengthy and laboured. By way of illustrations, the draft Equal Pay Code's introduction is 13 pages long; the current EOC Code of Practice on Equal Pay is itself only 19 pages long in entirety
- Case law should be referenced
- There was repetition of definitions, for example protected characteristics in each section.

In responding to this consultation many of our members have spent some considerable time studying the draft documents in detail and we very much hope you find our comments of use when you come to consider the final format of the Codes and the Guidance. Given their evident importance it is plainly important to get these right, and if you have any queries on the responses we have made, please do not hesitate to let me know and I am sure we can provide further clarification.

Yours sincerely,

Bronwyn McKenna

Chair ELA EHRC Equality Act Codes and Guidance Working Party

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