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Consultation: Building a fairer Britain:

Reform of the Equality and Human Rights Commission

Response of the Employment Lawyers Association

15 June 2011

ELA Response to the consultation: Building a fairer Britain: Reform of the Equality and Human Rights Commission

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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 the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or policy aims of proposed legislation, but rather to make observations from a legal standpoint. ELA's Legislative & 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.

A sub-committee was set up by the Legislative & Policy committee of ELA under the co-chairmanship of Susan Belgrave (9 Gough Square) and Bronwyn McKenna (UNISON) to consider and comment on the consultation document "**Building a fairer Britain: Reform of the Equality and Human Rights Commission**". Its comments are set out below. A full list of the members of the sub-committee is annexed to the report.

Question 2: Do you agree that remodelling the duties at s.8 of the Equality Act 2006 to mirror the role and functions set out in paragraph 1.9 of Chapter 1 will help focus EHRC on its core objectives as an equality regulator? If not, what do you think EHRC's core functions should be?

Any re-modelling of the remit of a body with the statutory duty of protecting and championing equality and human rights must be approached with caution. Any reform of core objections should not inadvertently fetter the EHRC's ability to protect and promote equality and human rights and to achieve its purpose in relation to enforcement and compliance under EU equality directives. See for example Council Directive 2000/78/EC (the Framework Directive). Having narrowly defined functions could lead to inadvertent fetters being put into place, particularly if there is a conflict between paragraph 1.9(c) (holding Government and public bodies to account) and paragraph 1.9(f) (helping the Government to evaluation the effectiveness of Equality Act 2010). Currently section 8 sets out broad *duties.* Duties are, by their very nature, central to *strategic* delivery of core objectives. They are the high ideals by

which an organisation is measured. In contrast the *functions* set out in paragraph 1.9 are *operational*. They prescribe the activity expected on a day-to-day basis so that performance may be measured more akin to a "tick box exercise". So, for example, "promoting equality and diversity within society" is a core duty under section 8, and it is a clear strategic objective. In contrast "promoting awareness of equality legislation" (paragraph 1.9(a)) is an operational objective, and is much narrower than the strategic duty - it may *assist* in delivering on the strategic duty, but does not necessarily promote equality and diversity *per se.*

Furthermore, a "light touch" approach is being taken by the present Government to reduce bureaucracy in respect of the public sector general and specific equality duties under Part 11 of the Equality Act 2010. This is with the view to reducing bureaucracy, moving away from "tick box" exercises, and allowing organisations to focus on objectives relevant to local needs. In contrast, the approach taken in the proposed re-modelling of section 8 is a move to a more prescriptive approach.

Although ELA agrees that more focussed core objectives will help EHRC to deliver on its legal role, there needs to be wider public debate as to what its role should be at this stage bearing in mind in particular the necessity of having effective means of enforcement of Community rights. In this context, ELA has concerns that the proposal to replace strategic duties in section 8 by with the operational functions set out in paragraph 1.9 might not in fact deliver the UK's international obligations. What is perhaps required are Key Performance Indicators (which may well be operational) which underpin the strategic objectives of the EHRC.

Question 3: Do you agree with our proposal to amend the section 12 duty so that it:

a) **specifies the aims and outcomes which EHRC is required to monitor progress against; and**
b) **requires a report every 5 rather than 3 years, to tie into the parliamentary cycle and enable reports to capture meaningful change over time.**

We note that the intention is to repeal section 3 of the 2006 Act on the basis that this general duty is not considered sufficiently precisely to clarify the role of the EHRC as an "equality regulator" and "National Human Rights Institute". We consider this to be a matter of Government policy subject always to the requirement to ensure compliance with relevant EU

Directives although the absence of a general duty may make it less easy to understand the underlying purpose of the EHRC.

We have commented on the intention to remodel the specific statutory equality duties at section 8 of the Act and expressed our concern were both general and specific duties to be replaced by a list of operational functions. We have also suggested that robust KPIs could better deliver the aims of the legislation (and the applicable EU obligations). In that context, and having regard to the structural issues that are to be addressed (and as to which see our response to question 14), we think that prioritising the aims and outcomes that the EHRC is required to monitor could be an effective method of achieving the stated aim of building a fairer society. Our concern as practising equality lawyers is that any such change should not undermine the statutory duties of the EHRC especially its underlying purpose in terms of its fulfilment of the UK's underlying legal obligations under the Equality Directives.

We do not have any comment on the proposal to move the reporting period to a 5-year cycle.

Question 6: Do you think the government should repeal the Commission's power to make provision for conciliation services as part of the process of focusing the commission on its core functions?

The consultation paper expresses a desire to focus the EHCR's functions on strategic cases which are likely to have widespread impact; and not those functions which have a routine focus such as securing redress for the individual where conciliation may be more usual.

ELA agrees that in fulfilling its statutory duties the EHCR needs to have an overarching and strategic role, intervening where necessary in individuals' cases and initiating judicial review proceedings.

ELA notes that providing a conciliation service does not fall within the specific legal duties of the EHRC. ELA wishes however to make the following observations:- :

1. The EHCR's Equalities Mediation Service is unique and is not replicated elsewhere. Providers such as the National Mediation Helpline are not free services, unlike the EHCR's Equalities Mediation Service. The Court Service's Small Claims Mediation Service is free, but only available where the claim has already been issued. ACAS offers a free service for workplace disputes, but there is no equivalent provider for non employment disputes.

2. Other smaller providers do not have the skills, funding and resources to provide conciliation services on as a consistent basis as EHRC can do with the breadth of skill and experiences in equality and diversity issues and legislation. Without any comparable free service ELA is concerned that many individuals will be prevented from participating

in conciliation that incurs a fee. If the EHRC no longer provides this service, other providers may not have the resources to cope with a possible increase in their caseloads; ELA suggests that if this service is withdrawn that alternative funding be available to another provider to carry out conciliation in non workplace disputes.

Question 7: Do you agree with the proposals set out to provide a new system of information, advice and support? If not, what changes to the system would you recommend?

At 2.11, the consultation paper states "we are clear that there remains a need for high quality and timely information, advice and support on equality and human rights issues". The two priorities for the new system are expressed to be that it is "citizen focused" and "cost-effective". It appears to ELA that there are three distinct proposals upon which it is appropriate to provide an opinion. These are summarised as follows, and ELA's views are provided using the same numbering below:

(i) to replace the Commission's helpline (system of information and advice) by outsourcing this to private/alternative providers;
(ii) to discontinue entirely the Commission's grants programme (system of support);

(iii) to limit funding of legal cases to only those which would qualify for public funding under the existing civil legal aid scheme (system of support); except in cases of strategic importance

(i) In ELA's view, there is no fundamental legal reason why the services provided by the EHRC helpline could not be delivered through an alternative service provider. However, this in and of itself will not necessarily result in a cost-saving, if the cost of outsourcing the service is borne by the EHRC; unless there are alternative commercial incentives for a private provider (which would then necessitate appropriate safeguards to ensure the quality of the service to all users, free at the point of delivery). It will also of course be necessary to ensure that the EHRC's role as regulator is not affected by outsourcing the service (a function which will continue to require resourcing). Any outsourcing of the helpline, will require safeguards to be put in place concerning who the provider is, how the procurement process will be handled and provisions as to contract management from the EHRC going forward.

(ii) Similarly, as regards the further proposal to transfer the responsibility for handling complaints by disabled passengers regarding accessibility issues for users of airlines to the AUC, it is ELA's view that there is no reason in principle why the AUC could not take over this function, provided of course that the resources are in place to do so; ie. sufficient understanding of equality law and procedures, and capacity of skilled advisers. ELA notes that this at 2.11, the consultation paper emphasises that it is "important that citizens are able to get advice relevant to all their issues quickly and efficiently". Limiting grants to such organisations may jeopardise the ability of citizens to get advice relevant to their issues at all, than enable them to access it either quickly or efficiently.

(iii) In the experience of ELA members, civil legal aid is only very rarely available for individuals faced with discrimination. This proposal effectively bars all but those in receipt of means-tested benefits from receiving funding support. The value of the right not to be discriminated against is all but nullified if in practice the process of enforcement is not possible to pursue, whether for costs or other practical reasons. The risk is that either those with genuinely meritorious claims will be deterred from pursuing their rights with the benefit of legal advice, since it may not be cost-effective to do so; or that more will choose to do so as litigants-in-person which is likely to prove more costly both to the public purse, in terms of tribunal time dealing with litigants-in-person; and to employers on the receiving end of claims where individuals do not have the benefit of skilled legal advice. This is a particular concern in the equality field, since discrimination claims are generally more complex than other areas of law.

These concerns are only compounded in view of the proposal discussed as item (ii) above, which may limit services which presently exist aimed at supporting citizens who have experienced discrimination.

Question 10: Is there anything that distinguishes discrimination cases from other cases eligible for civil legal aid that would justify further public funding for support? If yes, what form do you believe that support should take?

ELA believes that discrimination cases can be distinguished from some other cases eligible for civil legal aid such as debt on the grounds of complexity. Discrimination claims often

require the Claimant to not only review domestic legislation and case law but also European and Human Rights legislation and case law.

The complexity of the issues which need to be decided and the evidential burden often confuse Claimants and may lead them to pursue weak claims, for example Claimants often confuse the concept of victimisation; they do not understand that this claim hinges on them undertaking a 'protected act' such as raising a grievance. Therefore public funding is essential in eradicating the misconception and combating weak cases being submitted at the Employment Tribunal, saving both public costs and costs to employers who need to defend these claims.

Equally the complexity issue may act as a barrier for Claimants bringing discrimination claims.

ELA believes that the form the public support should take is through a combination of telephone and face-to-face advice. ELA is of the opinion that the initial contact should be via telephone; this enables the advisor to assess initial prospects of success. Only if there are reasonable prospects of success should a further face-to-face consultation be arranged.

ELA's response on the 'Proposals for the Reform of Legal Aid in England and Wales' explores the criteria which should be used for face-to-face consultations and the difficulties that they potentially pose as advisors and clients are not always located in the same geographical area.

Question 14: Do you agree with our approach of legislative and non-legislative reform?

1. In order to answer this broad question it is important to reflect on the stated reasons for reform and whether the measures proposed adequately address those reasons. The Government assessment of the EHRC's performance to date is "weak" – (paragraph 3 of the Executive Summary). The Government has reached this conclusion, it says, because:

   (a) the EHRC has struggled to deliver against its policy remit, for instance attracting criticism from the Joint Committee on Human Rights on its failure to integrate human rights into its work;

   (b) the EHRC has not been able to demonstrate that it is delivering value for taxpayers' money, resulting in the qualification of its first two sets of accounts; and

(c) of the sheer breadth of the EHRC's remit combined with errors made in the process of setting up and the transition agreements put in place by the previous Government.

The JCHR's conclusion in a nutshell was that the strategy was poorly conceived and badly drafted. ELA sees this as ultimately a quality issue rather than a problem arising out of the EHRC's remit or governance structure.

2. The EHRC had in fact already commissioned Deloitte to review the functioning of its board in 2008 Deloitte identified the following "organisational challenges" for the Board to address:

   (a) the Board does not operate against clear, consistently understood roles and common purposes;

   (b) the size of the Board makes it cumbersome and the composition of the Board is not ideal;

   (c) there a number of cultural and behavioural barriers weakening the Board's ability to perform;

   (d) the Board does not plan and prepare for Board meetings effectively;

   (e) there is a lack of clarity as to how relationships should work between the Board/Senior Management Team/staff.

3. Deloitte made a number of recommendations, some of which have since been implemented. The JCHR found that "….. *a close reading of the Deloitte report provides some support for the view that problems with the functioning of the Board stemmed from leadership style*." Even if one accepts this conclusion, "*leadership style*" is not something which, in ELA's view, can be directly addressed by legislative or non-legislative reforms. This is best addressed by appraisals and training and sanctions where necessary – ultimately including termination of appointment or rejection of an application for reappointment.

Qualification of accounts

4. Once again, this problem appears to stem from individual failures rather than because of the breadth of the EHRC's remit or its governance structure. The rules were in place, they were simply not followed.

5. The third issue involved the procurement function of the EHRC. In particular, a sample review revealed that the EHRC entered into seven Single Tender Procurement Actions over £50,000 without seeking the appropriate authority from the Government Equalities Office (GEO). The review also identified some serious failings in procurement activity such as inadequate forward planning and a lack of focus on compliance with procedures.

6. The Comptroller and Auditor General comments in the accounts that:

   "The Commission does have procurement procedures in place, but there is no comprehensive Procurement Manual, in some cases incorrect information has been made available to staff on procurement processes and there has been an inadequate level of training for staff involved in procurement activity. The Commission does also have central procurement and corporate law teams, but to date their role has been mostly advisory and there has been no requirement for procurement actions to be passed through them. As a result, these central teams have often been unsighted on procurement activity or have been consulted at far too late a stage in the process."

7. It seems to ELA that the EHRC's problems stem not from its remit or its governance but from failure to follow the systems which exist.

Conclusion

8. In response to the broad question of whether ELA agrees with the approach of legislative and non-legislative reform, ELA has concluded that whilst many of the proposals are not controversial, they do not really address the underlying problems at the EHRC. Some of those problems are historic, connected with the problems of integrating the three legacy Commissions or for example, with perceived conflicting interests which have now been resolved.

9. Other problems are more deep seated, such as the qualification to the 2008/2009 accounts. .

10. Ultimately, it seems to ELA, that the EHRC has in place a governance structure which matches that of any other NDPB and there are no compelling reasons for introducing a different structure for the EHRC. The non-legislative reforms seem mostly to be aimed at underlining governance rules which are already in place and well known.

11. There is one proposal which is of concern to ELA and that is the reduction in the size of the board and an emphasis on corporate and finance skills. A reduction in the size of the board was recommended by Deloitte but ultimately rejected on the basis, as ELA understands it, of retaining a balance of influence and experience in respect of the different equality strands and human rights. The proposal to reduce the size of the board potentially changes its focus from being a board that works towards achieving the EHRC's equality and human rights objectives to one that focuses more on financial governance. The result may be fewer occasions on which the accounts are qualified but at the risk of compromising the achievement of strategic objectives. ELA would suggest therefore that any such change in the board is temporary, to get the EHRC's systems firmly established.

Members of ELA sub-committee

Susan Belgrave, 9 Gough Square – Co-Chair

Bronwyn McKenna, UNISON – Co- Chair

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