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Commission on Race and Ethnic Disparities
Ethnic Disparities and Inequality in the UK: call for evidence

Response from the Employment Lawyers Association

30 November 2020

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INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We 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 and regulation or calls for evidence. Given our membership composition, we have primarily focused on issues, statistics and examples of possible solutions that relate to law firms and the legal sector more generally, as this is the sector that we are best qualified to comment upon. However, we do also cite a few examples of and provide information about a small number of other sectors and there will obviously be numerous examples and data relating to other sectors that we have not commented upon in this paper.

2. A Working Party, co-chaired by Arpita Dutt and Shubha Banerjee was set up by the Legislative and Policy Committee of ELA to respond to the Commission on Race and Ethnic Disparities' call for evidence. Members of the Working Party are listed at the end of this paper.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

EXECUTIVE SUMMARY

4. This consultation response responds to questions 1,2,5 and 10 only, focussing on the areas of employment in general and then specifically the access to legal education, training and advancement. It details some of the latest research evidencing the cause of racial and ethnic disparities, measures that could be taken to improve representation in public sector workforces; how young people aged 16-24 years can access legal education, training and employment; we suggest measures to improve the representation in the workforce detailing examples of good practice; and comment on the positive role and challenges presented by artificial intelligence and machine learning.

QUESTION 1

What do you consider to be the main causes of racial and ethnic disparities in the UK, and why?

CHALLENGES/ISSUES FACED IN THE WORKPLACE BY BLACK AND MINORITY ETHNIC ('BAME') GROUPS

5. ELA considers that there are considerable challenges and issues which pervade the workplace for BAME groups. These challenges and issues are considered to be the main causal factors of ethnic and racial disparities which exist in the employment context in the UK.

6. The Commission is referred to ELA's response to the *'Review into increasing progression in the labour market for BAME workers: call for evidence'* dated 22 August 2016. This sets out substantive evidence about the barriers faced by BAME groups within the labour market. They are numerous and are summarised at page 3 of the 2016 response, and also listed below for ease of reference:
   - 6.1. the culture of an organisation;
   - 6.2. lack of executive team engagement and senior race equality champions;
   - 6.3. shortcomings in executive search, selection and shortlisting processes;
   - 6.4. lack of career development courses and support, role models and mentoring;
   - 6.5. lack of race monitoring data;
   - 6.6. lack of accessible and effective race equality policies or impactful diversity and inclusion policy and toolkits;
   - 6.7. lack of effective training;
   - 6.8. lack of understanding of and use of the positive action provisions in the Equality Act 2010 ('EqA'); and

6.9. lack of access to employment tribunals/difficulties in pursuing claims in the employment tribunal to seek redress, and lack of accountability/limited enforcement powers against persistent race discrimination.

6.10. limitations in the laws that are supposed to guard against discrimination.

This response does not intend to repeat the information set out in ELA's 2016 response, the contents of which are relevant and should be considered alongside this response. The focus of our response to this question will be on the under-representation of BAME groups in the workforce and racism experienced by BAME groups at work. In response to a later question, we will also discuss the ethnicity pay gap.

UNDER-REPRESENTATION OF BAME GROUPS IN THE WORKPLACE

7. It was noted in the McGregor-Smith review that *'Every person, regardless of their ethnicity or background, should be able to fulfil their potential at work. That is the business case as well as the moral case. Diverse organisations that attract and develop individuals from the widest pool of talent consistently perform better'*. Despite this, there are still significant concerns about the ethnic and racial diversity in organisations, and in the progression of certain BAME groups in the legal sector, and other professional sectors.

8. It was recently revealed that just 6 out of 800 'magic circle' law firm partners are Black.[1] The under-representation of BAME groups in senior positions is not confined to the legal sector. 'The Colour of Power' report, prepared by Operation Black Vote in conjunction with Green Park and The Guardian, highlighted that of 1,024 of the most senior positions in 28 areas of national importance including politics, the public sector, banking, publishing, media, law and accountancy, only 3% were from a UK BAME background, and less than 1% were BAME women.[2] Findings from the BITC's Race at the Top report highlight that the proportion of Black people in senior roles in the public sector was static at 1%, an increase of just 0.1% since 2014.3

9. In the workplace in general the employment rate for BAME groups is lower than for White Workers. As noted in the McGregor-Smith Review in 2017, it stood at 62.8% in comparison to the employment rate for White Workers at 75.6%.

[1] Allen & Overy – 1/192. Slaughter and May 0/92. Linklaters 1/92. Clifford Chance 2/162. Freshfields 2/118.
[2] https://www.theguardian.com/inequality/2017/sep/24/revealed-britains-most-powerful-elite-is-97-white

[3] https://www.bitc.org.uk/news/black-livelihoods-matter-less-than-2-in-top-management-roles-are-black/

10. Reference to 'BAME groups' does not, however, present a complete picture of ethnic disparities and can be misleading. Certain groups within that definition are under-represented to a greater degree than others. Furthermore, the impact of factors such as youth unemployment, economic inactivity, and labour force exit and entry are not reflected in more generalised findings. By way of example: -
    10.1. The unemployment rate of young Black people (30.3%) is more than double that of young White people (13.3%);
    10.2. The levels of economic inactivity remain highest amongst Pakistani/Bangladeshi groups;
    10.3. There are high rates of unemployment amongst Pakistani/ Bangladeshi women, despite falling in recent years from over 24.0% in 2012 to 15.0% in 2015. It is still significantly higher than the White female unemployment rate of 4.6%;
    10.4. Research has found that labour force exit and entry probabilities do not differ between Indian, Caribbean and White women. However, Pakistani and Bangladeshi women are less likely to enter and more likely to exit the labour market. In contrast, Black African women have comparatively high re-entry rates.[4]

Retention

11. Several city law firms have openly noted that the internal progression of BAME employees is an issue that needs to be urgently addressed. Research by YouGov has shown that BAME lawyers spent on average 20% less time at firms than their white colleagues before leaving.[5] Law firm Allen and Overy recently revealed that Black lawyers left its London office almost two-and-a-half years before their white peers.[6]

12. A recent best practice report by NOTICED, a law firm diversity network with a multiculturalism focus, highlights that there is a limited amount of data available relating to the reasons why employees from BAME backgrounds were leaving member firms.[7] In terms of taking steps to address the retention level of BAME staff, it was widely recognised by member firms that whilst recruitment of diverse candidates is crucial, it is a separate challenge entirely to retain the

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/594336/race-in-workplace-mcgregor-smith-review.pdf (page 45)
[5] https://www.personneltoday.com/hr/top-law-firms-commit-to-robust-ethnic-equality-measures/

[6] https://uk.reuters.com/article/us-britain-a-o/top-london-law-firm-reveals-retention-gap-for-black-minority-ethnic-lawyers-idUSKCN24U26N

[7] https://sites-herbertsmithfreehills.vuturevx.com/20/19043/landing-pages/noticed.pdf

wide pool of diverse candidates. A different set of objectives is required for the different goals.

Cultural factors and racism in the workplace

13. Recruitment and retention issues which affect BAME groups within the workforce cannot be scrutinised without assessing cultural factors and racism within the workplace.

14. Research by *Rare Recruitment* into recruitment earlier this year suggested that many BAME lawyers did not find their firms' cultures to be inclusive.[8] Many factors play a part here, including a shortage of BAME role models and lack of ethnically diverse workforces. Whilst acknowledging the importance of these factors in improving inclusivity at work, the focus here will be on racism experienced by BAME employees in the workplace.

15. Racism is often understood as hostile and obvious behaviours and attitudes. Examples of this include name calling, using racial slurs, racist jokes, or physical intimidation. However, the racism often experienced by BAME groups in the workplace is less overt and outright, and instead more covert and subtle. One example of this type of covert racism is called a micro-aggression. A micro-aggression is a statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination against members of a marginalised group such as a racial or ethnic minority. Micro-aggressions generally give the impression that an individual does not 'belong'. A recent publicised example of this is the account of Alexandra Wilson, a Black barrister, who was accused of being a Defendant three times in one day whilst at court.[9]

16. In addition, research by *Pearn Kandola* found that three in five (59% of) BAME employees feel that colleagues have made assumptions about their ability, character, or behaviour, based on their ethnicity[10].

17. Research by *YouGov* in collaboration with the 'Race at Work Black Voice' highlighted that 28% of Black employees said that they had witnessed or

[8] https://www.personneltoday.com/hr/top-law-firms-commit-to-robust-ethnic-equality-measures/

[9] https://www.theguardian.com/law/2020/sep/24/investigation-launched-after-black-barrister-mistaken-for-defendant-three-times-in-a-day

[10] https://pearnkandola.com/diversity-and-inclusion-hub/bias/imposter-syndrome/

experienced racial harassment from managers compared to only 13% of white employees.[11]

18. The impact of racism experienced by BAME groups in the workforce is noted in terms of the environment it creates for BAME employees at work, their mental health and livelihoods, motivation and aspiration at work as well as their concerns about progression in the workplace. The 'Race at Work Black Voice' report states that 33% of Black employees feel that their ethnicity will be a barrier to their next career move; in stark contrast, only 1% of white employees feel the same.[12]

ONS statistics in relation to pay gap 2020

19. Statistics from the ONS in October 2020 revealed that the pay gap between white and BAME employees in England and Wales has narrowed to its smallest level since consistent records began in 2012 to 2.3%.[13]

20. The statistics reveal that the median hourly earnings in 2019 for white workers were £12.40 an hour, which is just over 2% higher than the £12.11 an hour for BAME workers.

21. However, double-digit pay gaps for particular groups of ethnic minority employees should be noted:
    21.1. 16% for people of Pakistani descent
    21.2. 15% for white and black African and Bangladeshi
    21.3. 13% for white and black Caribbean.

Breaking down the data by gender as well, BAME men earned 6.1% less than white men whilst BAME women earned 2.1% more than white women.

22. There are also differences in the ethnicity pay gap across regions - it is largest in London at 23.8%, and smallest in Wales at 1.4%. The fact that BAME groups are paid almost a quarter less than their white counterparts in London is extremely concerning.

[11] https://www.bitc.org.uk/report/race-at-work-black-voices-report/

[12] https://www.bitc.org.uk/report/race-at-work-black-voices-report/

[13] https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/ethnicitypaygapsingreatbritain/2019

23. Particular concerns have been highlighted in relation to the pay gap for Pakistani workers who are paid less than their counterparts despite holding higher level degree qualifications and higher levels of academic attainment.[14]

24. Despite the narrowing of the ethnicity pay gap, ELA wishes to make clear that the statistics cannot be considered in isolation from other key barriers faced by BAME groups in the workplace. The reality is that BAME workers continue to be over-represented in lower paid jobs and precarious forms of employment (see below). Work must also be done to ensure that the pay gap continues to decrease and to tackle the disparities existing amongst the groups where the pay gaps continue to be significant.

OVER-REPRESENTATION OF BAME GROUPS IN PRECARIOUS FORMS OF EMPLOYMENT

25. Precarious workers include those who are shift workers, those who have a second job and those working under temporary or zero-hours contracts. Being in precarious employment causes income unpredictability as well as job insecurity, with such workers often being the first to be 'let go' in the event of an organisation downsizing and fewer opportunities for promotion and progression. In its 2016 report, 'Insecure Work and Ethnicity', the TUC examined the extent to which BAME groups are consistently disadvantaged in the labour market and identified the significant pay penalty that insecure workers suffer. To summarise:-
    25.1. Median hourly pay for those on a zero-hours contract in 2016 was worth only 66% of the median for all employees.[15]
    25.2. 1 in 8 Black employees are in insecure work (agency, seasonal, casual) - this is double the average rate for all groups of 1 in 17, and 1 in 20 for the White community.[16]
    25.3. The White population are least likely to be working in temporary jobs compared to other ethnic groups - 2.9 percent in 2011. This percentage remains constant in 2016. In 2016 it was the Indian community that was least likely to be in this form of work.[17]
    25.4. Involuntary temporary work, that is, those working on a temporary basis as they cannot find permanent work (rather than out of a preference for this type of work), is on average around 31 percent. For the Black community however it is significantly higher, at 42 percent, reflecting the

[14] https://www.theguardian.com/money/2020/oct/12/pay-gap-ethnic-minority-white-workers-ons

[15] Insecure Work and Ethnicity'. TUC. 2016, page 3
[16] Insecure Work and Ethnicity'. TUC. 2016, page 8
[17] Ibid, page 9

fact that Black workers have significantly fewer choices in the labour market.[18]

25.5. The proportion of the Black community on zero hours contracts is almost 5 percent - almost 1 in 20, whereas the national average is around 1 in 36. The White community is in line with the national average, and the Indian community are the least likely to be on zero hours contracts.[19]

26. Similarly, more recent research by the Carnegie Trust in its report 'Race - Inequality in the Workplace', concluded that taken together, those from all BAME groups were more likely than their White peers to be in each form of precarious work.[20] However, it noted variations in different BAME groups' experiences in precarious employment at age 25. To summarise:-

26.1. Pakistani and Black African young adults under 25 are more likely to be shift workers compared to White young adults;

26.2. Black Caribbean young adults are more likely to have a second job than White young adults;

26.3. Those identifying as Pakistani, Black African and 'Other ethnicities' are less likely to have a permanent contract than those who identify as White;

26.4. Those who identify as Mixed Heritage, Pakistani or 'Other ethnicities' are more likely to have a zero-hours contract than those who identify as White.

DIFFICULTIES IN BRINGING DISCRIMINATION CLAIMS AND ENFORCING RIGHTS

Lack of awareness of rights and difficulties/reluctance to raise concerns

27. It is undisputed that discrimination experienced by ethnic minorities remains prevalent. Of the discrimination cases reported by 650 people in the English and Welsh Civil and Social Justice Panel's 2015 survey, over a quarter (27%) were highlighted as being racially motivated.[21]

28. The TUC, in its report 'Let's talk about Racism' (2017), presented findings from a self-reporting survey of more than 5000 working people, the aim of which was to uncover the scale of race discrimination at workplaces.[22]

29. The Executive Summary found that BAME workers were less likely to formally

[18] ibid, page 12
[19] Ibid, page 13
[20] https://www.obv.org.uk/sites/default/files/images/Race-Inequality-in-the-Workforce-Final.pdf (page 19)
[21] Page 14- online survey of individuals' handling of legal issues in England and Wales 2015
[22] https://www.tuc.org.uk/sites/default/files/LetstalkaboutRacism.pdf

raise issues about racism at work with their employers. Most respondents preferred to speak to family members, friends or work colleagues. A very small number, just over a quarter of respondents who had experienced a racist incident at work, reported it to their employers.

30. Amongst its recommendations to tackle racial harassment and discrimination at work, the TUC recommended that the Government ensure that the Equality and Human Rights Commission (EHRC) had sufficient funding both to be able to promote workplace anti-racist policies and practice, and to be able to pursue more legal cases to ensure that the law reflects the nature of contemporary racism. We comment further on the EHRC later in this paper, but in broad terms we agree with the TUC recommendation.

31. Research has shown that individuals who experience discrimination are often unaware of their rights and the mechanisms for enforcing the same. The English and Welsh Civil and Social Justice Panel's survey results showed that 66% of people who faced a discrimination problem did not know how to seek legal redress.[23] Research undertaken by the Law Society and Legal Services Board considered the actions individuals took regarding legal issues experienced. It was reported that 36% respondents who had experienced discrimination took no action, compared with an average of 14% across 29 different issues types.[24] We consider that the TUC recommendation set out above would, if implemented, assist with improving people's awareness of their rights which would lead to increased attempts to enforce those rights.

Lack of access to funding in discrimination claims

32. A recent inquiry conducted by the EHRC focusing on the access to legal aid for discrimination cases found that *"recent years have seen access to justice restricted to such an extent that many people experiencing discrimination are not getting the help they need to seek redress*."[25]

33. As a result, primary consideration should be given to the impact of legal aid funding cuts on individuals seeking to enforce their rights in discrimination claims in the employment tribunal. As part of the legal aid reforms in 2013, through the introduction of Legal Aid, Sentencing and Punishment of Offenders

[23] https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf

[24] https://www.lawsociety.org.uk/en/topics/research/largest-ever-legal-needs-survey-in-england-and-wales

[25] https://www.equalityhumanrights.com/sites/default/files/access-to-legal-aid-for-discrimination-cases-our-legal-aid-inquiry.pdf

Act 2012 (LASPO), employment tribunal claims were removed from the scope of legal aid funding. In its place, a mandatory telephone 'Gateway Service' for legal aid was introduced whereby individuals seeking legal aid for discrimination issues must do so through the Gateway Service. If they are assessed as unsuitable for telephone advice, they should then be referred for face-to-face advice.

34. The inquiry commissioned by the EHRC into the effectiveness of relying upon legal aid and mentioned above concluded that very few people were receiving the representation they needed in courts and tribunals. Between 2013/14 and 2017/18, not a single workplace discrimination case received legal aid funding for representation in the employment tribunal and only 1 in 200 cases taken on by discrimination specialists received funding for representation in court.[26]

35. Breaking down the statistics even further, 33,150 calls regarding discrimination were made to the Gateway Service between 2013 and 2018. However, only 7,768 cases were taken on by specialist providers. Of the 7,768, 6,064 received telephone advice only, 1,646 received casework assistance, and 43 received funding to cover representation in court. None of the 10 applications to the Government's 'exceptional case funding' safety net scheme (which enables funding to be provided for representation where it is necessary to avoid a breach of a person's human rights or EU rights) was granted. Further, applications for funding for discrimination cases are less likely to be granted than in other types of claims. 45% of applications were successful in discrimination cases, a significantly lower success rate than public law (64%), education (67%), actions against the police etc. (70%), debt (72%), community care (79%) and housing (91%).[27]

36. These findings demonstrate that there is a real lack of access to legal aid funding for victims of discrimination, which cannot be disregarded when addressing the impact of systemic racial disparities in the UK. As it stands, the vast majority of individuals with discrimination complaints are either required to pay privately for legal advice about the merits of their potential claim, and then for representation, or they have to self-represent in claims in the tribunal (and in many cases receive little or no legal advice about complex areas of law prior to their claim being heard in the tribunal).

37. Discrimination claims are extremely complex and often involve ancillary issues which need to be understood before establishing whether discrimination has occurred. There is an uneven playing field and an 'inequality of arms' where

[26] ibid

[27] Ibid 28

individual victims of discrimination who are self-representing are facing Respondents armed with substantial amounts of professional legal advice and professional legal representation.

38. In 2019, the Government released a post-implementation review of LASPO 2012 and has agreed to re-introduce face to face advice in respect of several types of claims including discrimination cases. This re-introduction is very much welcomed, with academic research supporting the significance and value of face to face advice for groups of people, including Black and ethnic minority groups which are more likely to contain a higher proportion of individuals who encounter a language barrier when receiving advice.[28]

Likelihood of success of discrimination claims and range of awards made in successful claims

39. Annual statistics published by the Ministry of Justice for the period 2016/2017 to 2019/2020 demonstrate that the prospects of success in both race discrimination claims as well as claims of discrimination because of religion and belief are relatively low. The figures below collated from the Ministry of Justice set out the number of claims submitted to employment tribunals from April to March of the following year, together with the number of cases awarded compensation. [29]

Race discrimination	Number of cases submitted	Number of cases awarded compensation
2016/2017	2240	22
2017/2018	2991	22
2018/2019	3589	24
2019/2020	3967	28

Religion and belief discrimination	Number of cases submitted	Number of cases awarded compensation
2016/2017	384	7
2017/2018	670	3
2018/2019	753	3
2019/2020	797	0

[28] Page 24 - https://www.equalityhumanrights.com/sites/default/files/access-to-legal-aid-for-discrimination-cases-our-legal-aid-inquiry.pdf

[29] https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2020

40. By contrast, 6260 claims of sex discrimination were submitted in 2019/2020, 46 of which were awarded compensation and 8178 claims of disability discrimination were submitted in the same period, 71 of which were awarded compensation.

41. The median award for successful claims of race discrimination is relatively low. In 2019/2020, it was £8040; in 2018/2019 it was £7882; in 2017/18 it was £11,229. Median awards for successful claims of discrimination because of religion or belief are lower: in 2018/2019 £1,500, in 2017/18 £5,696, and in 2016/17 £12,045. As a result, even if an individual does have sufficient funds to pursue a claim to the employment tribunal, it may well not be cost-effective for them to pursue a claim, taking account of the likely legal costs versus the likely value of any award, and they will need to factor in the relatively low chance that their claim will result in any compensation in any event. These factors combine to be a significant disincentive to an individual considering whether to enforce their rights and challenge the race discrimination that they have encountered.

Difficulties and complexities in the legal framework – the EqA

42. Race is one of nine "protected characteristics" covered by the EqA which protects individuals from race discrimination, harassment and victimisation in employment and vocational training (and in other areas such as education, which are not discussed in this response).

43. Race is defined as **including**:
    43.1. Colour;
    43.2. Nationality; and
    43.3. Ethnic or national origins.

    (*Section 9(1), EqA*)

    While the definition is intended to be widely interpreted, limitations by both Parliament and the courts have resulted in decisions which arguably fall short of the aims of EqA.

44. By way of example, the Supreme Court held in *Taiwo v Olaigbe and another; Onu v Akwiwu and another [2016] UKSC 31*, that discrimination on the basis of 'immigration status', does not constitute race discrimination on the basis of 'nationality' and so does not fall within the scope of s9 of the EqA. In that case, two Nigerian employees were subjected to extremely poor treatment by their employers, having passports removed, being starved and being subjected to physical and mental abuse. However, the Supreme Court held that the reason for their abuse was not nationality, but was their vulnerability as domestic

migrant workers, and therefore they had not been the victims of race discrimination under s9 EqA.

45. Although 'nationality' is not defined in the EqA, the EHRC Code states that nationality is "the specific legal relationship between a person and a state through birth or naturalisation" (*paragraph 2.38*).

46. The Supreme Court in the case of *Taiwo* noted that Parliament could have chosen to include immigration status in the list of protected characteristics in the EqA but had not done so.

47. In its research paper 'England's most disadvantaged groups: Migrants, refugees and asylum seekers', the EHRC found that of the 2.64 million migrant workers (legally allowed to work) in the UK in 2014, many were vulnerable to exploitation and not able to enjoy the same economic rights as non-migrant workers.[30]Despite this extreme vulnerability, such individuals would not appear to be protected by the EqA.

The role of the EHRC in enforcement of rights

48. When considering enforcement of rights, it is also relevant to consider whether the statutory bodies that have been tasked with enforcing rights and addressing racial inequalities are carrying out their mandate effectively.

49. The EHRC has statutory responsibility for protecting human rights and reducing inequalities, including racial inequality. In 2007, it replaced the Commission for Racial Equality (CRE) in respect of issues of race inequality.

50. In a recently published report by the Joint Committee on Human Rights, 'Black people, racism and human rights', Eleventh Report of Session 2019-21, the Joint Committee examined the effectiveness of the EHRC in light of significant budgetary cuts and questioned its ability to act as a champion for the Black community.

51. It should be noted that in 2006 the CRE had a budget of £90 million just for race issues; while the EHRC currently has a budget of £17.1 million for all the work it is required to do across all the protected characteristics.[31] From a financial point of view alone, ELA is concerned that the EHRC appears to be a weaker force in tackling race equality issues than the CRE.

[30] .www.equalityhumanrights.com/IsEnglandFairer, March 2016
[31] https://committees.parliament.uk/publications/3376/documents/32359/default/ (para 97)

52. Positive contributions of the EHRC are noted and welcomed, including the publication of the 2018 'Is Britain Fairer?' report; use of its enquiry powers to inquire into racial harassment in publicly funded universities, and its use of litigation and enforcement powers. However, as paragraph 94 of the 'Is Britain Fairer?' report sets out, of the legal cases the Commission has closed over the last three years, only one in five cases either wholly or partly addressed issues of race.

53. ELA would also echo the point made at paragraph 98 of the 'Is Britain Fairer?' report, that it is noteworthy that, at the time of writing the report, no commissioners on the EHRC board are Black. ELA would welcome diversity of representation amongst Commissioners, particularly given the EHRC's remit to tackle race equality issues. The EHRC would also be in a stronger position when advocating for racial diversity in other organisations if such diversity was exhibited in its own organisation.

QUESTION 2

What could be done to improve representation, retention and progression opportunities for people of different ethnic backgrounds in public sector workforces (for example, in education, healthcare or policing)?

54. Although all organisations in all sectors will want to improve the diversity of their workforces, public sector organisations are required to take active steps to tackle inequality, under the Public Sector Equality Duty (PSED). The recommendations below would be good practice for any employer but could be enforced as obligations on the public sector.

Current policies and practices

55. In order to answer the question as to what more could be done to improve representation, retention and progression, it is first necessary to review the current practices in place.

56. ELA recognises that most lawyers working in the public sector are subject to the wider policies and procedures of the organisation which employs them. Our experience is that public sector organisations have policies in place to improve the recruitment of BAME staff. For example, all staff involved in recruitment are required to undergo unconscious bias training, interview panels are required to be ethnically diverse and all recruitment applications are anonymised so that BAME candidates are not sifted out.

57. A number of public sector employers are known to use exit questionnaires or exit interviews and should be encouraged to analyse this data and monitor any trends in respect of retention and exit reasons for individuals of different BAME backgrounds.

Data collection and analysis

58. ELA considers that organisations could do more in relation to data collection and analysis, which could be used to improve the recruitment and retention of BAME staff. The regularity of the collection of diversity information and how this information is used may also differ between organisations. A standardised approach as to when data must be collected and what must be collected would assist in comparing how different public sector organisations are faring.

59. Some organisations collect data at recruitment, termination and from all staff annually when they submit their choices for employee benefits and complete compliance training. As a result, they possess data to track how BAME staff are represented throughout the organisation's graded pay scales, whether they are progressing to senior levels and how well they are performing in comparison to their peers. ELA recommends that Statutory Guidance is provided to all public sector organisations across the UK about the regularity and types of diversity information to be collected and disaggregated to reflect ethnicities. This is likely to produce more reliable data and help to address any concerns from the organisation that the data collected for this purpose is DPA 2018 compliant. The consistency of approach will assist national monitoring by the EHRC, local authority associations and trade unions.

60. ELA recommends that organisations analyse ethnicity data from applicants (both successful and unsuccessful) in order to determine whether or not the application process disproportionately rejects BAME applicants and, if so, at which stage of the recruitment process. If it can be determined that BAME candidates struggle to make it through a certain part of the recruitment process, organisations can then target their efforts to alleviate any discriminatory practices or bias.

61. Further analysis could also compare the ethnicity of the local and general population so that it can be determined whether or not the organisation is attracting a proportionate number of BAME applicants. If not, steps could be taken pursuant to Section 158 EqA (positive action) to target those communities that are under-represented in order to encourage more applications, or deploy Section 159 EqA (positive action in recruitment) to appoint qualified candidates. See also Q10 – the use of the Rooney Rule.

Improving retention and progression

62. Staff may leave due to lack of career progression opportunities and if these are improved, retention can also be improved. In order to specifically assist those from BAME backgrounds, a mentoring and/or shadowing scheme for BAME staff would provide them with support. Promoting and implementing formal mentoring schemes may assist progression opportunities by matching colleagues seeking to progress with those with considerable experience, not only being able to share that experience but providing a valuable networking contact. Mentoring was specifically referenced within the Parker review as one of the best practice initiatives, specifically for improving ethnic diversity for senior management.

63. Public sector and private sector organisations should advertise senior vacancies to both external and internal candidates as a matter of good practice. The decision in the case of *Ryan v South West Ambulance Services NHS Trust* UKEAT/0213/19/VP relates to the protected characteristic of age but is applicable to race and the problem with recruiting from Talent Pools. Mrs Ryan was a Learning and Development Officer aged 66, after a redundancy process, a vacancy arose for two positions but as she was not in the Talent Pool, she was not considered for either of the two positions. She claimed indirect age discrimination. As in many organisations, the purpose of this Talent Pool was to identify and develop future leaders and managers within certain graded bands and, to retain existing leaders and managers at a senior band by establishing an identified pool of high performing and talented employees who would benefit from additional training opportunities. In addition, the Tribunal found that some, albeit not all, "vacancies could be filled with limited need to advertise for and to interview candidates because those in the Talent Pool would already have been identified as worthy of promotion into leadership roles". This enabled the Trust to fill roles in some circumstances more quickly than would otherwise be the case. However, the Trust could not evidentially establish the justification for the Talent Pool. Recruiting internally where there are no or disproportionately low numbers of ethnic minority candidates in the Talent Pool is likely to perpetuate the lack of workforce ethnic diversity, particularly in more senior roles.

The Public Sector Equality Duty ('PSED')

64. Under Section 149 EqA, listed public bodies in England, Wales and Scotland are subject to the general PSED, which requires that:

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

AND

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

65. The duty is a useful tool for improving recruitment, retention and progression opportunities for people of different ethnic backgrounds, however a number of measures could be implemented to maximise its efficiency. Under the current 'Single Equality Duty', the specific duties applicable to public authorities in England are far less onerous than those found in former legislation as the need to produce a race equality scheme was abolished. This was replaced by a requirement on the public authority to set out the steps to be taken to achieve general objectives and implement such steps.

66. The specific duties also differ between England, Scotland and Wales, which can make comparison difficult. The objectives in England require relevant organisations annually to publish information to demonstrate compliance with the general equality duty. This information must include, in particular, information relating to people who share a protected characteristic who are either employed by the organisation or affected by its policies and practices.

67. Public authorities with fewer than 150 employees are exempt from the requirement to publish information on their employees. Extending this requirement to all public sector bodies in a proportionate way dependent upon

size and resources is likely to improve awareness, data capture and race equality across the entire public sector.

68. Each listed authority must prepare and publish, at least every four years, one or more objectives that it thinks it needs to achieve to further any of the aims of the general equality duty. The objectives must be specific and measurable. Both the equality information and the equality objectives must be published in a manner that is accessible to the public.

69. In contrast to England, public authorities in Wales are under an annual mandatory action plan obligation whereby listed bodies must produce an annual report by 31 March each year specifically to set out:
    69.1. the steps that the authority has taken to identify and collect relevant information;
    69.2. how the authority has used this information in meeting the three aims of the general duty;
    69.3. any reasons for not collecting relevant information;
    69.4. a statement on the effectiveness of the authority's arrangements for identifying and collecting relevant information;
    69.5. progress towards fulfilling each of the authority's equality objectives;
    69.6. a statement on the effectiveness of the steps that the authority has taken to fulfil each of its equality objectives;
    69.7. specified employment information, including information on training and pay (unless it has already published this information elsewhere).

70. A listed body in Wales (but not in England) must also publish, in an accessible format:
    70.1. a Strategic Equality Plan (and any revisions);
    70.2. equality objectives including accompanying statements regarding timescales and actions to be taken;
    70.3. its reasons for deciding not to publish an equality objective in respect of one or more protected characteristic;
    70.4. its reasons for deciding not to publish an equality objective to address the causes of gender pay difference if it has identified a difference in pay between men and women;
    70.5. an action plan to address gender pay difference;
    70.6. reports of its assessments of impact on protected groups of proposed policies and practices and any reviews of existing policies and practices, where the impact is substantial.

71. The legislation in both England and Wales has the same objective. However, because ELA takes the view that a mandatory action plan is more likely to achieve the desirable objectives to improve the recruitment, progression and

retention of BAME workers in the public sector workforce than the position in England, that such mandatory plans as set out in paragraphs 69 and 70 could be adopted.

Race Equality Strategy/Action Plan

72. Public sector organisations could also publish a separate Race Equality Strategy or Action Plan as part of their Strategic Equality Plans. The requirement to publish specified employment information including on training and pay would, ELA believes, increase accountability on the progress in these areas for BAME workers.

73. Extending and harmonising these specific duties across the UK would assist with data comparison and the sharing of information on good practice measures.

74. There is no UK wide portal that collates strategic equality objectives or plans, or signposts to all UK public sector organisations. Searching to discern what different public sector organisations are doing well is onerous. Sharing initiatives, outcomes and good practice will help efficiency, communication and be a reputational driver for senior leaders to improve the representation of BAME workers. ELA recommends that a single portal for public sector organisations' Race Equality Strategy/Action Plans and outcomes is created. This could be led and monitored by the EHRC that could publish a bi-annual report focussing on good practice in the public sector.

QUESTION 5

How can the ways young people (in particular those aged 16 to 24 years) find out about and access education, training and employment opportunities be improved?

75. ELA, as a membership organisation representing the views of employment lawyers, is limited as to what it can meaningfully add to this question insofar as it relates to education. We have therefore chosen to focus on the areas where we can most credibly comment which is in respect of training and employment opportunities in the legal profession.

76. Studies have shown that individuals from BAME backgrounds continue to be disproportionately underrepresented in the workforce when compared to individuals who identify as white (as set out in detail in our response to question 1 above). Nationally, the working age population includes 16% of people from a BAME background. However, in 2019, the Government's Race Disparity Unit

reported that out of 11 public sector workforces that collect data on the ethnicity of their workers, only 4 had workforces which reflected (or exceeded) this percentage.

77. When looking at the legal profession in particular, statistics from the Solicitors Regulation Authority (the "SRA") show that the proportion of BAME lawyers working in law firms is 21%. This figure has not changed since 2017. A 2019 anonymised diversity report completed by *Aspiring Solicitors*, a private organisation which seeks to increase diversity in the legal profession, found that the disparities between BAME and white individuals are just as significant when it comes to training opportunities. They reported that out of 577 vacation schemes, only 10.1% of individuals who secured them were Black. Similarly, only 10.1% of 322 training contracts were secured by Black applicants.

78. A closer look at the figures collected by the ONS and published by the Cabinet Office regarding unemployment ethnicity data by age reveals that in every year between 2004 and 2018, white 16 to 24 year olds had a lower unemployment rate than those from all other ethnic groups combined. The evidence shows that more needs to be done to improve the way in which young people from BAME backgrounds find out about and access training and employment. Our views and recommendations in respect of how to remedy this disadvantage are detailed below.

Targeted Communications, Campaigns and Recruitment

79. Employers should be taking pro-active steps to ensure that candidates for training and work experience opportunities are sourced from a wide talent pool, which includes those from BAME backgrounds. The reason for this is the disadvantage demonstrated above. It is imperative that organisations and institutions focus on raising awareness amongst young people across a variety of career trajectories and aspirations. In our view this can be done through company initiatives, such as targeted communications and campaigns, or alternatively, through building relationships with specialist recruitment organisations which seek to increase diversity in the workplace. A general dissemination of information and open applications may encourage a departure from the perception that professional careers are inaccessible and subsequently unattainable. We explore these suggestions in more detail below.

Changing traditional routes – the Solicitors Qualifying Examination (SQE)

80. Readily available information on education and training pathways and changes to routes to qualification on the basis that new and/or evolved routes are implemented to breakdown past barriers faced by young people from BAME backgrounds may improve access to and encourage young people from BAME backgrounds to take an interest in professional careers, educational and/or training programmes in which they are underrepresented. An example of this in respect of the legal profession is the Solicitors Qualifying Exam ('SQE').

81. The Solicitors Regulation Authority will introduce the SQE in Autumn 2021. The SQE will provide a new route to qualifying as a solicitor which will introduce a standardised two stage test for qualifying, and also introduce changes in how training experience is obtained. Under the existing system, an individual usually needs to secure and undertake a two year training contract, but under the new, much more flexible system, they will need to complete two years of work experience which can include pro bono work, and can be undertaken with up to four different legal employers.

82. The two objectives set out for the SQE are:
    82.1. greater assurance of consistent, high standards at the point of admission; and
    82.2. the development of new and diverse pathways to qualification, which are responsive to the changing legal services market and promote a diverse profession by removing artificial and unjustifiable barriers.

83. Given the lower levels of success of BAME applicants when applying for training contracts that we have set out above, it is to be hoped that the more flexible routes to attaining sufficient work experience will improve the career prospects of aspiring lawyers from BAME backgrounds. While it is too early to conclude whether the SQE will have the desired impact, the *Bridge Group*, a non-profit research consultancy that seeks to promote social equality, has acknowledged that the SQE may be a welcome change. *Bridge Group* reported in 2017 that while recognising that the introduction of the SQE cannot address all of the challenges that affect diversity, it could *"help the sector to understand better the causes of, and potential solutions to, the lack of diversity, due to the greater standardisation and transparency the SQE affords*". It added that such outcomes are likely to be realised only if the introduction of the SQE is coupled with a wide range of associated actions.

84. If, once the SQE has been introduced, studies find that it does in fact improve access to training amongst young aspiring lawyers from BAME backgrounds then ELA would encourage other professions which entail a similar path to entry

involving work experience and entry exams prior to qualification, to consider introducing similar changes so as to remove some of the barriers that face BAME applicants and help increase diversity.

Positive action in recruitment

85. Positive action involves using special measures to redress disadvantage in order to achieve equality of opportunity. It is not positive discrimination. Colm O'Cinneide, Professor of Constitutional and Human Rights Law at UCL, has defined positive action as "*the use of special measures to assist members of disadvantaged groups in overcoming the obstacles and discrimination they face in contemporary society*". We talk more about positive action in our response to question 10 below, but it is worth noting at this point that UK equality law includes two positive action provisions in EqA, the first of which allows general positive action under section 158, which permits employers to take action to overcome disadvantages and/or meet specific needs. This effectively permits a wide range of reasonable measures to be taken on a voluntary basis.

86. The EHRC includes in its guidance on positive action in the workplace examples of possible positive actions available to an employer. Possible actions can include:
    86.1. placing job adverts to target particular groups, to increase the number of applicants from that group;
    86.2. including statements in job adverts to encourage applications from under-represented groups, such as 'we welcome female applicants';
    86.3. offering internships to help certain groups get opportunities or progress at work;
    86.4. hosting an open day specifically for under-represented groups to encourage them to get into a particular field; and
    86.5. favouring the job candidate from an under-represented group, where two candidates are 'as qualified as' each other.

87. It is ELA's understanding that the provisions of section 158 of EqA and the possible actions set out above in the EHRC guidance are not widely known about, discussed or applied by employers. Positive action is often misconstrued by those employers who are aware of the concept as positive discrimination. Employers and education providers who are aware of the provisions and do wish to address inequality and disparities using positive action may, for fear of criticism and legal liability and a misunderstanding of the difference between positive action and positive discrimination, be deterred from doing so.

88. ELA would therefore suggest that firstly, there be more education as to the evidence that shows that there is a need for positive action. Secondly, we would suggest that positive action be promoted to organisations and employers in a way that sets out the benefits of diversity to those organisations and employers, that the difference between positive action and positive discrimination be explained, and that the possible positive action initiatives mentioned in this paper be highlighted. ELA also suggests that organisations and employers be encouraged or even perhaps incentivised to adopt some or all of the initiatives where they are concerned about diversity within their organisation, potentially on a time limited basis so that research can then be conducted to measure the effectiveness of such actions. ELA would suggest that the EHRC could be tasked with producing and maintaining a central portal of information that would assist those employers who wish to adopt positive action measures.

Company Initiatives

89. Examples of company initiatives, some of which may be examples of positive action, include:
    - 89.1. Targeted networking opportunities;
    - 89.2. The use of campus ambassadors at a wide range of universities and not just 'red brick' universities;
    - 89.3. Attending career fairs at universities with a high intake of individuals from BAME backgrounds;
    - 89.4. Social media campaigns;
    - 89.5. Offering work experience programmes that require a transparent and fair application process (rather than work experience simply being offered to the children of clients, for example), and if possible, ensuring that paid work experience is available (as that 'levels the playing field' somewhat by enabling those whose financial circumstances do not allow them to undertake unpaid work experience to in fact undertake a paid placement);
    - 89.6. Working with local schools and colleges and inviting students from BAME backgrounds to spend a day at an organisation;
    - 89.7. Mentoring.

Examples of Positive Action working Positively in the Legal Sector

90. 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.

91. Bryan Cave Leighton Paisner initiated an annual event in 2016, named 'Race for Change'. It seeks to target black undergraduates and recent graduates in order to increase the representation of black lawyers in law firms through creating access to role models, networks, insights and tips about succeeding in law. They also have an initiative named 'Career Kick Start' which offers 25 students, aged 16-17 from low socio-economic backgrounds, a two-week work experience programme with the firm.

92. Linklaters ran 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 gained on the job experience and had one to one mentoring at the firm. They also completed 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.

Apprenticeships

93. Apprenticeships offer a route into work through paid employment, 'on the job' training and a qualification. A report published by the EHRC in March 2019 found that few employers were making use of positive action in connection with apprenticeships and work needed to be done to help employers recognise the benefits of using positive action.

94. BAME candidates are significantly underrepresented in apprenticeships across England. According to the government's report on participation in apprenticeships published in October 2020, 88.2% of apprentices in England aged 16-24 are white (https://www.ethnicity-facts-figures.service.gov.uk/education-skills-and-training/a-levels-apprenticeships-further-education/participation-in-apprenticeships/latest#main-facts-and-figures). No breakdown by ethnicity is available, meaning that comparison between groups of those from BAME backgrounds cannot be carried out.

Leigh Day – an example of the application of positive action practices in relation to apprentices

95. In a drive to improve its recruitment of young black aspiring lawyers (who are underrepresented at the firm), and in acknowledgment of the socio-economic barriers faced by them, law firm Leigh Day in 2019 and 2020 launched and ran open days and recruitment campaigns which specifically targeted black A-Level students of African-Caribbean or African heritage for its legal apprenticeship programme. These events encouraged applications from underrepresented groups whom the evidence suggested were discouraged from applying.

96. In September 2019, the firm tweeted, *"Leigh Day are looking for six black students of Afro-Caribbean or African heritage who have completed A Levels in London, to a good grade level, and who wish to train as solicitors without taking the university route*". The Firm published and disseminated information on the targeted open days and recruitment for the apprenticeship programme through a campaign using and/or engaging:

    96.1. advertisements in local and national job boards and on social media;
    96.2. advertisements via BAME networks such as the Black Solicitors Network; and
    96.3. the firm's ties with local community-based groups and networks resulting from its work on the Windrush scandal and other diversity and inclusion initiatives with local inner-city schools and social mobility organisations to advertise its open day and legal apprenticeship programme.
    96.4. In 2019, around 100 interested students, parents, teachers and career advisers attended the firm's apprenticeship open day. The firm received around 40 applications from black A-Level students of African-Caribbean or African heritage for the 2019 apprenticeship programme.
    96.5. Around 3 out of the 40 2019 applicants identified as male. Noting the higher proportion of female applicants, and disproportionately low number of male participants in the 2019 recruitment round, in 2020, the firm chose to target and recruit only male students of African-Caribbean or African heritage.
    96.6. In 2020, around 50 individuals attended the firm's online open day webinar. The firm received around 170 applications from A-Level students of African-Caribbean or African heritage for the 2020 apprenticeship programme.

Specialist Diversity Recruitment Organisations

97. Companies can establish relationships with specialist diversity recruitment organisations in order to ensure they are recruiting young people from a wide talent pool. *Aspiring Solicitors* for example have nearly 49,000 members that they work with, and partner with over 58 organisations to help young people

find out about and access careers in law. The types of services that they provide to help achieve their aim include:

97.1. coaching and mentoring;
97.2. competitions and social media campaigns;
97.3. the use of campus ambassadors;
97.4. scholarships; and
97.5. workshops and work experience.

Since its establishment *Aspiring Solicitors* has helped over 4,500 of its members secure vacation schemes and training contracts.

98. *Rare Recruitment* is another organisation, which seeks to increase diversity in education, training and employment in the workplace. It delivers a number of different programmes to help it achieve this aim, including:
    98.1. Target Oxbridge - a year-long intensive development programme launched in 2012 to help Black students increase their chances of getting into the Universities of Oxford or Cambridge. This year, 75 of *Rare's* Target Oxbridge students secured a place at Oxford or Cambridge and it helped a further 160 Black students to apply;
    98.2. Unistart - insight events for 200+ Black school leavers aimed at giving advice about university and careers;
    98.3. Rare Foundations (Law) - a series of insight events for first year Black students interested in a career in commercial law;
    98.4. Articles: an intensive development programme for penultimate school year Black students interested in commercial law, during which they have access to one to one coaching sessions and group events at law firms;
    98.5. We also understand that a number of the organisations we have mentioned use *Rare Recruitment's* software to assist them in recruiting candidates from diverse backgrounds.

99. ELA considers these organisations and their initiatives to be of great importance in helping the legal profession in particular to reduce the evidenced racial inequalities that exist when recruiting young people. We are unable to comment on whether such organisations exist in other industries however, if they do not, then we consider their formation may help bridge the equality gap that we know exists across sectors.

Kingsley Napley and The Times

100. Kingsley Napley in partnership with *The Times* ran a UK-wide student competition aimed at Key Stage 5 pupils called 'The Legal Apprentice" in 2019 and 2020. Its main objectives were to:

100.1. provide a younger group of students with insight and information as to the role of a solicitor;
100.2. broaden the range of students who might consider becoming a solicitor, building their confidence and positively influencing their goals and aspirations; and
100.3. create a competition that appeals to those wanting to become a solicitor and give them a chance to exercise the type of skills needed to do that successfully.
100.4. In its first year, 3,000 students took part in the competition, from around 10% of all secondary schools across the UK. After a series of online tasks, three teams were selected to attend a final event in London. The eventual winners, who were from a state grammar school in Northern Ireland, were then invited to interview for legal apprenticeship positions at the firm, with one of the winners accepting the position.
100.5. In its second year, 685 teams from 200 schools took part. All tasks were made available online in response to the COVID-19 pandemic. The firm held a virtual masterclass attended by two state schools and two grammar schools in September 2020. We understand that four students of the winning team have been invited to interview for one legal apprenticeship position, an internship and two work experience placements.
100.6. Through the project, the firm engaged students from across the UK who may previously not have envisaged the legal profession as accessible to them. In recognition of its work on the project, the firm was shortlisted for the UK Diversity Legal Awards 2019 and the Diversity and Inclusion award at the Lexis Nexis Legal Awards 2020.

Recommendation

101. ELA recommends positive action as a first step where the evidence shows statistical under representation in a profession or in a firm or corporate organisations. Businesses should be encouraged/incentivised to introduce similar initiatives with a targeted approach towards those from BAME backgrounds who might otherwise not have thought that a career in that specific sector or firm was available to them.

QUESTION 10

Can you suggest other ways in which racial and ethnic disparities in the UK could be addressed? In particular, is there evidence of where specific initiatives or interventions have resulted in positive outcomes? Are there any measures which have been counterproductive and why?

General observations

102. There are a number of measures that the Commission could consider to help address racial and ethnic disparities in the UK and advance positive outcomes. These include, but are not limited to:
    102.1. the introduction of mandatory ethnicity pay gap reporting;
    102.2. the introduction of targets or quotas;
    102.3. reform of the Equality Act 2010 (EqA);
    102.4. reviewing the efficacy of the current 'positive action' legislation;
    102.5. introducing the use of the 'Rooney rule';
    102.6. considering the role of artificial intelligence ('AI'); and
    102.7. a new Race Equality Code to increase senior leadership and board representation.

We will consider each of these in more detail below.

Ethnicity Pay Gap Reporting

103. There has been an increased focus on the business case and economic benefit in closing the ethnicity pay gap, with both the Confederation of British Industry and the McGregor-Smith Review (2017) estimating that *"bridging the ethnicity pay gap could uplift UK GDP by up to £24bn a year"*[32]. Eliminating the ethnicity pay gap would be good for business and good for society.

104. ELA notes that the Race at Work Charter ("the Charter")[33], developed by the Government in partnership with Business in the Community, currently has 517 signatories, including numerous high-profile employers. The Charter comprises a series of measures to tackle ethnic disparities in the workplace, including to *"capture ethnicity data and publicise progress"*.

105. Mandatory gender pay gap reporting was introduced in 2017 by the EqA (Gender Pay Gap Information Regulations) for private and voluntary sector employers with over 250 employees with corresponding regulations for specified English and non-devolved public authorities. The regulations had the effect of making gender pay disparity a board level issue. The regulations

[32] https://www.cbi.org.uk/articles/bridge-the-gap-practical-ways-to-close-your-ethnicity-pay-gap/ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/594336/race-in-workplace-mcgregor-smith-review.pdf
[33] https://www.bitc.org.uk/post_tag/race-at-work-charter/

increased accountability and transparency thereby providing a reputational spotlight on employers. The publication of data informed female employees in the workforce and prospective recruits about the gender representation gap and some employers have created action plans to remedy any disparity. The data collection, analysis and reporting framework mechanisms are now in place, and can be replicated. Gender pay gap reporting has driven change.

106. ELA believes that comparable legislation requiring mandatory ethnicity pay reporting would, on the evidence of Gender pay gap reporting, have the same effect of highlighting and seeking to address racial pay disparities. It would ensure that employers collate data on the pay of their ethnic minority workforce and then:
    106.1. reflect on the data and identify what steps need to be taken to reduce any gap found;
    106.2. report on the pay gap; and
    106.3. inform an organisation's wider inclusivity and diversity strategy.

107. ELA responded to the government's consultation on ethnicity pay reporting in 2018 ("Government Consultation") and maintains the views expressed in its response. In ELA's view, there are hurdles to overcome in respect of implementing mandatory ethnicity pay reporting. However, as set out in ELA's response to the Government Consultation, there are ways in which these apparent barriers can be sensibly addressed.

108. ELA's views on the approach to be taken in respect of implementing mandatory ethnicity pay reporting can be summarised as follows:
    108.1. all large (250 or more employees) and medium-sized employers (50-249 employees) should report ethnicity pay information by quartile, using the same methodology for gender pay gap reporting, with very large employers additionally reporting their ethnicity pay gaps in a way that reflects multiple ethnic groups;
    108.2. keeping the ethnicity pay gap and gender pay gap reporting regimes as uniform as possible is likely to be simple and cost effective, and therefore most likely to be complied with by employers;
    108.3. for pay reporting to be meaningful, numbers depend on narrative and contextualisation relevant to the reporting employer or sector; however, provision of a contextual narrative should be voluntary to reduce the burden faced by employers;
    108.4. ELA recommends the introduction of a Statutory Code of Guidance ('the Code'), including guidance on how to provide a breakdown of demographics and how to provide any contextual data;
    108.5. ELA recommends that a periodic review of ethnicity pay reporting be undertaken following its introduction; and

108.6. communication with employees is key to encourage self-reporting and particularly emphasising that there is no down-side in providing this data and explaining matters including:
  108.6.1. the purpose of collecting the data;
  108.6.2. how and when it will be collected; and
  108.6.3. how it will be kept confidential.

109. On 28 January 2020, the Equal Pay Bill ("the Bill") had its first reading in the House of Lords[34]. Clause 7 of the Bill seeks to amend section 78 of the EqA in the following (non-exhaustive) ways:
  109.1. widen the scope of pay gap reporting to include differences in the pay of employees of different ethnic origins and require certain additional information to be included (including information on the mean and median average hourly pay earning by part-time and full-time employees and for employees of different ethnic origins);
  109.2. lower the threshold for reporting to organisations with 100 or more employees; and
  109.3. require employers to publish a document setting out the course of action they plan to pursue in order to reduce any difference in pay between male and female employees, and employees of different ethnic origins. Importantly, in terms of resources, the proposal is not to set out a duty to eradicate the gap but to set out a plan to do so.

110. A second reading of the Bill is yet to be scheduled. ELA welcomes these further proposed amendments.

111. It is encouraging that, pending ethnicity pay reporting becoming mandatory, some employers are voluntarily capturing, as well as publishing, ethnicity pay data. However, a report published by PricewaterhouseCoopers LLP on ethnicity pay gap reporting in September 2020[35] established that only 10% of over 100 companies they had surveyed had voluntarily disclosed their ethnicity pay gap. Whilst statistics have improved in recent years (for example, the survey revealed an increase in the number of companies collecting data, from 53% in 2018 to 68% in 2020), key concerns remain in respect of legal and GDPR requirements and other uncertainties regarding the collection of data.

112. The ethnicity pay data collection exercise could therefore be accompanied by a Statutory Code of Guidance. ELA recommends that the Code also focuses on planning communication with employees, noting the importance of creating trust with employees in respect of sharing their personal data relating to ethnicity,

[34] https://services.parliament.uk/bills/2019-21/equalpay.html
[35] https://www.pwc.co.uk/human-resource-services/assets/pdfs/ethnicity-pay-report.pdf

enabling employers to capture and publish meaningful data. ELA takes the view that such a Code would provide helpful guidance to employers and businesses in complying with their obligations.

113. Public and private sector organisations must publish their gender pay gap reporting information and send it to the government's website portal https://gender-pay-gap.service.gov.uk which collates the information and allows public access to the information for comparisons to be made. Notwithstanding the suspension of reporting for 2019/2020 due to the Covid-19 pandemic, 159 organisations reported their gender pay gap information this year (compared to 5849 in 2018/2019). ELA considers a similar central reporting website portal should exist for ethnicity pay gap reporting.

Quotas v Targets

114. The McGregor-Smith Review on Race in the workplace[36] suggested that diversity-related quotas can be resented by employees; everyone should feel that they have been recruited based on their abilities, rather than to meet a pre-agreed quota. However, attendees at roundtable discussions chaired by Baroness McGregor-Smith indicated that they would be *"more open to the idea of aspirational targets that employers could work towards. The massive variation between the life experiences of different ethnic groups means it is essential that employers should collect and publish data on the ethnic breakdown of their workforce to ensure that meaningful targets can be set, and more importantly, measured. It was agreed that targets should reflect local demographics and could be set locally by those parts of the company expected to deliver them"*.

115. The EHRC's "Employment Statutory Code of Practice"[37] suggests that an example of positive action under section 158 of the EqA could include "*setting targets for increasing participation of the targeted group*". There are no legal consequences if aspirational targets are not achieved; however, employers may want to review their initiatives regularly to assess whether any further steps need to be taken to meet their diversity objectives.

116. Having collected the necessary data to understand the diversity of a workforce, employers will be better equipped to pinpoint specific areas where action is required and implement aspirational targets to drive change. The McGregor-Smith Review emphasised that targets set must be meaningful and reflect the

36 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/594336/race-in-workplace-mcgregor-smith-review.pdf

37 https://www.equalityhumanrights.com/sites/default/files/employercode.pdf; section 12.24.

reality of the situation. Accordingly, aspirational targets will only work if employers have robust data to establish a baseline and measure the impact of positive action.

117. A number of high-profile companies have embraced the above approach in setting aspirational diversity targets, including:
    117.1. Linklaters –, the firm aims, starting from the 2020/21 recruitment cycle, to recruit 35% minority ethnic trainees each year, of whom 10% will be Black (UK); and have 5 times as many Black partners globally by 202738;
    117.2. Ernst & Young – the firm has a target of 40% female Partners and 20% BAME Partners by 202539; and
    117.3. Lloyds Banking Group – targets to increase Black representation in senior roles from 0.6% at senior grades to at least 3% by 2025, to align with the overall UK labour market40. Credit rating agency Moody's described Lloyds Banking Group's programme to promote more black employees to senior roles as "credit positive", marking the first time that the rating agency has explicitly linked a company's stability to ethnic diversity measures41.

118. However, ELA encourages the use of aspirational diversity targets, based on reliable and carefully considered data, taking into account the potential impact upon individuals from other ethnic groups. In respect of Quotas the ELA membership is split. Some ELA members would encourage the use of quotas in large employers and organisations – for example this may be a time limited measure where there has been evidence of persistent disparities for a significant period and positive action initiatives have been undertaken but no meaningful change has resulted e.g. in the Police Service. However, other ELA members do not endorse quotas for the reasons set out above in paragraph 114 above.

119. An example of time limited 'levelling up' legislation to progress the advancement of women is the Sex Discrimination (Election Candidates) Act) 2002 which was initially in force until 2015 but was extended until 2030 by the EqA. The legislation has accelerated women's political representation in the UK Parliament to 32%.

Equality law reform – dormant provisions

[38] https://www.linklaters.com/en/about-us/diversity-and-inclusion/race-action-plan
[39] https://www.ey.com/en_uk/diversity-inclusiveness/commitment-to-anti-racism-in-the-uk
[40] https://www.lloydsbankinggroup.com/Our-Group/responsible-business/inclusion-and-diversity/ethnicity/our-stand-for-racial-equality/
[41] https://www.ft.com/content/f577f05f-e943-482a-841c-a85c71bf306a

120. The coalition government (2010 – 2015) either repealed or did not implement various parts of the EqA. ELA considers below whether the dormant provisions in the EqA should be enacted to address the evidence that we have set out above of continuing statistical disparities based on ethnicity which have created inequality:-

a) The socio-economic duty (section 1 of the EqA)

120.1. The socio-economic public sector duty in Part 1, Section 1 EqA and recommendations arising have been discussed in ELA's previous consultation response to a call for evidence for a review into the increasing progression in the labour market for BAME workers in 2016. At that time, the provision lay dormant, however, recent developments have meant that the duty has come into force in Scotland only, enabling its assessment as a potential tool to remedy racial and ethnic disparities in England. Socio-economic rights could provide a guarantee of dignity and justice, particularly for those most at risk of poverty and material deprivation.

120.2. The duty requires that specified public bodies have regard to exercising their functions in a way that is designed to reduce the inequalities caused by socio-economic disadvantages when making strategic decisions. Further, guidance from the Scottish government (see below), has introduced the requirement for the bodies to publish their reasoning once a decision has been made to prove they have paid due regard to the duty in the decision-making process.

120.3. In its role as the regulator of the EqA the EHRC has the responsibility to monitor and develop best practice for the duty where it is in force.

120.4. Although we could not source a reported claim, an individual can bring a judicial review claim against a public body to challenge a failure to have due regard to its socio-economic duty. The EHRC may choose to support the challenge[42]. The legal concept of 'due regard' is not new. There have been a number of successful judicial review challenges arising from a breach of the public sector equality duty (PSED), which requires a public authority to have 'due regard' to assess the impact on equality of proposed changes to policies, procedures and practices. The law is therefore well established.

120.5. The Court of Appeal approved the six principles established by the High Court in the case of R. (Brown) v. Secretary of State for Work and

[42] https://gov.wales/socio-economic-duty-overview#section-42134

Pensions [2008] EWHC 3158 which are also relevant for a public body in fulfilling its 'due regard' duty under the PSED. The Court also confirmed some additional principles:

120.5.1. the equality duty is an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation;

120.5.2. the duty is upon the decision maker personally. What matters is what he or she took into account and what he or she knew;

120.5.3. a public body must assess the risk and extent of any adverse; impact and the ways in which such risk may be eliminated before the adoption of a proposed policy;

120.5.4. a public body must have available enough evidence to demonstrate that it has discharged the duty; and

120.5.5. public bodies should place considerations of equality, where they arise, at the centre of formulation of policy, side by side with all other pressing circumstances of whatever magnitude.

120.6. ELA has set out the law and guidance above because some commentators have questioned how a breach of the 'socio-economic duty' will be actioned as a potential obstacle to it. Good legal foundations already exist.

Where the socio-economic duty has been commenced to date

120.7. The socio-economic duty has never come into force in England and there appears to be no plan to do so. The Welsh government are planning to introduce the duty on 31 March 2021, and some local councils, such as Newcastle council[43], have made the decision to treat the duty as if it were in force.

120.8. Scotland is the only country within the UK, which has brought the provision into force from 1 April 2018. It is known as the 'Fairer Scotland Duty'. A research report by the EHRC[44] published in August 2018, reviewed the potential impact of the socio-economic duty and improvements required. The findings included that public bodies appear to be disaggregating socio-economic data to a greater extent in order to identify priority areas. The socio-economic requirements appear to have provided a formal framework, assisted in aligning partners' priorities, have provided opportunities for partnership working, and encouraged

[43] "Tackling Socio-Economic Inequalities Locally" by Just Fair July 2018 https://justfair.org.uk/wp-content/uploads/2018/06/Just-Fair-June2018-Tackling-socio-economic-inequalities-locally.pdf

[44] https://www.equalityhumanrights.com/sites/default/files/socio-economic_requirements_-_full_report_v1.pdf

working practices that consider and seek to address local socio-economic disadvantage/issues.

Recommendations on the socio-economic duties

120.9. Given that the disparities in respect of race and ethnicity are often inextricably linked with socio-economic inequalities, proper implementation of this duty may, in the medium to long-term, alleviate the disadvantages faced by those of an ethnic minority background as part of a public sector race equality strategy. As such, ELA recommends that compliance with the socio-economic duty be continued to be pursued by the devolved administrations so that the necessary data may be collected to assess its efficacy and that the outcomes are monitored.

120.10. Related to this, the socio-economic duty could facilitate a more effective improvement to racial and ethnic disparities if combined with the currently dormant section 14 of the EqA, (should it be brought into force). Section 14 provides statutory recognition of combined discrimination, popularly known as 'intersectional discrimination' (see below). If this provision were commenced, it could provide protection from discrimination for racial and gender groups such as Muslim women in the workplace, amongst others. Combined with the socio-economic duty, it may lead to employers lawfully taking steps to address shortages of, for example, working-class Bengali women or men in their workplace by specifically targeting such women or men as candidates and recruiting them in a tie-break situation.

120.11. ELA is of the view that evidence shows that race inequality continues, that socio-economic inequality is associated with ethnic heritage and that the disproportionate inequality is caused not just by ethnic heritage but by socio-economic inequality. Accordingly, one of the ways in which racial inequality can be tackled is by the introduction of the socio-economic duty. The early data from Scotland in respect of the socio-economic duty set out above suggests that the duty is an effective way in which to address inequality. On this basis some within ELA would take the view that the socio-economic duty should be brought into force in England and that it should be closely monitored both as to its efficacy and its cost. However, ELA's membership is not united on this issue and some would disagree with this policy because the burdens on business have not been considered fully as against the efficacy of the provisions in tackling the desired aim. This part of ELA's membership would assert

that a consultation and impact assessment should be undertaken prior to the introduction of the socio-economic duty.

b) Intersectional Discrimination

120.12. Section 14 EqA is a dormant provision which provides for protection against 'combined discrimination' or discrimination on the basis of dual characteristics. It has not been implemented. Whilst it is possible to bring a claim of discrimination on the basis of multiple protected characteristics without section 14, a claimant must prove discrimination on the grounds of each protected characteristic alone. This fails to take account of the fact that in relation to combined discrimination, it is usually the unique combination of both characteristics that results in the discrimination. Dr Bahl, for example, is a Black Asian woman and was the first office holder that the Law Society had ever appointed who was not both white and male. She claimed to have been harassed and bullied because of the combined characteristics of sex and race. In *Bahl v The Law Society and others* [2004] IRLR 799, the EAT and Court of Appeal overturned a decision of an Employment Tribunal that Dr Bahl had been subjected to both direct race and sex discrimination because it had failed to analyse which of the two applied. It is noteworthy that the Tribunal's reasons did suggest that the discrimination that Dr Bahl encountered was a product not of the Claimant being Black or being a woman, but because of her having the dual characteristics of being Black and a woman.

120.13. There is no principled reason as to why discrimination on more than one protected characteristic should not be protected. The EqA seeks to compensate people if they are the subject of discrimination. This also has the effect of incentivising members of society not to discriminate against other people. Whether the discrimination is because of one protected characteristic or a combination of protected characteristics is not a logical basis to exclude the operation of discrimination law. It is agreed by all that discrimination law should apply to all those who are treated less favourably because of one protected characteristic and so there is no reason why, if a person is treated less favourably because of the combined effect of two protected characteristics that person should be left in discrimination 'no-man's land'.

120.14. The evidence of the greater inequality suffered by ethnic minority women (e.g. the statistical evidence that Bangladeshi Muslim women are more disadvantaged because of their sex, ethnicity and religion) speaks of the need for the law to fill this unprincipled void. In order to maintain consistency in discrimination law ELA recommends that the law should

address discrimination because of more than one protected characteristic. If the aim is to reduce race inequality then bringing section 14 EqA into force would address this continuing lacuna.

d) **Third Party Harassment**

120.15. A third-party is someone who a worker interacts with as part of their job but who is not employed by the same employer as them. Examples include customers, clients, patients, business contacts, contractors or agency workers.

120.16. Previously, under the EqA, an employer could be liable when an employee was harassed on more than two occasions by a third party, and the employer knowingly failed to take steps to prevent it happening to that employee again. This much criticised 'three-strikes' rule was a high threshold for employees to overcome and only two EAT judgments can be found.

120.17. The EAT judgment in *Bessong –v- Penine Care NHS Foundation Trust* UKEAT/0247/18/JOJ[45] decides a claim brought by a mental health nurse who was assaulted by a patient on racial grounds. The judgment confirmed that the EqA contains no current effective protection in cases of third-party harassment.

120.18. The outcome of a government consultation in October 2012[46] received 80 responses, 20% of which called for a repeal of third-party harassment provisions and 71% opposed it. The third-party provision lacked utility but was not over-burdensome to employers. The government repealed the legislation because quantifiable evidence did not support retaining it.

120.19. In 2017, the BBC commissioned ComRes to undertake research. It found that third party sexual harassment was most likely to be experienced by those working on temporary contracts, or agency workers. They also found it was particularly prevalent within the retail, care and hospitality industries with approximately 18% of respondents reporting sexual harassment by clients or customers. In 2018, the EHRC gathered evidence from around 1,000 individuals and employers. It was found that around a quarter of those reporting harassment had identified the perpetrator as a third party.

[45] https://www.bailii.org/uk/cases/UKEAT/2019/0247_18_1810.html

[46] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/137749/equalityconsultation-response_1_.pdf

120.20. On 22 March 2019, the TUC produced a report[47] which established that workers who interact with the public as part of their job are far more likely to experience abuse and harassment from the public than those who do not interact with the public by default. Young people may be more likely to experience third-party abuse and harassment than older workers due to the sectors they work in, the roles they undertake and their relatively vulnerable position in the labour market, such as being over-represented in insecure work. Ethnic minority employees were less likely to report third party harassment. The #MeToo and Black Lives Matter movements have provided significant evidence of the reality of lived experience of individuals experiencing third party harassment.

120.21. A further government consultation in October 2019 on sexual harassment in the workplace sought views on whether new third-party harassment provisions should be introduced, and if so, when an employer should become liable. The outcome of that consultation is awaited.

Recommendation on Third Party Harassment

120.22. Based on the evidence above ELA recommends that improved provisions for making employers liable for third party discrimination/harassment should be reintroduced. An important control on the liability third party harassment is that the employer must have 'knowingly' failed to act. It is clearly important that any such duty should not place obligations on employers who are not, or should not be aware, of harassment but if they are and take no action there is no principled reason not to extend liability to them for those who work in their businesses. Further, Employers could also consider whether their commercial agreements (with clients, suppliers, and other third parties) should expressly prohibit unlawful harassment of their staff by third parties or their representatives and whether appropriate contractual remedies could be built into those agreements in the event of a breach.

d) Statutory Questionnaires

120.23. Between 1975 and 2014, a statutory procedure existed to enable individuals to ask such questions as were relevant and necessary to ascertain whether workplace discrimination may have occurred. The

[47] https://www.tuc.org.uk/resource/tackling-third-party-abuse-and-harassment

legacy Equality Commissions and the EHRC published template questions to assist individuals to make reasonable enquiries. The questionnaire could be served on an employer any time prior to, or within 28 days of lodging proceedings. For the worker, it was a useful tool to understand the strength of their claim, including to obtain data to support it that would not otherwise be lawfully available through a grievance procedure, or a Data Subject Access request. It was a mechanism that helped to alleviate the evidential imbalance inherent in discrimination and equal pay cases. An example of such information central to most employment equality claims is the treatment of comparators (individuals who may have been treated more favourably). The employer would be given an early indication of the particular issues. A court or tribunal could draw an adverse inference from any failure to respond at all within the 8 week prescribed period for doing so (without reasonable excuse), or from an evasive or equivocal response.

120.24. Section 138 EqA which encompassed the statutory questionnaire procedure was repealed on 6 April 2014 as part of the government's commitment to cut red tape. The government estimated that 9-10,000 businesses completed questionnaires, taking 5-6 hours to complete and that questionnaires were often used as 'fishing expeditions' by employees bringing misconceived claims. This decision to repeal meant that individuals could no longer use the statutory questionnaire procedure to obtain information before they decided to bring a discrimination claim, or after.

120.25. The statutory questionnaire was replaced by ACAS Guidance – an informal, non-legislative approach to questions and answers that the government considered would be "fairer for all" and would enable businesses to better challenge any unreasonable requests for information. This guidance is not legally binding, there are no time limits for employers to respond and no adverse inferences can be drawn from a failure to answer. In our experience, it is used far less frequently and is far less effective a tool at obtaining information than the statutory questionnaire process.

120.26. On 18 December 2018, the government rejected calls from the EHRC and the Women and Equalities Select Committee to reinstate the statutory procedure.

120.27. In view of the statistics in response to question 1 evidencing the difficulty for claimants in bringing and succeeding in discrimination claims, ELA recommends the consideration of the reintroduction of some

form of statutory questionnaire process, which avoids imposing onerous duties on employers but allows more effective information gathering for employees.

120.28. Possible methods to balance the need for claimants to seek information with the need for proportionality would be to limit the questionnaire by up to 20 key questions, or to provide standard form Questionnaires for particular types of cases or to make the questionnaire a matter to inform the disclosure obligation of the employer. Whereas an uncontrolled questionnaire process could place too great a burden on business, equally a justice system with no questionnaire process undermines access to justice for employees as shown above. ELA would suggest a consultative process so that the proportionate use of questionnaires which balanced the benefit to employees and the burdens on employers could have a place in suitably balanced legislation.

e) **Improving the Employment Tribunal's remedies in successful discrimination claims**

120.29. Prior to 2015, Employment Tribunals had extended powers to make 'recommendations' under section 124 EqA. Where a claimant won a discrimination claim, an employment tribunal could make a declaration, order compensation to be paid, and make an appropriate recommendation. Where a tribunal made a recommendation its sole aim did not have to reduce the negative impact on the individual claimant(s) but could also be aimed at reducing the impact of the discriminatory act on the wider workforce. The recommendation was required to state that the respondent should take specific action within a specified period of time. In the case of non-compliance with a recommendation, a tribunal had the power to award compensation or increase any award already made.

120.30. A number of wider recommendations were made under this provision, mainly relating to training or reviewing and updating policies. The following cases are examples:

120.30.1. ET/1604478/11; ET/1600000/12 *Crisp v Iceland Food Limited* 2012 - by 23 May 2013 - Iceland was required to give disability discrimination training with a mental health focus to all HR staff who assist managers in disciplinary and grievance matters, as well as to all senior managers.

120.30.2. ET/2203585/12 *Tantun v Travers Smith Braithwaite* 2013 - the tribunal ordered partners and senior staff at the firm to undergo anti-discrimination training.

120.30.3. ET/3303944/2011 *Why v Enfield Grammar School* 2012. Staff and the Head Teacher were ordered to undergo equal opportunities training.

120.30.4. ET/1400762/11 *Stone v Ramsey Healthcare UK Operations Limited* 2011. Staff and HR managers were ordered to undergo training on maternity rights.

Section 2 of the Deregulation Act 2015 amended Section 124 EqA and removed the power of Employment Tribunals to make wider recommendations in discrimination claims.

Recommendation

120.31. The power to made wider recommendations is likely to reduce systemic race discrimination in the workplace and ensure lessons are learned from successful race discrimination claims. A Statutory Code of Guidance could assist the Employment Tribunal in making these recommendations. The implementation of recommendations could be monitored by the EHRC.

120.32. If the aim is to use the law to address racial inequality, then recommendations, as we have shown above, can be useful targeted interventions, provided they are the subject of a robust judicial process (including appeal) and are directed to businesses so that systemic issues can be corrected. ELA recommends that this measured power is reintroduced.

Equality law reform – Improvements to existing legislation

121. We also consider areas of legislation that might be improved.

a) Positive action

121.1. In the UK, positive action is permitted action by an employer to assist protected groups, which are disadvantaged or under-represented in a particular job. It is a limited exception to the prohibition on discrimination in employment.

121.2. Sections 158 and 159 EqA are the provisions which set out how employers can use positive action to help them address disparities in their workforces. We have set out more detail with regard to the operation of section 158 in our response to question 2 above. In this part

of the response we will focus on section 159, as this is the provision which has the potential to advance ethnic representation in workforces but has caused employers most difficulty in practice. In its explanation of section 159, the supplement to the EHRC Code states that:
"This provision essentially allows positive action in recruitment and promotion in relation to a "tie-breaker". It allows an employer faced with making a choice between two or more candidates who are of equal merit to take into consideration whether one is from a group that is disproportionately under-represented or otherwise disadvantaged within the workforce." (page 8)

121.3. It was not until early 2019 that the Employment Tribunal ('ET') heard the first case which considered s.159 EqA - *Mr M Furlong v Chief Constable of Cheshire Police* [2019][48]. The ET found that the police force's recruitment process had directly discriminated against a white, heterosexual, male applicant in its use of section 159. We outline the facts below to illustrate the complexity of the provision.

The Facts

121.3.1. The claimant, Mr Furlong, a white heterosexual male applied for a position as a Police Constable in the 2017/18 recruitment process with Cheshire Constabulary ('Cheshire'). The recruitment process comprised three stages; an application form to check candidate eligibility; a 'sift' stage comprising a competency interview and various written and interactive exercises; and, finally, an interview stage for all candidates who had successfully passed the 'sift'. In 2017/2018, a large cohort of 127 candidates progressed to interview. At this final stage, Cheshire applied 'positive action' appointing first any candidates with protected characteristics before selecting from the pool of remaining applicants.

121.3.2. Despite passing the 'sift' and appearing to perform well at interview, Mr Furlong did not secure an appointment. He brought claims of direct discrimination on the grounds of sexual orientation, race and sex, alleging that the respondent had unlawfully treated candidates with protected characteristics more favourably than himself, when they were less qualified for

48 https://assets.publishing.service.gov.uk/media/5c66abfd40f0b61a1e93a27a/Mr_M_Furlong_v_The_Chief_Constable_of_Cheshire_Police_2405577.18_judgment_and_reasons.pdf.

selection. Cheshire contended that it had lawfully applied positive action measures pursuant s.159 to boost recruitment from under-represented groups.

121.3.3. The ET heard evidence that between 2015 and 2018 Cheshire had also put in place other measures to increase diversity e.g. holding events with North West employers to support and develop applicants from diverse communities. This resulted in the percentage of officers in Cheshire who were BAME more than doubling: from 0:61% to 1.46% compared to the BAME population in Cheshire of 3:09% in 2018. These measures fell within the range of permitted positive action measures pursuant to section 158 of the EqA.

121.3.4. More generally, police forces nationally had increased the percentage of officers from BAME backgrounds from 2% in 1999 to 5.5% in 2015 (compared with 14% of the wider population coming from BAME backgrounds).

What did the ET find?

121.3.5. Despite accepting the existence of a legitimate aim to improve minority representation, the ET, drawing on the explanatory notes to the EqA and the EHRC Code, found that Cheshire had misapplied s.159. Upholding the claim in favour of Mr Furlong, the ET held that Cheshire had not used positive action as a 'tie-breaker'. Rather, it had '*obtained and ignored qualitative data'* which demonstrated a range of skill and suitability amongst the 127 candidates who had passed the 'sift' stage, and had effectively '*applied an artificially low threshold*' in choosing to '*deem as equal*' all 127 candidates who had reached interview stage. While no formal scoring framework was applied to the final 127, the evaluation forms completed by interviewers clearly showed that some candidates were stronger than others.

121.3.6. Rather than selecting between equally qualified candidates, the ET found that Cheshire had applied a 'policy' of preferring candidates with protected characteristics (including race), which is prohibited by legislation.

121.3.7. Mr Furlong had performed comparatively well at interview and had received positive feedback. The ET was persuaded that,

but for the inappropriately broad application of positive action principles, he would have successfully secured a post.

What problems does the ET decision in Furlong pose for employers?

121.3.8. This case highlights the issues employers face when trying to use s.159, particularly in seeking to demonstrate to an ET that two or more candidates are 'as qualified'. The ET decision suggests, applying European case law, that an objective test will be used by ETs and it will be the ET, not the employer, to assess whether candidates are 'as qualified'.

Recommendations on Positive Action

121.4. The one decided case under s.159 has a dissuasive effect on its use because the employer will have little comfort that its view will not be second guessed. We would suggest that consideration is given through the consultative legislative process so that the 'as qualified' test is amended so that the standard of the test would be 'in the reasonable view of the employer'. That would mean that it would not simply be up to the ET to review fully the employer's decision making process. The current test allows an ET to carry out a full reassessment which puts the employer at risk. The ELA recommended test allows latitude to the employer for their subjective reasoning but ensures that their discretion is controlled within margins by the requirement of reasonableness. We suggest that such an approach would remove the dissuasive nature of the test and could provide employers more reassurance that they could successfully defend claims where they have applied s.159.

121.5. On the issue of proportionality, whilst the ET commended Cheshire's attempts to recruit from a wider pool so as to create a more diverse police force, the ET determined that Cheshire's radical and substantial change in its recruitment process was *"..premature without a full analysis of the impact of the measures that were already in place…".* If this approach is followed by other ETs *Furlong* suggests that prior to using s.159 employers should assess what other measures they have used to improve diversity. Employers would also need to consider how effective those measures have been. If the actions that an employer has taken are not proving effective then they should consider using s.159.

121.6. If that is the test then, for instance, achieving diverse representation amongst the ranks of police officers could take a significant time to

achieve and demonstrates that in the context of the Furlong case where Cheshire implemented positive action measures for 3 years prior to resorting to the use of s.159, this provision appears to be over-burdensome, lacks utility, and needs reform.

Rooney rule

121.7. To address the under-representation of BAME individuals, particularly in senior positions, some employers are considering using the Rooney Rule. The principle, named after America's National Football League (NFL) diversity committee chairman, Dan Rooney, requires all franchises in the league to interview at least one BAME candidate for every head coach or senior vacancy. The Rooney rule provides at least one BAME applicant is short listed to the final assessment stage for role(s) within an organisation so that they are provided with the same chance as non-BAME applicants. In 2003, there were just three BAME NFL head coaches. By 2017, there were eight. Between 2007 and 2016, 10 of the 20 Super Bowl teams had either a BAME head coach or general manager, whereas before 2007 there were none.

121.8. Proponents of this rule say it side-steps any accusations of tokenism by emphasising that final recruitment decisions will be based on competency. In the UK, a number of organisations have decided to adopt the Rooney Rule, they include: the Football Association, English Cricket Board, ITN, BBC, Peabody & LQ Housing Associations.

121.9. However, there are concerns whether the Rooney Rule may fall foul of the positive action legislation. Under section 159, it is only possible to treat individuals from different groups differently if they are "as qualified as" each other. As stated above, this is difficult to demonstrate, even at the final stage of a recruitment exercise. At a shortlist stage, it is likely to be more difficult for employers to meet this requirement, when less information will be available about the candidates. However, as employers will already be making an assessment of one applicant's qualifications compared to another at the shortlist stage, it is possible. Currently neither the EqA nor any of the guidance which accompanies it expressly rules out applying this test at an earlier stage in the recruitment process.

121.10. It is important to note that under section 159, as discussed above, there cannot be a blanket policy of treating those with a particular protected characteristic more favourably. There is a strong argument that the Rooney Rule, or the automatic shortlisting of a BAME candidate for

interview, would amount to a blanket policy and would therefore be contrary to section 159 and would be unlawful under the present legislation.

Possible reform of positive action legislation

121.11. The Commission may wish to consider the 'Two Ticks' scheme that applies to disabled employees as a possible means of ensuring that employers who wish to use the Rooney Rule, can do so in the comfort that it is lawful.

121.12. The Two Ticks scheme falls within section 13(3) EqA (rather than under the positive action provisions) and allows employers to treat disabled persons more favourably than non-disabled persons, including at any stage in the recruitment process. This is supported by the EHRC Code, which confirms that disability can be treated differently as a result of this statutory provision. There is presently no such provision for race.

121.13. Employers who are accredited by the Two Ticks scheme commit, amongst other things, to interview all disabled applicants who meet the minimum criteria for a job vacancy and consider them on their abilities.

121.14. Consideration could be given to recommending that section 13(3) of the EqA is amended to apply to race for the purposes of any recruitment process. The amendment could be used by accredited employers who wish to use the Rooney Rule to increase the racial diversity of their workforces. Accreditation could be provided by the EHRC. The amendment could be introduced for a limited period of time, and its efficacy reviewed annually by the EHRC.

121.15. The membership of ELA is not united on this issue. Such a departure would require careful policy consideration and consultation. This dissenting cohort of ELA members would note that disability stands alone as a protected characteristic requiring adjustments, or some would say positive discrimination, so as to overcome the barriers faced by disabled people in employment. However, others note that barriers to employment are suffered by those with other protected characteristics and if this departure was taken then similar action may need, subject to evidence of the levels of disparity, to be applied proportionately to 'level up' the recruitment prospects of those with other protected characteristics. The dissenting cohort does not consider that this would be appropriate. However, those in favour consider that the evidence of disparity on racial and ethnic grounds, some of which is demonstrated in

this paper, is so substantial that it would be appropriate for these provisions that only relate to recruitment to be extended so that they protect not just those with disabilities, but also those whose protected characteristic is race.

b) <u>Artificial Intelligence</u>

121.16. The use of technology has been growing rapidly in recent years including the use of algorithms, automatic facial recognition, robotic process automation, and other forms of artificial intelligence (AI) and machine learning (ML).

121.17. There is a growing body of research about the impact of such technology but limited research on the impact on ethnic groups. This is particularly important given the impact of the COVID-19 pandemic on the way in which people work. Working from home or remotely has and will become more common. This suggests that the reliance on this technology will increase over time.

121.18. The effects of the use of technology on the way ethnic minority individuals apply for work, carry out their work, and have their employment terminated is also an under-researched area of law.

121.19. ELA refers to Robin Allen QC's paper entitled *Artificial Intelligence, Machine Learning, Algorithms and Discrimination Law – The New Frontier*[49]. In addition, the following papers are also relied upon:

121.19.1. *A is for Algorithms B is for Beware* – IDS Employment Law Brief 2020[50]; and

121.19.2. Artificial Intelligence and race a systematic review[51].

121.20. There are advantages in the use of technology in the employment context:-

121.20.1. In recruitment, the use of technology by recruitment agencies and in-house recruitment teams saves significant cost. Algorithms can target job adverts at certain ethnic groups. Answers to questions can be recorded, applications and CVs can be screened for key words, and facial recognition technology can be used in interviews to identify tone and facial expression. AI can be used for general background

[49] https://482pe539799u3ynseg2hl1r3-wpengine.netdna-ssl.com/wp-content/uploads/2020/02/Discrimination-Law-in-2020.FINAL_-1.pdf

[50] **Artificial intelligence and race: a systematic review, L.I.M. 2020, 20(2), 74-84**

[51] **A is for algorithms, B is for beware..., IDS Emp. L. Brief 2019, 1112, 2**

checks, and to check and assess the individuals' social media presence; robots can conduct interviews; and personality and performance assessment can be undertaken by machine learning.

121.20.2. Technology can also help collate data about pay, promotion and appraisal scores, which can be more objective and reliable than human decision-making.

121.20.3. Unconscious bias can also be interrupted through the use of reliable technology.

121.21. However, there are potentially discriminatory implications in using such technology. These include:

121.21.1. It is an unregulated area of law with little or no guidance that could lead to discrimination under the EqA. For example:

121.21.1.1. direct discrimination: treating somebody less favourably because of a protected characteristic for example, rejecting CVs based on algorithms with unintended but embedded racial biases; and/or

121.21.1.2. indirect discrimination, for example facial recognition software could amount to a provision, criteria or practice that disadvantages particular ethnic groups.

121.21.2. Employment judges and lawyers are often unfamiliar with the way that technology is used and therefore overlook areas where discrimination could be occurring. Training may be required.

121.21.3. Data subjects/individuals are not aware that they can object to the processing of their personal data and have the right not to be subjected to a detriment in consequence of the pure application of an algorithm (Article 22 GDPR).

121.21.4. AI is also being used to assess the voices of people as part of the recruitment process. Research has suggested that some forms of Voice Recognition Technology (VRT) have a high inaccuracy rate when it comes to identifying words from black people. The New York Times reported in March 2020 that:-

'The systems misidentified words about 19% of the time with white people. With black people, mistakes jumped to 35%. About 2% of audio snippets from white people were considered unreadable by these systems, according to the study, which was conducted by researchers at Stanford University.

That rose to 20% with black people52. This also has implications for any workers with accents.'

121.21.5. There has been anecdotal evidence of facial recognition being unreliable, particularly when classifying darker skinned people. However, there has only been one case that deals with this issue, namely, *Bridges v South Wales Police* [2020] EWCA Civ 1058. In this case, South Wales Police used live facial recognition in a public place. The Court of Appeal decided that the Police had failed to comply with their obligations of privacy, data protection and discrimination law. This included the fact that there were discrimination biases built into their automatic facial recognition platform.

Recommendations on AI and Decision making Technology

121.22. ELA would recommend that guidance is produced for employers and service providers by the EHRC on:

121.22.1. how to eliminate racial bias in technology;

121.22.2. training on diversity and inclusion to those who are involved in creating and using the technology;

121.22.3. capturing data and auditing the impact of the technology on different racial groups; and

121.22.4. collaborating and sharing information within an industry or sector, to help mitigate against future harm and promote advances.

121.23. ELA also considers that further research needs to be done on the specific impact of different types of technology on different racial and ethnic groups. There is an important research monitoring and oversight role for the EHRC and a need for it to develop capacity and expertise in this area.

c) <u>Voluntary Codes</u>

Race Fairness Commitment

122. To reduce the attrition of BAME workers, over 40 top law firms and recruitment firms have signed the 'Race Fairness Commitment' produced by the specialist diversity recruitment organisation *Rare*, with the primary focus being to monitor

[52] https://www.nytimes.com/2020/03/23/technology/speech-recognition-bias-apple-amazon-google.html#click=https://t.co/FMLGpNQvjT

the career progression of Black and other ethnic minority lawyers in order to challenge systemic racism.[53]

Race Equality Code 2020[54]

123. This new voluntary governance framework (www.theracecode.org) was launched on 30 October 2020 to improve the racial diversity of senior leadership teams and the boards of all organisations. It does not seek to create new obligations but a set of standards and an accountability framework based on the existing legislative framework, the 200 recommendations arising from reports commissioned into race issues to date, and best practice to achieve greater board diversity. It can be adopted across all industries and the private, public and voluntary sectors.

124. Adopters of the framework are required to carry out a self-assessment against the Code's requirements, explaining in a robust 'apply and explain' process, the outcomes of their practices. Where a requirement has not been achieved, the reason for non-achievement and intended measures to satisfy the requirements should be provided. The Code is underpinned by four key principles: Reporting, Action, Composition and Education (RACE). An annual report must be published on the organisation's website.

125. We are aware that Birmingham City Council has adopted the 'Race Equality Code 2020'[55] and await the outcome with interest.

126. ELA's view of the Code is that a simple, legally compliant voluntary framework based on familiar governance measures that can be universally applied, is a positive step. It does not require amending or improving any legislation, but may accelerate the pace of change of diverse ethnic representation in senior leadership positions well before any of the above measures in this consultation response can be implemented and begin to take effect.

[53] http://www.racefairnesscommitment.com/

[54] www.theracecode.org

[55] https://www.birmingham.gov.uk/news/article/746/birmingham_city_council_becomes_an_early_adopter_of_race_code_to_tackle_boardroom_race_equality

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