Title: Amendment of Section 147 of the Equality Act 2010	Impact Assessment (IA)
IA No: GEO 1031	**Date: 15/11/2011**
Lead department or agency: Home Office (Government Equalities Office)	**Stage:** Final Proposal
	Source of intervention: Domestic
	Type of measure: Primary Legislation
Other departments or agencies: Department for Business Innovation and Skills, Ministry of Justice	**Contact for enquiries**: Matthew King; Government Equalities Office (Matthew.King2@Homeoffice.gsi.gov.uk) Tel; 0207 035 8092

Summary: Intervention and Options

RPC: Amber

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of One-In, One-Out?**	**Measure qualifies as**
> 0	> 0	< 0	Yes	OUT

What is the problem under consideration? Why is government intervention necessary?

Following concerns raised by the legal profession in the autumn of 2010, a view has developed among practitioners that Section 147 of the Equality Act 2010 is flawed. Specifically it is alleged that the drafting does not allow an employee to seek their existing lawyer's advice prior to signing a compromise contract settling a discrimination dispute with their employer or former employer. Responses to the 2011 BIS consultation on Resolving Workplace Disputes form bodies such as the BCC, CBI and TUC also highlighted that there was an issue. The Government has sought to allay these concerns through meeting the legal profession, issuing new guidance and other published advice, but the alternative perception continues to lead to an apparent reluctance by lawyers to freely recommend such contracts and businesses to use compromise contracts,. This risks putting increased pressure on other means of dispute resolution– the ACAS COT 3 procedure and the employment tribunals, neither of which are funded to absorb such an increase in their caseload (it is estimated that before the Equality Act 2010 2,800 discrimination cases a year were resolved using compromise contracts). Parties to disputes are also encountering other burdens as lawyers feel obliged to spend extra time expressing to clients that there are increased risks of using a compromise contact compared with the alternatives. **Intervention is required to ensure that compromise contracts are seen to be fit for purpose.**

What are the policy objectives and the intended effects?

The Government wishes to restore confidence in compromise contracts as an effective means of dispute resolution at work. The intended effects are to prevent an overload of other means of dispute resolution through Acas or an increase in cases going to tribunals that could otherwise have been resolved.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 1: Do nothing and rely on guidance – Having already issued revised guidance and legal opinion, GEO could continue to monitor the position. It has not been possible to obtain accurate quantitative evidence of a build up of cases on ACAS or the Tribunals Service.

Option 2: Amend section 147 of the Equality Act 2010 (preferred) – Section 147 could be amended to make it clear that an employee can seek the independent advice of their existing lawyer prior to signing a compromise contract.

Issuing guidance and leading Counsel opinion on the drafting of Section 147 was ineffective. Therefore, option 2 is considered a last resort after non-legislative solutions have failed, and is preferred as it is the only way to visibly and decisively restore confidence in compromise contracts amongst the legal profession and business, and would ensure the UK complies with its EU obligations. It will reduce any possible future burdens on employers whilst supporting wider Government policies to ensure parties can effectively resolve disputes informally where possible.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date: 10/2015**

Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** Yes	**< 20** Yes	**Small** Yes	**Medium** Yes	**Large** Yes
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded: N/A**		**Non-traded: N/A**

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: .... Date: ....

Summary: Analysis & Evidence

Policy Option 2

Description: Amend section 147 of the Equality Act 2010

FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 88.4	Best Estimate: >0*

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	1	0	**0**
High	0		0	**0**
Best Estimate	0		0	**0**

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

Employers will only need to be aware of the changes to the law where a dispute arises, and therefore no general familiarisation costs have been monetised (see above). This cost would be included in the overall cost of negotiating a compromise contract (see evidence base). The legal profession will need to be aware that the legislation has been clarified. However, they are likely to become aware through learning as a matter of course as part of their profession, with no additional burdens. The change explicitly reverts to the pre-existing situation so no new learning is required.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	1	0	**0**
High	0		10.3	**88.4**
Best Estimate	0		> 0*	**>0***

Description and scale of key monetised benefits by 'main affected groups'

Amendment of Section 147 of the Equality Act 2010 could affect a maximum of 3,000 discrimination disputes per year where the use of a compromise contract as a legitimate option for dispute resolution is in doubt. This would lead to annually recurring benefits as follows:
Private and voluntary sector employers - £0-4.2million
Exchequer and public sector employers - £0-3.4million
Individuals - £0-2.6million
*As there is no quantifiable evidence on the number of cases that have been affected by the negative perception, and this is likely to be significantly lower than both the 100% assumed for the high range, and the 50% which would represent the midpoint of this range, we can provide no definite best estimate. Instead we can only state that some benefits would exist.

Other key non-monetised benefits by 'main affected groups'

There are non-financial negative effects of employment disputes to both employers and claimants that could be increased if compromise contracts are not being used, and more protracted methods of dispute resolution are being used. For example, 38% of employers report other non-financial negative effects on their organisation from a discrimination claim being brought against them, such as poor team atmosphere and 7% of claimants report that the dispute has increased their difficulty in finding employment.

Key assumptions/sensitivities/risks | **Discount rate (%)** | 3.5

- The failure of compromise contracts to be used as a mechanism for dispute resolution could affect as many 3,000 cases per annum. This would include an estimated maximum of 2,780 discrimination cases brought to tribunal that reach private settlement, that use a compromise contract.
- The cost of negotiating a compromise contract is around £600 to all parties involved. The employer would pay for the claimant's legal advice
- The cost of the failure of compromise contracts is half the average cost of a typical discrimination case to all parties affected

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0	Benefits: >0	Net: < 0	Yes	OUT

Evidence Base (for summary sheets)

Introduction

Compromise contracts are a means of settling equality disputes in the workplace without recourse to the Tribunals Service or where parties have been to Tribunal and decided to pull back from seeking a judgment. The other method is the Advisory, Conciliation and Arbitration Service (ACAS) COT 3 procedure, but this is not always a suitable route – it is more time-consuming and bureaucratic in nature, is not suitable for resolving disputes referred *from* tribunal and ACAS is not funded to take on dispute resolution that might usually be expected to be resolved by compromise contract.

Compromise contracts may be used to settle cases of alleged discrimination because of a protected characteristic (such as race, sex or disability), harassment linked to such a characteristic and victimisation against an employee who has, for example, previously made a complaint.

A less formal means of settlement, they are nevertheless legally binding on the parties (usually an employer and employee, or group of employees). Because of this, it is a requirement in section 147 of the Equality Act 2010 that the employee receives independent advice prior to signing a contract, to protect their interests. Such contracts were originally provided for in the Trade Union and Employment Rights Act1993, but the Equality Act 2010 brought together this and subsequent pieces of legislation governing such contracts into a coherent, single section (Section 147 – "Qualifying compromise contract").

The Government is committed to reassuring employers, employees and the legal profession that the option of solving discrimination disputes at work by compromise contract is robust and user-friendly. BIS in particular regards compromise contracts and their non-equality-related equivalentsas a key means of shifting the future burden away from judicial resolution of disputes at work. Furthermore, the existence of such arrangements is a requirement of EU law.[1]

Problem under consideration

There is a strong view amongst some lawyers that there is a drafting flaw with Section 147, in that on one reading, an employee is not able to seek the advice of their existing lawyer prior to signing a compromise contract. This would mean that the employee would have to seek a different lawyer's advice, incurring all the inconvenience and expense that this would entail – for example, having to start from scratch in explaining their complaint.

In most cases, the employee's lawyer is clearly the best qualified person to advise on a draft compromise contract, so the perception that this is rendered problematic by the drafting of section 147 inevitably has had negative implications for the wider perception of compromise contracts.

The Law Society originally raised concerns over the drafting of Section 147 in the autumn of 2010. The Government Equalities Office (GEO) reconfirmed with Parliamentary Counsel (who drafted the Act) its view that there was no defect, exchanged correspondence with the Society and met with their representatives and those of other groups such as the Employment Lawyers Association in an effort to reassure the legal profession as to the integrity of Section 147. GEO also published leading Counsel's opinion that the section worked in the way intended and GEO and the Equality and Human Rights Commission (EHRC) published new guidance on how section 147 works.

Eventually the Law Society changed its position from saying that section 147 was defective to one of neutrality. However, its initial position had by that point attained significant publicity, and it has proved difficult to overcome the perception, in the intervening period, that compromise contracts should either be avoided or approached with extreme caution.

The 2011 BIS consultation on resolving workplace disputes prompted numerous concerns from business about the current position with section 147, even though the consultation did not invite views on the particular issue. Those expressing concern over the uncertainty or calling for clarification included the Confederation of British Industry, ACAS, the British Chambers of Commerce, the Engineering Employers

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[1] Article 17(1) of the Recast Directive (2006/54/EC); Article 7(1) of the Race Directive (2000/43/EC); Article 9(1) of the Framework Directive (2000/78/EC); and Article 8(1) of the Gender Directive (2004/113/EC).

Association and the Council of Employment Judges, the Equality and Human Rights Commission and the Trades Union Congress.

Rationale for Intervention

It is likely that some cases that would, but for reluctance of lawyers to engage, have been resolved by compromise contract are instead being pushed towards ACAS or the Tribunals service for resolution. However, because there is no centrally collated record of the volume of compromise contracts entered into, and because ACAS and the Tribunals service have no way of telling how many such cases they are now dealing with, it is only possible to rely on anecdotal evidence that some lawyers are cautioning their clients against using such contracts.

Government intervention is required to ensure that Section 147 works as intended and so that employers and employees always see compromise contracts as a legitimate option for resolving workplace disputes, without having to pursue judicial proceedings.

Policy objective

The Government wishes to restore confidence in compromise contracts as a form of discrimination-related dispute resolution in the workplace – indeed it wishes to see growing use of such contracts in the future as an alternative to parties taking cases to employment tribunal. By clarifying beyond doubt that employees can ask their lawyer to advise on a draft compromise contract the legal profession will be reassured, and in turn, employers and employees will feel more confident in negotiating such contracts. Lawyers will once again confidently advise their clients that this is safe to do. This must be done whilst posing minimal burdens on wider businesses, to tackle the negative perception that compromise contracts will not work for those that otherwise may have used them.

Additionally, it is a requirement of European law that such effective arrangements are in place.

Description of Policy options

Option 1: Do nothing and rely on guidance - Having issued revised guidance and legal opinion, GEO could continue to monitor the position. It has not been possible to obtain accurate quantitative evidence of a build up of cases on ACAS or the Tribunals Service.

The danger of doing nothing is that cases may already be leading to and may continue to lead to judicial proceedings because of the negative perception of compromise contracts, at which point confidence in compromise contracts may be irreparably damaged. Doing nothing would also undermine the Department for Business Innovation and Skills' (BIS) policy objectives for reform of the dispute resolution machinery, and it potentially exposes the Government to the threat of proceedings for breach of EU law.

Option 2: Amend Section 147 of the Equality Act 2010 (preferred option) – Section 147 could be amended to make it clear beyond any doubt that an employee can seek the independent advice of their existing lawyer prior to signing a compromise contract. The amendment would be achieved by using section 2(2) of the European Communities Act 1972, since the measure arises from an EU requirement.

Only a clarifying amendment to the Equality Act will provide the necessary reassurance to employers and the legal profession. Guidance and issuing leading Counsel opinion on the drafting of Section 147 was ineffective as reassurance. Amending the legislation is believed to be the only way Government can send an effective message that Compromise Contracts remain a legitimate option for dispute resolution. An amendment would avoid the possibility of cases being instead pushed towards ACAS and the Tribunals Service, neither of which is resourced to cope with large caseload increases. It would also ensure that the UK is not challenged over its compliance with EU law. This is a last resort as non-legislative options have already failed.

Given optimum clearance conditions, we would hope to lay an amending order before Parliament in early 2012, with the amendment coming into force from April 2012. This would be complemented by a publicity drive amongst legal organisations and those bodies representative of employees and employers. Effective dissemination of the amendment to legal professionals in particular would be essential to restoring confidence.

Micro Business and Start-up Exemption

Given that it is a requirement of EU Law that the UK has in place robust arrangements for equality dispute resolution in the employment field, the micro business exemption cannot apply in this case if implementation of option 2 took place. Even if it did apply, there would be sound grounds for a waiver because small businesses, particularly the legal profession itself, are calling for the proposed amendment, which would be deregulatory in nature as it will limit uncertainty and possible additional burdens in how compromise contracts can be reached.

Costs and Benefits

Note: Throughout this impact assessment all prices have been inflated to 2011 prices using HM Treasury GDP Deflator Series consistent with 23 March 2011 Budget Report unless stated otherwise

Option 1

Number of Cases Affected

Where compromise contracts are not being used because there is a negative view about the law and they are no longer treated as a legitimate option for dispute resolution, there will be burdens to all parties involved. Compromise contracts are intended to aid and facilitate mediation and dispute resolution, and avoid formal legal proceedings taking place.

Evidence from the Survey of Employment Tribunal Applications (SETA) 2008 suggests that of the 17% of claims that are privately settled where discrimination was the primary jurisdiction, 75% made use of a compromise contract.[2] Between 2008/09 and 2010/11 there were an average of 37,500 jurisdictional claims of discrimination (not equal pay) accepted by the Employment Tribunal Service. To estimate the number of cases per annum which would have included a discrimination claim; it is necessary to adjust this figure by the average number of jurisdiction claims per case over the same period (1.72). Therefore, the estimate of the number of discrimination cases expected at employment tribunal per annum is 21,800.[3] Hence, compromise contracts would be used in as many as 2,780 discrimination cases per annum to resolve the dispute. This would be the upper limit for the annual number of cases, where claims have been already accepted, that could be affected by the negative response to the legality of using compromise contracts. However, as there is no quantifiable estimate of the extent to which this perception exists, the lower limit of the number of cases affected should be considered as zero.

Whilst a range of 0-100% of the potential number of cases affected has been used here, and is used throughout this impact assessment, the best estimate of the number affected should not be viewed as the mid-point. This would likely be an overestimate. Using 100% gives an illustrative estimate of the potential benefits only in the worst case scenario that confidence in compromise contracts has completely failed. In reality, it is likely that only a fraction of employers are avoiding using them entirely. **As there is no direct evidence of what this fraction is, no best estimate has been calculated.**

In addition to compromise contracts being used where claims have already been brought to tribunal, they can also be used to resolve disputes before such time arises. GEO has received anecdotal evidence that the negative perception exists generally as regards Section 147, and therefore is likely to have an effect on this circumstance also. Without having any strong quantified evidence on this area, it is assumed that this effect could be affecting a modest estimate of as many as 0-1% of the average annual number of discrimination cases actually brought to tribunal, and therefore leading to an additional 0-220 cases brought each year. As above, no best estimate is calculated as there is no quantifiable evidence, and this assumption was made to give an indicative magnitude of impact only.

[2] Findings from the Survey of Employment Tribunal Applications, 2008; Department for Business Innovation and Skills; 19% did not use a compromise contract and 7% ‘don’t know’

[3] Employment Tribunal Annual Statistics (GB), 2008/09-2010/11

Using the breakdown by sector of respondents to discrimination cases from the Survey of Employment Tribunal Applications (SETA) 2008, table1 sets out the number of cases per annum by sector of employer that may be affected by the negative perception of Section 147.

Table 1 – Breakdown of affected discrimination cases by sector of employer, per annum

	Percentage of Cases	Number of Cases	
		Low	High
Private Sector	52%	0	1,558
Public Sector	36%	0	1,079
Voluntary Sector	12%	0	360
Total	100%	0	2,997

Source: SETA 2008, GEO estimates

Cost of Discrimination Employment Tribunal Cases

Exchequer

The average cost of an accepted employment tribunal claim is calculated using the Employment Tribunals Service Annual Accounts and Report 2005/2006[1]; net operating cost divided by the number of claims accepted. Therefore, the average cost to the exchequer per claim accepted is **£693** in 2010/2011 prices.

Individuals

The average costs to individuals are calculated using SETA 2008, and reflect average values where the primary jurisdiction of a claim was discrimination[2]. The cost to the individual of market work forgone as a result of claiming is represented by loss of earnings, which is also taken from SETA 2008. The overall average cost of a discrimination case is **£1,830**.

Table 2 – Cost of a discrimination case to the individual

Cost for Advice and Representation	£887
Costs incurred from travel and communication	£31
Loss of Earnings	£913
Total	**£1,830**

Source: SETA 2008 adjusted for zero values

Employers

The average costs to employers are calculated using SETA 2008. This is calculated as the cost of advice and representation, time spent by corporate managers and senior officials, and time spent by other employees, namely dedicated personnel, training and industrial relations managers, on the case. The median hourly wage excluding overtime is assumed to be £48.06[3] and £27.66[4] respectively for these two roles. The overall average cost to an employer of a discrimination case is **£5,498**.[5]

Table 3 – Cost of a discrimination case to the employer

[1] Employment Tribunals Service Annual Accounts & Report, 2005/2006;http://www.employmenttribunals.gov.uk/Documents/Publications/ARA0506.pdf; More recent accounts for the Employment tribunals Service are not available as annual reports are now published under the Tribunals Service as a whole, which are not considered as indicative of the true actuarial cost

[2] Note, all cost figures taken form SETA 2008 in this Impact Assessment are adjusted from median figures to account for zero values

[3] ASHE 2010 –111, incl. 24% uplift for non-wage labour costs – Note: uplift derived from European Labour Costs Survey (2007)

[4] ASHE 2010 –1135, incl. 24% uplift for non-wage labour costs

[5] Assumes 7 hour day

Time spent on case by directors & senior staff	£2,019
Time spent on case by other staff	£581
Cost for advice and representation	£2,898
Total	**£5,498**

Source: SETA 2008 adjusted for zero values, ASHE 2010

Settlements and Compensation

No consideration of the actual cost of settlements and compensation awards to employers is considered here as this would be indicative of non-compliance with the law. Likewise, these transfer payments to individuals are also not considered within this assessment as benefits.

The Cost of a Compromise Contract

After consulting legal advice from Treasury Solicitors, it is estimated that both parties would each require 6 hours of a legal professional's time in reaching a legitimate compromise contract. Treasury Solicitors' advice is also that the employer would typically pay for the claimant to receive legal advice on the compromise contract. The median hourly wage excluding overtime for a legal professional is assumed to be £30.41.[6] In addition to the time of the lawyer, the cost of the employer's and claimant's time should be considered. The median hourly wage costs of a corporate manager or senior official and all employees are £48.06 and £14.16 respectively.[7] On average, once the two parties had agreed to use a compromise contract to resolve their dispute, it should require at most half a day of their time. Therefore, the cost of a compromise contract is estimated at **£583.**

The Cost of Compromise Contracts failing as a Legitimate Option for Dispute Resolution

If compromise contracts are not being used where previously they were as a result of the negative perception regarding Section 147, there will be real costs to all parties involved. Cases may subsequently be referred to alternative dispute resolution, either through progressing through the tribunal process, or by being referred to bodies such as ACAS. Since these cases would involve issues between the parties that would otherwise have been resolved by a compromise contract, they are unlikely to be as costly as typical. To estimate this, an assumption of 50% of the average costs for any discrimination case, irrespective of outcome, has been used. Therefore, the average burden of the compromise contract failing as an option, minus the cost that would have been incurred form coming to such a resolution, is **£3,428** (see table 4).

Table 4 – Cost of Compromise Contracts failing as a Legitimate Option for Dispute Resolution

Employer	£2,216
Individual	£866
Exchequer	£346
Total	**£3,428**

Source: SETA 2008 adjusted for zero values, ASHE 2010, GEO estimates

Non-Monetised Costs

Tables 5 and 6 show some of the non-financial negative effectives of being involved in discrimination related workplace disputes from SETA.

A large number of claimants report negative effects of bringing discrimination cases. Almost half of these report that the experience is stressful/emotionally draining/depressing, and 7% have difficulty in finding subsequent employment. 38% of employers also experience negative non-financial effects on their organisation as a result of a

[6] ASHE 2010 – 241, incl. 24% uplift for non-wage labour costs
[7] ASHE 2010 – 111 & All, incl. 24% uplift for non-wage labour costs

claim being brought against them. Compromise contracts are typically a less burdensome form of dispute resolution. If these are not working as intended, it is reasonable to assume that the non-financial negative effects of the affected workplace disputes could be increased.

Table 5 – Percentage of claimants in cases where discrimination was the primary jurisdiction reporting non-financial negative effects

	Percent reporting negative effect
Stressful/emotionally draining/depression	48%
Physical health problems	16%
Difficulty in getting re-employed	7%
Loss of confidence/self-esteem	12%
Financial problems	5%
Lost hope/faith/trust in the system	5%

Source: SETA 2008

Table 6 – Did discrimination case have any non-financial negative effects on employer's organisation

	Percent reporting negative effect
Yes	38%
No	60%
Don't know	2%

Source: SETA 2008

Summary

The overall cost of compromise contracts failing as a legitimate option for dispute resolution would be **£0-10.3million** per annum, with our best estimate being that this cost is at least greater than zero

Option 2

Costs

Transitional Costs

In the uncommon eventuality that employers encounter a discrimination dispute with an employee, they will subsequently need to be aware of the option of using a compromise contract, without difficulty. This is therefore expected to be a minimal familiarisation cost on employers.

In practice, familiarisation with specific guidance on the use of compromise contracts would only be required of an employer where a dispute had been registered. Hence, this has been accounted for in the overall average cost of using the compromise contract approach.

It is assumed that legal professionals will find out about the amendment of Section 147 through professional bodies such as the Law Society, as part of their wider professional development and need to monitor changes to the law. Therefore no additional familiarisation costs are assumed for this group.

Therefore, there will be no significant familiarisation costs as an impact of this policy. It is simply clarifying a reversion to pr-existing practice.

Benefits

Annually Recurring Benefits

Amending Section 147 to meet the concerns of those who believe it does not currently offer a legitimate means of dispute resolution would lead to benefits at most equal to the described costs of doing nothing in option 1. This benefit would be £0-10.27million, with a best estimate that it would at least be greater than zero.

Table 7– Summary of annually recurring benefits of option 2 by key affected groups

	Annually recurring benefits	
	Low	High
Private and Voluntary Sector Employers	£0	£4.25million
Exchequer and Public Sector Employers	£0	£3.43million
Individuals	£0	£2.59million
Total	**£0**	**£10.27million**

Source: GEO estimates, ASHE2010, SETA 2008, Employment Tribunal Service Annual Statistics 2008/09 – 2010/11

Non-monetised benefits

There would be non-monetised benefits to employers and employees where compromise contracts avoid other protracted dispute resolution options such as resorting to the Tribunals Service. These would be equivalent to the types of non-monetised costs described under option 1.

Risks and Assumptions

The main risks and assumptions associated with this measure, including as regards the monetisation of the impact, are as follows:

- Currently there is no available quantifiable evidence on the true extent of the negative perception regarding Section 147 of the Equality Act, and the impact it is having. However, it is clear that there is some negative impact, thus making a strong case for targeted government intervention to correct this. The monetisation of the impacts of the options here take this into consideration by using a wide range for the assumed number of cases affected, to represent the difference between a complete failure of compromise contracts, and either no or minimal impact.
- There is no quantifiable evidence on how often compromise contracts are used to resolve disputes before a claim is made to tribunal. The assumption used under option 1 is however considered to be modest given the evidence that 75% of cases where a claim is formally made and the parties seek private settlement use a compromise contract.
- The assumed cost of a compromise contract is considered reasonable, and legal advice was sought to estimate the amount of a legal professional's time that would typically be needed.
- Where compromise contracts fail, it is inevitable that the dispute will either enter or continue formal proceedings either via ACAS or the Employment Tribunal Service. The cost of this has been estimated on average to be half the average cost of a standard discrimination claim. This assumption was made on the basis that claims where a compromise contract would be appropriate, would involve issues that would typically be quicker and less burdensome to resolve than the average discrimination dispute.
- There is a risk that not amending Section 147 could leave the UK in a position where it was liable to challenge under EU law. The likelihood of this challenge being successful would depend on how badly compromised the domestic dispute resolution arrangements were considered to be by the European Commission, once alerted to the issue. We would not however expect anything to happen in this regard soon.

Direct Costs and Benefits to Business (One-in, One-out)

For the purposes of One-In-One-Out scoring we calculate that this measure would bring at least some net benefits to business, without being able to form a best estimate. This measure is in scope of OIOO as it is an amendment of existing regulation that is an EU requirement, and should subsequently be deregulatory in nature. Therefore, this measure is counted as an OUT.

Wider Impacts

Amendment would help to provide an additional means of dispute resolution in employment. It gives employers and employees a means of settling a discrimination dispute relating to any protected characteristic (race, disability, sex etc) short of going to tribunal.

An Equality Impact Assessment has not been prepared, as there are no negative impacts arising from this proposal.

Small businesses should disproportionately benefit from the proposed amendment, since compromise contracts tend to be used more in the private sector, where there are more small employers and because the legal profession, which would advise on the drawing up of such contracts, is typically made up of small businesses.

Amendment would also have a positive impact on the tribunal system, by reducing likely caseload, as greater numbers of disputes are settled informally.

Monitoring and Review

The Government Equalities Office is committed to reviewing the Equality Act as a whole, and the provision of compromise contracts, will form part of this review. This review will provide a proportionate check that the provision is operating as expected and will assess the impact of any changes to the wording of this provision.

The precise review approach is being determined in the context of the wider Equality Act review and is being considered alongside the other projects within the Evaluation Framework. But, due to the nature of this provision, we expect the review will as a minimum involve:

- monitoring the use of compromise contracts (and alternatives)
- monitoring and evaluating legal cases arising
- gathering stakeholder views

Summary and Implementation

Option 2 is preferred as this would at least have some positive impacts for business, the Exchequer and individuals where compromise contracts can be used in effective dispute resolution.

Whilst the evidence of the extent of the problem is anecdotal at best, doing nothing would only continue to perpetuate the negative impacts that may be occurring, and possibly lead to a growing lack of confidence by employers and the legal profession regarding Section 147.

An illustrative implementation timetable for option 2 would be as follows:

January 2012 – Draft guidance published for dissemination by legal profession and employers

February 2012 – Amending order laid before Parliament

April 2012 – Amendment comes into force

Explanatory Memorandum to

The Equality Act 2010 (Amendment) Order 2012

2012 No. [XXXX]

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument clarifies the meaning of part of section 147 of the Equality Act 2010 ("the Act"). That section sets out the conditions under which a compromise contract settling a case brought under the Act can be lawful. The instrument maintains the effect of the current drafting, but makes its meaning more transparent to address a perception that the section is currently defective.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The Act replaces previous discrimination legislation, such as the Race Relations Act 1976 and the Sex Discrimination Act 1975, some of which contained provisions equivalent to Section147.

4.2 Section 147 is a provision within Part 10 of the Act (Contracts etc). It sets out the conditions that must be fulfilled in order for a compromise contract settling a dispute under the Act to be legally valid. This Order is intended to clarify, through an amendment to subsection (5) of section 147, that a complainant may use their lawyer as the independent advisor who must, under the Act, advise on a contract prior to it being signed. Section 147 came into force in October 2010, along with most of the Act.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

The Home Secretary, the Rt Hon Theresa May MP, has made the following statement regarding human rights:

"In my view the provisions of The Equality Act (Amendment) Order 2012 are compatible with the Convention rights".

7. Policy background

- **What is being done and why**

7.1 The Act is intended, among other things, to provide employers and employees with a choice of effective dispute resolution mechanisms. It also implements the requirements of Council Directives 2000/78/EC, 2000/43/EC, 2004/113/EC and 2006/54/EC. These require member States to introduce judicial or administrative procedures which, where deemed necessary by the Member States, include conciliation procedures for the enforcement of the requirements under the principle of equal treatment. They also provide that all terms in a contract which are contrary to the principle of equal treatment are or may be null and void. Section 147 is specifically concerned with an option which Member States may adopt, to permit prohibited terms not to be made null and void.

7.2 The Order addresses the perception of some lawyers and employers that there is a problem with the current drafting of section 147. The proposed amendment should ensure that in cases of alleged discrimination, employers and employees feel confident in using compromise contracts as a means of dispute resolution and lawyers feel confident in recommending such contracts to clients.

7.3 Compromise contracts are one of two methods (the other being the Advisory, Conciliatory and Arbitration Service (Acas) "COT 3" procedure) of resolving employment disputes without the need to go through the formal Employment Tribunal process. They can also be used as an alternative means of resolution after a case has entered the tribunal stage. Such contracts are very similar to compromise agreements that are used to resolve employment rights disputes (for example, unfair dismissal). Compromise contracts are a means of settling disputes concerning alleged discrimination, harassment or victimisation by an employer against an employee. Often they are used to resolve cases involving a combination of employment and discrimination claims.

7.4 A key principle of compromise contracts is that the complainant must seek independent advice when drawing one up with their employer, to ensure that their interests are fully safeguarded in the process. Section 147 sets out who can be an independent adviser for this purpose, and it also states who is excluded from being such an adviser. In the autumn of 2010 members of the legal profession and the Law Society publicly expressed the view that on their reading, section 147 was defective because it did not allow a complainant to use their lawyer as an independent advisor prior to signing a contract. They specifically drew attention to sub-section (5)(d) of section 147, which, if read out of context, appears to stipulate that a person acting for the complainant (e.g., their lawyer) cannot be their independent advisor. If this were so it would not be a logical or desired outcome since a complainant's lawyer would in most cases be the logical choice to provide the requisite independent advice.

7.5 The Government maintains that section 147 works in the way intended. Subsection 147(4) sets out who can be an independent advisor for a complainant. Subsection 147(5) then sets out who, irrespective of subsection 147(4), cannot be an independent advisor. Subsections 147(8) and (9) then set out who would be considered persons involved in or parties to a dispute and so not suitable to be an independent advisor.

7.6 However, despite Government reassurances, there is anecdotal evidence as well as evidence from recent consultation (see below) that people in the legal profession and business continue to lack confidence in using compromise contracts to settle discrimination cases. There is some corresponding evidence of an increase in referrals to Acas which might be attributable to the uncertainty, but in the absence of data collection on the use of compromise contracts, it is not possible to be definitive about this.

7.7 Given that compromise contracts are likely to constitute an increasingly important means of dispute resolution in future, the Government is proposing to amend the legislation to restore confidence in the system, which currently appears to be lacking. We are doing this by amending

section 147(5), to put it beyond doubt that a person acting for the complainant (e.g. their lawyer) is not disqualified from advising him or her in relation to a compromise contract.

8. Consultation outcome

8.1 No specific consultation was undertaken on this order. However, a more general consultation was carried out in 2007 – *"A Framework for a Fairer Future: Proposals for a Single Equality Bill for Great Britain"*, which proposed the harmonisation and simplification of existing equality legislation. It also had the aim of ensuring *"that people can resolve their disputes in ways that are accessible, proportionate and effective."* Compromise contracts were not specifically covered as part of the consultation because the then Department for Business, Enterprise and Regulatory Reform (BERR) ran a concurrent "Dispute Resolution Review" on workplace disputes. The BERR review found that compromise agreements were viewed as a valuable means of alternative dispute resolution by business.

8.2 More recently, the Department for Business, Innovation and Skills completed a further review on resolving workplace disputes, a consultation on which closed in October 2011. A number of respondents, including a range of organisations representing business expressed concern about the uncertainty surrounding the legal status of compromise contracts.

9. Guidance

9.1 No guidance has been specifically published alongside this instrument. Guidance for employers and employees on compromise agreements is available both on the Government Equalities Office page of the Home Office website and from the Equality and Human Rights Commission, as part of wider guidance on the Act.

10. Impact

10.1 The impact on business, charities or voluntary bodies as a whole is minimal, but those in dispute with their employees will potentially benefit if their preferred means of settling the dispute is through a compromise contract.

10.2 The impact on the public sector as a whole is minimal, but with the same potential benefits explained above.

10.3 A full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available at from the Home Office at http://homeoffice.gov.uk/equalities and is published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.

11. Regulating small business

11.1 This instrument applies to small business.

11.2 No steps have been taken to minimise the impact of the requirements on firms employing up to 20 people because this instrument is clarifying existing law in a way that does not burden business.

11.3 A range of guidance on the Act has been prepared and published by bodies including the Equality and Human Rights Commission, Acas and the British Chambers of Commerce, some of which is tailored particularly for small businesses. No guidance is planned to assist small businesses with this particular instrument for the reason given above.

12. Monitoring & review

12.1 As with the Act, the effect of this instrument will be monitored and reviewed on an ongoing basis by the Government and the Equality and Human Rights Commission.

13. Contact

Mr Matthew King at the Government Equalities Office (Tel: 0207 035 8092 email: Matthew.king2@homeoffice.gsi.gov.uk can answer any queries regarding this instrument.