GEO Consultation:

New streamlined procedure for obtaining information about potential discrimination and equality of terms cases

Response from the Employment Lawyers Association (ELA)

13th July 2010

1. INTRODUCTION

1.1 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 the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation or employment-law related documentation, rather to make observations of practical significance 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.

1.2 A sub-committee was set up by the Legislative and Policy Committee of the ELA under the chairmanship of Alison Wetherfield of McDermott Will & Emery UK LLP to consider and comment in July 2010 on the Government Equalities Office (the "GEO") proposed paperwork for a new streamlined procedure, pursuant to section 138, Equality Act 2010 (the "Act"), for obtaining information in discrimination and equality of terms cases under the Act. Its report is set out below.

1.3 As specialist employment lawyers, ELA's members have extensive experience of the use of the existing questionnaires which will be superseded by the new forms. The members of the sub-committee were chosen from amongst ELA's members to ensure a representative range of views from members across Great Britain and comprise both barristers and solicitors, including some who primarily represent Claimants and some who primarily represent Respondents or are in-house corporate employment counsel. A full list of the members of the sub-committee is annexed to the report.

1.4 Please note that while ELA has responded to the suggested consultation questions on the standard form (and used the comments column on that form to refer to sections of the following report), as ELA does not fit any of the categories of suggested consultees ("employee/employer/provider of goods or services or a consumer") and as ELA also has a unique perspective and experience base regarding the use of questionnaires, the sub-committee has elected to provide comments on the new forms which range well beyond the suggested questions.

2. SUMMARY OF KEY POINTS

2.1 The forms, as clearly set out in section 138 of the Act, are for the purpose of obtaining information, among other things for use as admissible evidence in an Employment Tribunal, on matters which are or may be relevant in proceedings brought under the Act. The guidance and forms should be designed for that purpose, not to encourage an adversarial stance or pleading-style drafting or response. The Discrimination guidance and form could be improved in a number of significant ways to achieve this central practical purpose of factual evidence seeking, with far greater focus on guidance as to how to ask a relevant and answerable question. See section 3 below.

2.2 Unrepresented Claimants and Respondents, particularly individual employees who may be sued for discrimination under section 110 of the Act, would be better assisted in the understanding and use of the new forms if a number of significant changes are made. In particular, ELA suggests more plain language explanation of the consequences of (i) non-response or evasive, equivocal or late response; and (ii) admission of facts which appear to be evidence of discrimination. See sections 3, 4 and 6 below.

2.3 The two booklets appear to have been drafted in isolation from each other, one (equality of terms) based on the format previously used in the sex, equal pay, sexual orientation, religion or belief and age questionnaires, and the other (discrimination) based on the race and disability questionnaires. The contents of the booklets and the tone and look of the forms now differ markedly for no discernable reason (and only one booklet even refers to the existence of the other: equality of terms to discrimination but not vice versa). In general the quality, approach, helpfulness and comprehensibility of the Equality of Terms booklet greatly exceed those of the Discrimination booklet. See sections 3, 4, 6 and 7 below.

2.4 ELA has particular concerns about inaccuracy in legal definition summaries in the Discrimination booklet and a failure to liaise with the EHRC in its preparation of the Code of Practice on Employment. See sections 3, 4 and 5 below.

2.5 The two booklets also appear to have been drafted without sufficient thought to other relevant employment law structures affecting the employees and employers which may use them, possibly because both are based on earlier questionnaire guidance and formats developed some years ago. In particular, further guidance should be given about how these forms and their use sit alongside grievance procedures within the workplace, and how data protection and confidentiality concerns may affect the provision of any information about other employees in response to the Discrimination form, not only pay information given in response to the Equality of Terms form. See sections 5 and 9 below.

2.6 Both booklets give advice as to useage which is inconsistent with Employment Tribunal standard procedure in suggesting that completed questionnaires should immediately be sent to Employment Tribunals where proceedings have been filed and fail to give any guidance as to how use of a questionnaire might differ before or after the filing of either a grievance or proceedings. See sections 3 and 9 below.

3. "THE INSTRUCTIONS AND GUIDANCE NOTES ARE HELPFUL": COMMENTS

3.1 ELA takes as its starting point that the forms are proposed as those referred to in section 138(2)(a) and (b) of the Act for questions and answers "on any matter which is or may be relevant", and that helpfulness of instructions and guidance notes should be judged in terms of the purpose of assisting complainants to obtain relevant factual information, while sufficiently informing respondents of the possible consequences of non-response or evasive, equivocal or late response.

3.2 To be helpful, therefore, in ELA's view, the booklets need to explain succinctly and accurately what may be relevant to a contravention of the Act – hence to explain the Act or cross-refer to a better source – to provide guidance on how to ask questions, and to provide guidance on how to answer without exposure to legal consequences.

3.3 **Succinct and accurate guidance regarding relevant information**

3.3.1 In general, ELA considers the Equality of Terms booklet to be succinctly and accurately drafted. It is informative and accessible in providing a short narrative summary of the Act and what might contravene it as to equality of terms to Claimants and Respondents alike. The quality of explanation and presentation are impressive and ELA has only a few suggestions for additional information to be included, on page 14 of the booklet:

(a) an expanded definition of like work so that parties understand that the nature and extent of any differences between the work of the Claimant and his/her comparator, and the frequency with which those differences arise in practice, will be relevant considerations for any Employment Tribunal in deciding whether the Claimant's work is "like [the comparator of the opposite sex's] work."

(b) more illustrative examples of "other [contractual] benefits", such as overtime pay, sick pay, redundancy payments, pension contributions, meal breaks and paid holidays;

(c) an addition to the comparator definition to explain that a Claimant is fully entitled to select as a comparator a colleague (of the opposite sex) whom he/she believes is engaged in work of a lesser value (where the claim is one of equal value). Furthermore, it should be pointed out that a Claimant cannot use the Equality of Terms legislation to achieve more favourable terms than his/her comparator, even if that comparator is performing lesser work; and

(d) guidance that, in the event of a successful claim (before an employment tribunal), a Claimant may be entitled to recover back pay for a period of 6 years from the date of the Tribunal claim.

3.3.2 So far as reasonably possible, in ELA's view the Equality of Terms booklet should be the model upon which the Discrimination booklet (which, in its current format, we consider to be substantially defective) is based.

3.3.3 ELA's concerns regarding the Discrimination booklet are three-fold.

3.3.4 Most importantly, ELA's concerns relate to the Discrimination booklet's approach to and accuracy in explaining the Act. While the Equality of Terms booklet provides a very few short and accurately paraphrased summaries of defined terms from the Act, a prominent cross-reference to the ECHR Code of Practice on Equal Pay at the start of the Guidance Notes, and a very short and accurate narrative summary of how the Act works thereafter, the Discrimination booklet appears to attempt to be the only source necessary for a prospective user of the form. For example, while the EHRC Code of Practice on Employment is mentioned (on page 6 at paragraph 7) the reference suggests that it is of relevance "as evidence in any proceedings" rather than as a far more comprehensive explanation of the Act.

3.3.5 What the GEO appears to have tried to do is incorporate a complete explanation of the law along with guidance on using the questionnaire within the same document. This is potentially of benefit to Claimants as it allows them to have all the information required to complete the documents in one place, without the need to refer to other documents. However, given the range of protected acts to which the new questionnaire applies, the extended

varieties of unlawful action and the potential use of the document in the Employment Tribunal and civil courts, the attempt to cover so many topics renders the document overly long and as a result, inaccessible to the very group of (unrepresented) users who are the primary intended beneficiaries. This is worrying as this may result in Claimants deciding not to use them at all.

3.3.6 Compression of the whole of discrimination law into one Act has been a great achievement, but it is one which took many years, and unfortunately the tight timeframe under which the GEO has obviously worked cannot be expected to create an adequate "one source" reference.

3.3.7 While ELA had only a few suggestions regarding additions to the legal explanations in the Equality of Terms booklet, the Discrimination booklet explanations throughout unfortunately misrepresent important aspects of the underlying law. See, as one example, the definition of Indirect Discrimination on page 3, which fails to specify that the Claimant must personally be disadvantaged. While this error is corrected in the Appendix definition, it is notable and unhelpful that there is internal inconsistency (and duplication) in the document.

3.3.8 The approach to explanation of the phrase "because of" within the definition of Direct Discrimination (on pages 3-4 of the booklet) is another good example of the need for further review of this booklet's explanation of key terms. An unrepresented Claimant or Respondent might easily be led to believe incorrectly that "Direct Discrimination", "Association Discrimination" and "Perception Discrimination" are separately defined types of discrimination within the Act. This approach is notably different from that taken in explaining direct discrimination "because of" a protected characteristic seen in the draft form at least of the ECHR Code of Practice on Employment on which consultation took place in April 2010. The draft Code was careful to explain that "because of a protected characteristic" is clearly intended to encompass less favourable treatment of a person <u>related to</u> a protected characteristic – including because of (a) their own protected characteristic, (b) the protected characteristics of a third party and (c) incorrect perceptions of their own

protected characteristic. The Discrimination booklet by contrast not only suggests three different sorts of discrimination, but also fails to cover discrimination because of the protected characteristic of a third party with whom the complainant has no "association" – as, for example, experienced by the white car-hire dispatcher constructively dismissed in *Weathersfield Ltd v Sargeant [1999] IRLR 94* by a policy of discrimination against Black and Asian prospective customers.

3.3.9 There are also very surprising omissions – for example, no discussion of the difference between "less favourable treatment" and "treating someone unfavourably/badly" (the latter being how the booklet rather confusingly conveys the single concept of subjection to a detriment), and the importance of a comparison of cases for the purposes of direct discrimination. Further examples abound in the Appendix of confusing and inaccurate summaries, but it is not ELA's role to redraft (although we have drawn attention below in section 4 to several problems which impede understanding as well as mislead).

3.3.10 ELA's other two concerns relate to the Discrimination booklet's length and its format. It is far too long at 44 pages (probably because of its ambition to be the only source of explanation necessary), and its format – cover sheet, glossary of terms, lengthy introduction and separate guidance notes for Claimant and Respondent, all before the Claimant comes to the prescribed form - is too complex and could deter unrepresented Claimants and lose the attention of unrepresented Respondents. The Equality of Terms booklet format (four parts only – an Introduction, the Complainant's questions, the Respondent's answers and Guidance Notes) is far more helpful, and certain sections which appear in both booklets – for example the definition of complainant and sections as to how the question form works in practice and how to complete the form – are notably tighter in drafting in the Equality of Terms booklet.

3.3.11 If the Discrimination booklet is reconsidered and re-ordered, so that all relevant discussion of claims under the Act form part of the Guidance Notes, it will be important to review all explanations of the Act for accuracy and internal consistency. It will be vital to ensure external consistency with the

ECHR Code of Practice on Employment, and it would be far more sensible to refer users of the questionnaire to that more comprehensive source for adequate explanation of the Act and what might contravene it. A prominent cross-reference to that Code should ideally precede a shorter, tighter, more accurate set of Guidance Notes. Certain key definitions (checked for consistency with the Code of Practice) could, as in the Equality of Terms booklet, appear on the first page as "Terms used in the booklet".

3.3.12 At present the Discrimination booklet is, however, neither succinct, nor accurate, nor an adequate single source of explanation of the Act.

3.4 Guidance on how to ask questions

3.4.1 As stated above, ELA's starting point is that the central purpose of the guidance should be to facilitate obtaining information on any relevant or possibly relevant matter, particularly for unrepresented Claimants.

3.4.2 ELA's experience with use of the existing questionnaires may be of value in considering how the forms might actually better elicit information. Both members who primarily represent Claimants and members who primarily represent Respondents have commented during this exercise that the existing format for all questionnaire forms save equal pay may have the unfortunate consequence of encouraging "questions" which represent pleadings and unfortunately often elicit "pleading-like" responses. This is the effect of using as standard questions those now proposed as sections 3, 4 and 5 in the Discrimination form.

3.4.3 Claimants following the instructions (particularly when represented) tend to draft long "statements of case" detailing many incidents chronologically over time, followed by an explication of how legal definitions apply to that case history. Respondents following the instructions (particularly when represented) tend also to respond in long "defences", with legal argument following. It is sometimes only the follow up questions which actually seek specific relevant information. These are often (particularly when Claimants are represented) combined with very large numbers of questions about many aspects of the treatment of the "protected group" in the workplace which

Respondents often see as irrelevant "fishing trips" or attempts to run up expenses so that settlement of even a weak claim looks more attractive. Claimants are in turn frequently frustrated by the limited return in actual information from a questionnaire, when Respondents reply that information is irrelevant or confidential or unduly burdensome to provide, particularly if the Claimant has also expended considerable time and costs in putting together the questions.

3.4.4 In ELA's view, any revision of questionnaires could better attempt to guide both Claimants and Respondents so that less "pseudo-pleading" goes on and more relevant specific information is actually sought and actually provided. Such "pseudo-pleading" is not appropriate before a claim is filed and is duplicative after a claim is filed. It would also be helpful to assist the Respondent further in understanding why the Claimant suspects discrimination. In ELA's view, this could be done both by revisiting the "standard questions" and by helping Claimants to ask better tailored questions.

3.4.5 Looking at the "standard questions" and the currently proposed guidance for complainants in the Discrimination booklet, section 3, the tick box for "protected characteristic(s)", simply requests a conclusion about relevant characteristics. Everyone has multiple protected characteristics and this tick box approach does not assist in raising a question about a relevant matter. Section 4 gives a further tick box as to type of contravention believed, but no guidance is offered as to how the complainant might tie the facts that follow either to that contravention or to the protected characteristic. A more nuanced approach and follow on set of questions dependent on the type of contravention alleged might do this and help the Respondent understand what it is that the complainant is unsure of and actually wants to know. For example, for any form of discrimination requiring analysis of the position of a comparator, section 3 might ask for relevant protected characteristic, and section 4 might ask the complainant to state a fact or facts both about the Claimant and, where relevant, about any comparison case known to or posited by the Claimant involving a person who does not share the relevant characteristic. ELA recognises, however, that such guidance, when so many

forms of discrimination are being combined in one questionnaire, may be too difficult to draft.

3.4.6 The problem remains, however, that the current approach to sections 3 to 5 encourages legalisation, not exchange of relevant information. The complainant is encouraged, through tick boxes in sections 3 and 4, to assert a contravention of the Act. That is superficially consistent with section 138, which provides that the complainant is a person who thinks that a contravention of the Act has occurred. Nothing in section 138, however, suggests that the complainant should have to analyse or identify, effectively to plead, that contravention. This, however, is encouraged by the guidance in connection with section 4 (at page 12), which is to "give as many facts as you can", followed by a reminder of all the sorts of legal complaint that can be made to shape the facts as presented. The guidance to section 5, although noting that it is not mandatory to respond, states that "you may find it useful to indicate what kind of unlawful conduct you think the treatment may have been".

3.4.7 This approach transforms a relevant information seeking exercise into an accusatory one, to which, in response the Respondent is then also effectively required "to plead". Because the complainant is encouraged to give as many facts as they can, without regard to incidents which may be out of time, and without any guidance about what sort of "continuing acts" might allow consideration of such acts, the Respondent is often able to refuse "to plead" on grounds of timeliness. It is unclear how any of this assists in obtaining information – in standard litigation terms, this looks more like a request to admit liability or at least facts, with all the attendant opportunities to take jurisdictional points, rather than a request for information. It also forces complainants to take positions for which they may have insufficient basis, when actually they might prefer not to tick any box in section 4 if they are unsure of the legal basis of their claim, or if they wish to await the receipt of information from the Respondent. The formalisation of a stance by Claimants prior to the information they have requested being available seems to defeat the purpose of the questionnaire.

3.4.8 ELA recognises that re-thinking the "standard questions" after many years may seem surprising, but in ELA's view the "tick box" and accusatory approach of sections 3 to 5 may encourage focus on the law as opposed to the factual basis upon which any complaint is based. Sections 4 and 5, in particular, in insisting on a legal analysis seem to go further than section 138. While it may help Complainants to suggest that trying to identify each alleged act of discrimination and the protected characteristic on which they are relying could help focus their questions, the creation of a standard form which makes that identification central and the information sought marginal is not sensible.

3.4.9 In ELA's view, however the "standard questions" are drafted, the emphasis should be on encouraging Claimants to ask pertinent tailored questions, and giving more assistance in drafting them. One casualty of this harmonisation exercise appears to be that guidance on specific types of discrimination and how particular types of question might elicit relevant information has been lost. Even if the standard questions cannot be tailored to the multiple legal elements which apply to the various forms of discrimination, it would be sensible to suggest questions or give guidance on questions relating to comparators, or decision makers etc., which is currently entirely lacking from the Discrimination booklet. It would be helpful to manage expectations about the likelihood of a Respondent answering questions which appear to have no direct relevance to the particular treatment suffered by the Claimant. Examples could be given that assist unrepresented Claimants to make specific enquiries about relevant policies, including Equal Opportunities Policies, and whether individual Respondents have been provided with equal opportunities training.

3.4.10 The "Other Questions" section on page 15 of the Discrimination booklet as currently drafted does none of this, and gives very few suggestions – and one of them, at paragraph 21, could be quite unhelpful if it encourages complainants to ask for diversity statistics for protected groups unaffected by the complainant's own treatment. It is further unclear why this section, at paragraphs 22 and 23, singles out Victimisation and Indirect Discrimination but no other legal concepts, and suggests questions for them. The questions suggested are, again, extremely legalistic. We do not suggest that other legal

concepts are needed here, but rather that complainants should be encouraged to ask relevant, non-legalistic questions to elicit facts.

3.4.11 The Equality of Terms booklet is, again, more helpful in providing guidance on how to ask for relevant information. It is far less adversarial in approach and does not require an identification of the legal basis of the claim. It is also helpful in suggesting a number of approaches to tailored questions (on page 6 in guidance for question 4).

3.5 **Guidance on how to answer questions without legal exposure**

3.5.1 ELA also takes as a starting point the law on questionnaires and their relevance to discrimination legislation. Section 138 is intended to harmonise, not change, existing law. All employment lawyers are well aware, of course, that a failure in answering a questionnaire is a matter specified at item 6 of the "*Barton*" guidelines (as endorsed in *Igen Ltd v Wong [2005] ICR 931*) as a matter from which an inference as to "secondary fact" – that is, that an employer could have treated an employee less favourably because of a protected characteristic - may, in appropriate cases, be drawn where just and equitable to do so, from such a failure. Equally, all employment lawyers are aware that the drawing of such an inference is not a "tick box exercise" and that it is necessary in each case to consider whether the failure in question – however reprehensible - is capable of constituting evidence supporting the inference that the respondent acted discriminatorily in the manner alleged. See *D'Silva v NATFHE et al. [2008] IRLR 412.*

3.5.2 Both booklets are, however, quite weak in explaining any of this to Respondents. Within the introduction section of both of these booklets, a paragraph addresses the consequences of failure, but in insufficiently plain language for an unrepresented Respondent to understand. The Equality of Terms booklet says at page 3 that "an employment tribunal may draw any inference", and the Discrimination booklet says at page 8 that "an employment tribunal or court may draw its own conclusions from that". The Discrimination booklet includes a far stronger warning that "this could include an inference that the person questioned has discriminated against the complainant or

subjected the complainant to harassment in a way which is unlawful under the Act", but this appears at the end of the Complainant's questions and is not repeated or reemphasised in the section for the Respondent's answers, with the result that a Respondent may skim over it, and may not understand the relevance of the sections of the form at Section E (on page 32) which offer a chance to explain unwillingness or inability to answer questions. The Equality of Terms booklet provides quite a misleading note at pages 12 to 13 at the end of the Respondent's answer form, giving as an example that a tribunal "may conclude that you did not provide a proper explanation for a difference in pay because there was no genuine reason for the difference" without completing the logical thought that this could result in a ruling of unequal terms.

3.5.3 Given the importance that failure to comply by a Respondent may have on subsequent Employment Tribunal proceedings and the Respondent's ability to defend an Employment Tribunal claim, ELA consider that both booklets should use plain language and contain a far more expansive explanation as to the consequences of failing to respond or providing evasive or ambiguous answers. While we do not generally support separate guidance notes for Complainants and Respondents, it is essential that this message is strongly communicated to Respondents. In this respect the position of the Claimant and the Respondent are not binary: the consequences of a failure to respond or an inadequately considered response are potentially far more serious for the Respondent. At present paragraph 15 of Discrimination booklet 'Part C – Guidance for the Respondent' may even somewhat irresponsibly suggest that non-response is consequence-less by starting the sentence: "If you do reply to the Questions Form…". ELA is of the view that Respondents should instead be reminded here that the responses may be relied upon in future proceedings and as a consequence, they should ensure that the responses being provided are full and accurate, and that they have taken the opportunity to explain why any questions have been left wholly or partially unanswered.

3.5.4 This is particularly important for individuals who may themselves be the subject of proceedings and who may receive a Discrimination form from a colleague or subordinate. Although the Discrimination Questionnaire states at

paragraph 2 in 'Part A – Introduction' that the questionnaire process "helps a complainant to get information from the person or organisation (the "respondent")", in ELA's view, the emphasis in the guidance notes is directed towards organisations rather than individuals. ELA believe that the Discrimination guidance notes should specifically deal with the position of such an individual, who may feel placed in a very difficult position. Such an employee may fear breaching his or her own contract if asked to reveal confidential information about workplace matters or other colleagues. [Note that questions of confidentiality are covered more fully in section 9 below.] The guidance notes do not currently, for example, even advise such an employee to alert the employer or to seek advice on a matter with clear implications for his or her own employment position.

3.5.5 Just as complainants would be assisted if guided to ask specific, tailored questions, for relevant information, so too the guidance notes could also assist Respondents further by explaining that they are not required to provide information which is not relevant.

3.5.6 *Victimisation*: ELA has considered whether, in response to specific questions in a Discrimination or Equality of Terms questionnaire, it could constitute victimisation if an employer refused to provide data on any ground (including that it is considered to be personal data or sensitive personal data and which the employer believes cannot fall properly under any of the permitted exemptions for disclosure). Should the employer choose not to divulge such data until it receives a court order to do so and so long as the employer has genuine, fair and objective reasons why it believes it cannot divulge such data, ELA does not consider that such actions would automatically constitute victimisation. This is because the employer would not have provided such data to the employee in any event and its refusal to disclose the data is not because the employee has requested such information in the context of a discrimination grievance, questionnaire or employment tribunal proceedings. In ELA's view, however, the discussion of victimisation at page 36 of the Discrimination booklet may potentially mislead a recipient Respondent who

does not feel able to respond fully to a questionnaire and is concerned that this will be seen as subjecting the complainant to a detriment.

3.5.7 The discussion above of the problem of an/the adversarial approach in the Discrimination form is also relevant to guidance to Respondents. While the Equality of Terms form merely requires statement of a "belief" that the complainant "may" not have received equality of terms, the more muscular and adversarial language of the Discrimination form (which challenges the Respondent to respond to a specific statement that treatment may have been "unlawful") places the Respondent in a very different position in responding. The Equality of Terms booklet deal sensibly and forthrightly with what to do by way of conciliatory approaches if the question form reveals an inequality of terms (at paragraph 7 on page 17). The Discrimination booklet is less helpful. It is very unlikely that a Respondent would agree, in Section D, with the bald statement that "the treatment or failure experienced by the complainant was unlawful", but a Respondent may recognise an arguable claim advanced by a complainant and need help in understanding the consequences of honestly replying. The guidance, at page 19 gives no assistance to the Respondent as to consequences (including possible awards or costs) or ways to move forward in trying to resolve the dispute if "unlawful" conduct were to be agreed. This is an oversight and a failure to provide helpful guidance.

4. "THE INSTRUCTIONS AND GUIDANCE NOTES ARE EASY TO UNDERSTAND": COMMENTS

4.1 It is not ELA's role to re-draft, but the following comments may assist in creating documentation which is easier to understand.

4.2 **Discrimination booklet, using the relevant Headings and paragraph numbers (but subject to our general points above)**

First page (i.e. before contents page)

The first paragraph refers to the Act's replacement of "the existing anti-discrimination law". It would be technically more accurate to refer to replacement of "the existing **UK** anti-discrimination law". A very brief explanation of the European law context for such law could perhaps also appear here.

Part A

Paragraph 2. Consider adding an explanation in the last sentence that information presented to a Tribunal may include documents and the Respondent's answers.

Paragraph 6. This paragraph reiterates paragraph 2 and is therefore superfluous.

Paragraph 10. ELA believes that this paragraph may have been borrowed from the existing disability questionnaire guidance, and that the reference to "alternative formats" may be envisaged to apply to certain people with disabilities who have difficulty reading normal size type. In a general purpose form, the reference to reasonable adjustment is confusing without an explanation that this may apply to a particular disability. Note, in so far as para 10 appears to suggest that printed forms need to be used to raised a question under section 138, this would appear to contradict paragraph 4 and s.138 (3) of the Act.

Paragraph 12. Unrepresented parties may be unaware that the Claimant and the Respondent will be made aware by the Employment Tribunal of the date when the claim was received. For consistency with tribunal terminology, "presented" rather than "received" is more accurate.

Paragraph 12. At the end of the final sentence, consider adding a sentence which explains that this means the complainant may be prevented from pursuing a claim.

Paragraph 13. The final sentence should be amended to clarify that there are several other examples referred to as exceptional in the Act.

Paragraph 14. In ELA's view, this paragraph repeats much of what is contained in paragraph 2. and does not really add anything of value. In any event, reference in bullet point 1 to *" no need for legal proceedings"* is potentially misleading and may be read as suggesting that the Complainant should await receipt of a response before presenting claim – despite a statement in the Guidance to the contrary.

Paragraph 17. The guidance would be easier to understand if it explained what it means to be admissible in Employment Tribunal proceedings.

Paragraph 17: Bullet point 1 should state that the normal time limit is "within" 3 months.

5. "THE GUIDANCE NOTES SIGNPOSTING TO OTHER INFORMATION SOURCES IS HELPFUL": COMMENTS

5.1 ELA has already explained its view that the booklets should provide questionnaire-specific guidance, but should not attempt to be a comprehensive description or analysis of the relevant law. It follows that both booklets, including the Equality of Terms booklet, should include a statement at the outset that the information contained within is designed to provide general guidance to the reader, but does not constitute a comprehensive description / analysis of the relevant law.

5.2 It should also be made clear to readers that all elements of the Equality Act must be interpreted with regard to case law from domestic courts and the ECJ. At present, the Discrimination booklet does not contain this advice at all, and the Equality of Terms booklet only refers to such case law in discussing the definition of "same employment". Details of (and links to) other useful sources of information on the meaning of the Act (most importantly the EHRC Codes of Practice) should be given at the start of the Guidance Notes (as is already the case in the Equality of Terms booklet).

5.3 ELA also notes that both booklets suggest writing to the "Secretary of the Tribunal" if they want to seek permission to serve the form after the time limit has elapsed. It would be more helpful if the complainant is directed to where the address for the "Secretary to the Tribunals" can be found.

6. "THE QUESTIONS/ANSWERS FORM IS STRAIGHTFORWARD TO COMPLETE": COMMENTS

6.1 The approach taken in the Equality of Terms booklet of providing guidance in small italics on the form itself regarding filling out each question and answer is, in ELA's view, far more straightforward than the Discrimination form current approach of requiring flicking backwards and forwards between form and guidance.

6.2 The formatting of the forms is obviously something that will be affected by later version presentation. In general, however, the Discrimination form is badly formatted currently. A strong indication would need to be given to Claimants that the boxes (as drafted) are unlikely to provide enough space to set out all the information necessary. The layout of the Equality of Terms questionnaire is more helpful.

6.3 The Discrimination form still currently includes some "hangovers" from its prior existence apparently as the disability questionnaire. Under Section D of the Answers Form, there is a curious statement that "You cannot justify a failure to comply with a reasonable adjustment". This should be removed unless guidance as to which other forms of discrimination cannot be justified is to be added.

7. "THE LENGTH OF THE GUIDANCE, INSTRUCTIONS AND FORMS ARE PROPORTIONATE FOR THE NEED": COMMENTS

7.1 ELA has commented above on our view that the Discrimination booklet is too long and explained how, in ELA's view, it should be revised in consistency with the Equality of Terms booklet.

7.2 We note that the Introduction to the Discrimination questionnaire booklet will necessarily be longer than that in the Equality of Terms questionnaire, given the need to consider the use of this questionnaire in civil claims and the breadth of law to be explained.

8. "THE WHOLE PROCESS FOR COMPLETING THE FORMS APPEARS EASIER THAN THE CURRENT PROCESS": COMMENTS

8.1 ELA's comments have been focused on outcomes rather than appearances, but we do note that the use of letters in the Respondent's Discrimination Answers Form should assist in avoiding some of the confusion caused by the numbering used in the existing form.

8.2 ELA is of the view that when in print, it would be beneficial if the actual forms themselves could be distinguished perhaps in colour from the guidance notes and therefore readily identified within the booklet.

8.3 We also consider that it would be beneficial properly to signpost both on any website where the forms are stored and in the booklets themselves that there is another questionnaire form and that an initial consideration of whether the contravention involves Discrimination or Equality of Terms will need to be made.

9. "ANY OTHER COMMENTS ON THE NEW FORMS FOR DISCRIMINATION/EQUALITY OF TERMS"

9.1 As suggested in the summary of key points above, ELA also wishes to comment on a variety of other points: inconsistency with Employment Tribunal procedure, how use of a questionnaire affects and may affect grievance processes, and confidentiality/data protection.

9.2 Inconsistency with Employment Tribunal procedure

9.2.1 The universal experience of the members of the sub-committee is that it is standard practice to put a questionnaire before an Employment Tribunal by including a copy of the questionnaire and response in the hearing bundle. Therefore, it is unnecessary to provide the Employment Tribunal with a copy in advance of the final hearing as both booklets suggest.

9.3 Grievance procedure overlap

9.3.1 In ELA's view, the booklet guidance should recognise as to employees and employers that the questionnaire is usually being served within the context of an ongoing employment relationship in which other overlapping processes may be ongoing.

9.3.2 When the questionnaire procedures were introduced under the previous legislation (at various times up to April 2003), the employment landscape and mechanisms for resolving disputes were focused on recourse to the Employment Tribunal, albeit with ACAS's duty to conciliate and promote a settlement.

9.3.3 In recognition of the advantages of seeking the earliest possible resolution of employment disputes, the statutory dispute resolution procedures were introduced in 2004. Although these procedures were repealed (in light of the evidence that they were too formulaic, had increased the administrative burden on employers and had increased rather than decreased the number of claims to the ET), they were replaced in the Employment Act 2008 with provisions

again seeking to encourage the resolution of employment disputes. These new provisions permit ETs to impose financial penalties for failure of the Claimant or Respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Code states "employers and employees should always seek to resolve disciplinary and grievance issues in the workplace" and "many potential disciplinary or grievance issues can be resolved informally… however, where an issue cannot be resolved informally then it may be pursued formally".

9.3.4 The experience of members of ELA in acting for Claimants and Respondents in discrimination cases is that the questionnaire procedure is often used as an adversarial tool and is almost always a precursor to (or a part of) litigation. It is very likely that workplace grievance procedures will already have been launched about the same matter, or if not, will shortly be launched.

9.3.5 ELA is clear that the questionnaire procedure has a place in the litigation of, and/or resolution of, concerns/complaints that discrimination has occurred. As was recognised in *Carrington v Helix Lighting Limited [1990] IRLR 6* applicants may face considerable difficulties in proving a case of discrimination and the statutory procedure by way of a questionnaire is one important way in which the legislature has made provision for the Claimant to advance his or her case of discrimination.

9.3.6 However with the greater emphasis, and rightly so in ELA's view, towards encouraging parties to resolve issues, the booklets provide insufficient context and encouragement for alternative methods of obtaining information and seeking to resolve disputes.

9.3.7 There are many ways open to employees, which they will be aware of but could be reminded of. The Employment Rights Act 1996 requires that a written statement is given by an employer to every employee after two months of employment specifying a person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his employment and the manner in which any such application should be made. In addition to such grievance procedures, many employers issue equal opportunities and anti-

harassment policies which often include specific processes for raising a relevant grievance and seeking information and employer responses.

9.3.8 There can be real advantages to an employee in pursuing matters through the procedures set out in these policies rather than issuing a questionnaire. These include the speed within which the aggrieved may be able to obtain information: Employers will typically respond to a questionnaire towards the end of the eight week response window, whereas they are required to deal with grievance issues promptly and not unreasonably delay meetings etc under the Code. It may also elicit a clearer response: it is our experience that sometimes the quality of the written questions in a questionnaire and of the replies means that the complainant may not get a clear answer to the questions/information s/he is seeking. It can be easier to elicit the information required through asking questions face to face in a grievance meeting or discussion with his/her employer. Further, and crucially, the issue is more likely to be resolved if the parties have an opportunity to discuss matters.

9.3.9 An early resolution is to be encouraged where possible for all complaints but the impetus to do so is particularly acute where (one of) the Respondent(s) is an individual, since they may well need to continue to work alongside the complainant.

9.3.10 Obviously section 138 does not cross-refer to any of these issues and the questionnaire process is not one which includes anything other than written questions and answers. However, greater emphasis in the Guidance and Booklet on alternative actions which an individual may wish to pursue and a an indication of where s/he can go to seek assistance in considering the pros and cons of such options would, we believe, be in the interests of both employees and employers.

9.3.11 The ACAS guidance booklet entitled “Managing conflict at work” contains some useful guidance for employers on when certain types of alternative dispute resolution, whether internal or assisted by a third party, may be appropriate and may be a useful reference tool.

9.3.12 A separate issue is that there can be a practical problem for Respondents if, which often happens, a questionnaire and grievance are submitted to them at the same time or the timescales for dealing with both procedures overlap. In such circumstances many, particularly smaller, employers have difficulty in adequately responding to both, in light of the administrative resources which inevitably are involved. The guidance could helpfully provide guidance that a Claimant should consider the wisdom of filing either exactly the same statement of facts (because duplicative) or indeed slightly different statements (because confusing) as either or all of a grievance, a questionnaire statement of facts and an ET1. What is required of an employer in response is different. Where a grievance has been submitted, it may be sensible guidance to the Claimant to use a questionnaire in a more targeted way to try to get information in circumstances where the employer has, for whatever reason, not been prepared to consider or respond to particular facts in the grievance.

9.3.13 We note finally that the new Equality of Terms guidance notes refer to the possibility of ACAS conciliation as a conduit to resolution of inequality of terms (Para 7, page 17). This approach may assist the parties to avoid litigation and unnecessary cost and is therefore attractive, but specific cross-reference to ACAS materials on pre-claim conciliation would help the unrepresented to learn more about this alternative. The same reference should be included in the Discrimination booklet. Reference in addition to other forms of mediation which are often possible as part of a grievance process would also be helpful in both booklets.

9.4 Confidentiality and data protection

9.4.1 In ELA's view, Section 5 of the Equality of Terms Guidance Notes entitled "*What if the Employer is asked to identify confidential information?*" is helpful, informative and of an appropriate length. The reference to anonymising confidential data, the exemptions set out in Section 35 of the Data Protection Act 1998 (**DPA**) and the ability of an Employment Tribunal to order disclosure of relevant information are useful additions.

9.4.2 In ELA's view reference should also be made to the disclosure of sensitive personal data as defined in the DPA. An employer may argue that the employee's chosen comparator has been treated differently because of a factor which constitutes sensitive personal data, for example, the comparator's pregnancy or the fact they are going through gender reassignment or the fact they have a disabled child. In ELA's view, the guidance should refer to the data protection principles that may apply when divulging sensitive personal data. It would be helpful if parties could be referred to the Information Commissioner's website (www.informationcommissioner.gov.uk).

9.4.3 It is recommended that reference is made under the section entitled "Legal Protection of Confidential Information" to the fact that employers may sometimes claim that they cannot disclose certain information because they are prohibited from doing so by the DPA. ELA recommends that reference is made to the Information Commissioner's 'Exemptions' guidance by explaining that it can be difficult for an employer to decide whether it is necessary to disclose the data.[1] The explanation should then proceed to the examples set out on page 16 regarding anonymising data, consent of the data subject and the wide exemption under Section 35 of the DPA. ELA notes that the current Equality of Terms guidance is perhaps a little too respectful of the DPA where genuinely relevant information regarding a third party data subject is requested. The Guidance in relation to Question 5, Page 15 *"What if the employer is asked to identify confidential information?"* suggests that *"an employer may wish to seek the explicit consent of the comparator to disclose these details to the complainant…"*. ELA's suggestion is that where obviously relevant information, for example, as to a comparator, exists, guidance could state that an employer can of course request such consent.

9.4.4 In ELA's view, the Discrimination guidance for employees and employers on how to complete the discrimination questionnaires should also refer to the circumstances when an employer is asked to identify confidential information about other employees and the legal protection of such information. The

[1] http://www.ico.gov.uk/for_organisations/data_protection_guide/exemptions.aspx

guidance can be based on the information detailed in the Equality of Terms guidance notes. The principles in the DPA are clearly relevant to the employer's ability to respond fully and accurately to the employee's discrimination questionnaire. Reference should be made to both personal data and sensitive personal data.

9.4.5 Both booklets should also consider the question of commercially sensitive information, and manage the expectations of a complainant as to what can realistically be produced even if relevant unless the complainant is prepared to agree to use the information only in potential Employment tribunal proceedings. No equivalent of Rule 31.22 of the Civil Procedure Rules (which prevents a document which has been disclosed from being used other than for the purpose of the proceedings in which it is disclosed) applies to information disclosed in response to a questionnaire, which can raise legitimate concerns for a Respondent.

APPENDIX: WORKING PARTY MEMBERS

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