



Discrimination Law Association

**DISCRIMINATION LAW ASSOCIATION
RESPONSE TO THE DISCRIMINATION LAW REVIEW
REPORT A *FRAMEWORK FOR FAIRNESS*
SEPTEMBER 2007**

Introduction

The Discrimination Law Association ('DLA') is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind, the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

The DLA is a national association with a wide and diverse membership. The membership is growing and currently consists of over 400 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

The membership of the DLA has considerable experience in working in the field of discrimination law and in working with the statutory commissions. We are, therefore, well placed to comment on the Green Paper, *A Framework for Fairness*. This response has been prepared by a team of DLA members including leading practitioners, policy workers and academics.

The DLA welcomes the government's commitment to tackling discrimination and ensuring greater equality across society. We recognise and support the many positive developments that have occurred over the past decade, including the creation of the Disability Rights Commission; the introduction of positive duties on public bodies to tackle discrimination and promote equality in relation to race, gender, and disability; legislation outlawing discrimination on the grounds of age, religion or belief, and sexual orientation in employment; the introduction of civil partnerships and the enactment of the

Human Rights Act. We welcome and support the government's continued commitment to the creation of a single equality act.

We welcome the creation of the Discrimination Law Review as part of the process to prepare for a single equality act. In its terms of reference the DLR set itself the task of:

- considering the fundamental principles of discrimination legislation and its underlying concepts;
- considering the spectrum of enforcement options; and
- creating a clearer and more streamlined equality legislation framework which produces better outcomes for those who experience discrimination;
- creating a fairer legislative framework with consistency in protection afforded to different groups.

This Green Paper provides the first opportunity for individuals and organisations concerned about discrimination to formally submit their thoughts and ideas to the DLR. For this reason the DLA's response, as well as addressing the issues raised by the questions in the consultation paper, addresses issues that, in our view, were not given adequate or proper consideration in the Green Paper.

EXECUTIVE SUMMARY

Purpose Clause

1. A single equality act should reflect the role that anti-discrimination laws play in ensuring that all individuals have the same opportunities to participate in society as equal citizens. Any single equality act should be prefaced by a purpose clause drafted along the lines suggested by the equality commissions.

Direct Discrimination

2. The DLA agrees that the essence of direct discrimination lies in its comparative nature. Any court or tribunal adjudicating on a direct discrimination case must consider whether the claimant has been treated 'less favourably' on the prohibited grounds. Nevertheless, the DLA considers it important to distinguish between:
 - A consideration of the type of evidence needed to persuade a tribunal/court that less favourable treatment was on the prohibited ground; and
 - The formal need to find a comparator in every case.
3. As explained in *Shamoon v Chief Constable of the RUC* [2003] IRLR 284 HL, the DLA does not consider it necessary to establish a real or hypothetical comparator in order to establish 'less favourable treatment'. The search for a comparator can be over-emphasised, and whilst it can be useful in some cases, in others it can lead to a sterile line of enquiry. To support this approach, and to prevent misinterpretation and to focus the mind of a tribunal or court on the entirety of the evidence, the DLA recommends amending the current definition of direct race, sex, etc. discrimination so that it takes place where a person, on the relevant grounds, treats another 'less favourably than he would treat other persons'. Removal of the verb 'treats' and simply retaining 'would treat', focuses the mind of the tribunal or court on the entirety of the evidence rather than whether a particular actual comparator stands up to examination. The DLA also recommends removal of support clauses analogous to RRA s3(4). The comparative approach would be retained by the primary definition of direct discrimination, but the removal of the support clause would prevent misinterpretation.
4. The DLA further recommends that a statutory Code of Practice be drawn up by the Commission for Equality and Human Rights (CEHR) which would stress the need to consider hypothetical rather than actual comparators, and more importantly, to look in the round at all evidence. Such a Code of Practice should give examples of the different ways in which evidence of less favourable treatment can be adduced.

Disability Discrimination

5. The DLA would go beyond the DLR proposals in order to achieve greater consistency in the definitions of disability discrimination - in every case by levelling up rather than down:
 - A single definition of discrimination for all of the areas currently within Part 3 DDA;
 - A single definition of discrimination for the areas currently within Part 4 DDA;
 - Direct disability discrimination, that currently applies to employment and vocational training, should apply to all areas ;
 - Indirect discrimination should be included as a form of disability discrimination;
 - The definition of disability discrimination should include discrimination by association and perception as required by the EC Employment Framework Directive.
6. The DLA agrees that there should be a single objective justification test for disability discrimination across all areas; the justification test should be the same as the test to justify indirect discrimination, namely that the conduct has a legitimate aim, and the means of achieving that aim are appropriate and necessary.
7. The DLA supports a single threshold – substantial disadvantage – triggering the duty to make reasonable adjustment, and it is important that the threshold for unlawful action (currently in s.19(1)(b)) is also changed to substantial disadvantage rather than impossible/unreasonably difficult.
8. Contrary to the conclusion of the DLR, the DLA recommends that a single equality bill should adopt a definition which is based on the social model of disability (having a physical or mental impairment, with no qualification as to its effect upon an individual or as to the length of time for which it must last), and which focuses examination on the treatment which has been afforded to a disabled individual rather than whether or not they meet specific criteria for having protection.
9. Children should be given the ability to take DDA claims in their own name. This is particularly important for children in care where the local authority is both the ‘parent’ and potentially the body against which a disability discrimination claim is brought. Tribunals should be given the power to award compensation for disability discrimination in pre-16 education.
10. DDA claims in relation to education cases should be heard in specialist tribunals. Given the link between exclusions and special educational

needs, disability related exclusion appeals should be heard by special education needs and disability tribunals.

Indirect Discrimination

11. A single equality bill should not merely harmonise the definitions of indirect discrimination, it must also give full effect to the relevant EC Directives. The DLA recommends that the definition of indirect discrimination in the single equality bill should adopt the formulation in the Directives, so that indirect discrimination would occur where a provision, criterion or practice would put members of one or more protected groups at a disadvantage. This is consistent with the DLA's recommendation regarding the definition of direct discrimination, which should be defined as occurring when on one or more of the protected grounds a person treats another less favourably than they would treat other persons

Objective Justification Test

12. The harmonised test should adopt the formulation in the EC Directives namely that: 'The provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

Genuine Service Requirement

13. The DLA favours the introduction of a genuine service requirement test in addition to a limited number of specific exceptions if, and only if, the GSR was limited to "ensuring full equality in practice", including by the elimination of specific disadvantage suffered by persons of groups defined by reference to one or more of the protected grounds.

Goods, Facilities & Services, and Public Functions

14. The DLA supports a harmonised approach to addressing discrimination in GFS and public function as long as there is no reduction in the scope of protection, and as long as exclusions presently applicable only to discrimination in the provision of GFS or in the exercise of public functions are not extended to cover both sets of unlawful acts.

Equal Pay

15. Equal pay is a fundamental right under European Community law and cannot be sacrificed to convenience. Further, the UK Government is obliged by Article 141 to 'ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.
16. There is a broad degree of consensus that the current approach to the gender pay gap is not working. The DLA believes that an adequate response to the gender pay gap involves imposing obligations on employers to eradicate pay discrimination. The conclusion of the consultation paper (para 3.7) that 'at present, the evidence does not support legislation mandating equal pay reviews' is in our view irrational given the weight of support for such reviews.
17. Obligations on employers must include obligations to review existing pay structures; to determine the extent of and reasons for pay gaps between men and women; to publish the results of the review; and to take timely, transparent and adequate steps to eliminate any such pay differences which are tainted by sex discrimination. These obligations must in our view be carried out in conjunction with trade unions whose enforcement role will be vital.
18. Our principal suggestions concerning individual equal pay claims are that:
 - i. The comparator-based approach should be retained in modified form but should operate in addition to, not (as at present) instead of, a discrimination-driven approach;
 - ii. It should be possible to challenge discrimination in contractual terms (including pay) by reference to a hypothetical comparator under the normal provisions of a single equality act.
 - iii. Such discrimination-based claims could include challenges, inter alia, to disproportionate pay differences. They would also benefit women in very predominantly female workplaces, women whose jobs have been contracted-out, and those who, for other reasons, have no suitable actual comparators for the purpose of a comparator-based challenge.
 - iv. The decision in *Robertson v Defra* (which is in our view incompatible with EC law) must be reversed by statute.

Positive Action

19. The DLA does not agree that the term "balancing measures" which the Green Paper has adopted in place of the term "positive action", which has formed part of UK and EC equality legislation for many years. "Balancing" has various definitions; it could imply a comparison or achieving a state of equilibrium, but in our view overcoming disadvantage is a more dynamic and complex task. "Positive action", which we accept has in the past

mistakenly been confused with positive discrimination, conveys doing something to achieve a desired outcome that is not necessarily measured against the status or degree of disadvantage of other groups.

20. The Equalities Review noted that 'there are some areas where inequalities are so deep seated that not taking alternative action is condemning a whole generation or more to living with disadvantage and inequality.' The DLR proposes to broaden the law to 'permit measures which prevent or compensate for disadvantages or to meet special needs linked to the protected ground.'
21. The DLA recognises that the existing provisions for positive action are too restrictive and outdated. It supports the proposal for a broader framework for positive action.
22. Positive action measures must be capable of addressing disadvantages based on multiple/intersectional grounds.
23. The DLA proposes that primary legislation should include a broad provision for positive action and that this be supported either by regulations or a code of practice or both which provide greater clarity, especially for employers and service providers, on the types of measures which may be permitted. However, it will be important to secure balance between clarity which is not prescriptive and flexibility which makes it easier to adopt measures.
24. The DLA does not support the codification of ECJ jurisprudence in this area as it is still evolving: the jurisprudence is based on gender equality and mainly in the field of employment. We are not aware of any cases brought under the Race Directive or Employment Framework Directive, so it is not known if different interpretations will be adopted, where there is not the obvious 50-50 representation model. For example, we would hope that 'disadvantage' would be interpreted more widely than statistical under-representation or special need, and that achievement of social objectives such as cohesion, integration, and public confidence would be regarded as legitimate aims. Also, it is not known how this broad provision will be applied to education, housing, health services, provision of goods and services that are within the scope of the Race Directive.
25. The DLA supports the proposal that all protected groups should benefit from measures to meet particular needs but the measures should not be restricted to meeting needs in relation to education, training, welfare and other benefits.
26. We agree that the CEHR should not have a power to approve positive action schemes: this would be cumbersome, slow and more likely to deter rather than to encourage an employer or service provider to adopt positive action measures.
27. The DLA proposes the continuing and/or broadening, if necessary, of the scope of permitted voluntary positive action in the selection of candidates

by political parties. We agree that political parties can do more by way of mentoring, shadowing, outreach, encouragement etc. Political parties should be encouraged to take full advantage of positive action provisions in the legislation. These measures would not require new or additional measures – just sustained commitment and leadership. We consider that selection criteria referring to protected grounds other than gender are more problematic: who is an ethnic minority, which faiths, what age groups would count for the purposes of the shortlist?

Public Sector Equality Duties

28. The DLA's support for the single equality duty is subject to the following caveats:

a) The single duty ought to be extended to cover all discrimination strands. There is now absolutely no justification for the two-tiered system of legal regulation which would be reinforced by the failure to extend the duty to the new strands in a new piece of equality legislation. Harmonisation is very long overdue. If there is evidential support for the prioritisation of a particular strand (whether old or new) by a particular public authority this can be done within the context of a single duty of general application. Again, particular regard should be had to section 3 of the Fredman and Spencer response.

c) The general duty ought to apply to all public authorities. The principle of proportionality is easily capable of taking account of the nature, size and resources of any relevant public authority.

29. The DLA supports a clear statement of purpose in relation to the public sector duty. However, this ought to be tied to a clearly worded purpose clause and/or preamble to the legislation which makes specific reference to the need to tackle structural and historic disadvantage suffered by particular groups, often at the intersection of a number of grounds.

30. The DLA supports the preservation and fortification of enforceable specific duties. The DLA acknowledges the weaknesses in the specific race equality duties. It is important to recognise, however, that there is always going to be a need to place procedural obligations upon public authorities. To fail to do so will deprive the authorities of statutory rules as to compliance with the general duty and would make it impossible to measure and/or challenge failures to take pre-requisite steps. The absence of requirements as to outcomes is a significant part of what renders the specific duties toothless. The specific duties therefore require to be sharpened and strengthened, not diluted. The DLA cannot understand how a proposal to replace the weak specific duties (compliance with which is at least reviewable by a court at the instance of the relevant Commissions) with non-enforceable principles can possibly be taken to improve the operation of the duty. In this sense the DLA agrees with the streamlined approach prescribed in Section 2 of the

Fredman and Spencer response and would adopt and support the six steps outlined.

31. DLA also recognises that there would be much benefit to be gained by a consultative process which permits the scope and character of the duty, particularly as it may require to be satisfied differently in relation to different strands, to be carefully considered. A time scale which would facilitate adequate consultation with stakeholders ought to be adopted.

Public Procurement

32. There is wide agreement that public sector procurement can be an effective lever to secure good equality practice in the private sector. The race, disability and gender equality duties have led to a fresh focus on public procurement as one tool for the elimination of discrimination and promotion of equality. The CRE, DRC and EOC have issued detailed guidance indicating how authorities can comply with their equality duties in carrying out procurement and illustrating how the promotion of equality does not conflict with EU Rules and UK laws and policies. This guidance has generally been well received by public bodies. The 2004 EC Directive on public contracts provides for social issues to be taken into account in public procurement. The Directive confirms that a finding of a breach of national laws outlawing discrimination in employment is a ground for disqualification from participation in a contract; the DLA agrees with CRE, DRC and EOC that, in deciding whether to disqualify any contractor against whom such a finding has been made, public authorities should apply a proportionate assessment of any remedial measures. There remain divergent views in the UK regarding the place of public procurement within public sector equality duties.
33. The DLR has concluded that there is no need to include equality in procurement in legislation defining the general equality duty or to make it a specific duty; instead the DLR recommends practical guidance agreed jointly by the CEHR and government. The only question posed in the Green Paper concerns the contents of such guidance. There is already good, clear guidance published by the CRE, DRC and EOC, guidance published by the Office of Government Commerce and documents produced by the European Commission as well as guidance within the preamble to the EC Directive. Yet the majority of public authorities in Great Britain remain reluctant to accept the need for equality considerations to form part of their procurement processes. Therefore the DLA does not agree that what is required is more guidance.
34. The DLA recommends that the single equality bill should include a separate provision requiring public authorities designated by the Secretary of State to take all reasonably practicable steps in the procurement of works, goods and services to eliminate discrimination and to promote equality of opportunity. This statutory requirement should be supported by regulations setting minimum standards and a CEHR code of practice offering guidance on implementation.

35. In complying with this provision, authorities should make appropriate adjustments to their procedures to widen their supplier base to include SMEs owned or led by members of protected groups.
36. Public authorities currently subject to the race, disability and gender equality duties should ensure that any person engaged in procurement has been trained on their equality duties.
37. Government ministers should demonstrate commitment and leadership, and any national equality objectives should include an equality in procurement objective.
38. As an early priority, the CEHR should issue consolidated guidance on equality and public procurement.

Promoting Good Equality Practice in the Private Sector

39. The DLR's consideration of the private sector has been disappointingly limited, entailing a 'light touch equality tool' that would either be a voluntary assessed accredited standard or merely an equality compliance/check tool (ECT). Moreover, the precise nature of the ECT is not set out in the Green Paper.
40. Without the making of the accreditation compulsory or the introduction of some form of monitoring procedure, the ECT will have no greater impact than existing legislation and will therefore be ineffective in achieving diversity goals. The DLA proposes that the Equality Act (Codes of Practice) be amended to include a provision enabling the CEHR to issue a Code of Practice to cover equality and the promotion of diversity within the private sector.
41. Further, the DLA proposes that provision should be made in the equality act for regulations to be issued in relation to compliance with, monitoring of, and sanctions for non-compliance with the Code of Practice. The DLA proposes two possible models for this, an 'MOT model' and a 'Companies model'.

Effective Dispute Resolution

42. Effective resolution of disputes and enforcement of anti-discrimination law is a fundamental part of any reform of anti-discrimination law.
43. An employer striving towards the best anti-discrimination practice, needs to be sure that their competitors have to do the same. If responsible employers are undermined and under-cut by unscrupulous employers who ignore anti-discrimination law, secure in the knowledge that there will be no sanction, this will have serious consequences for the employer, employee and the economy.

44. EU law requires that sanctions against discrimination be “effective, proportionate and dissuasive”. To meet this requirement, employment tribunals should have powers to order reinstatement and reengagement, recommend changes of practice in light of the evidence in the case, grant interim relief and award exemplary damages.
45. Policies in several different areas are coalescing to create a situation in which the gains that a single equality act provide will be undermined by the absence of any support for individuals who wish to challenge unlawful practices. The CEHR will support only a small number of ‘strategic’ cases. Funding for local law centres, historically specialists in discrimination law, is being cut and law centres forced to close. Changes in the funding for legal aid, being introduced by the Legal Services Commission, will mean that legal service providers are only able to provide an average of 4.5 hours of advice and assistance on to an individual who faces discrimination. This is manifestly inadequate. These changes will lead to a drastic reduction, if not complete disappearance, in the legal advice and assistance available to victims of discrimination.
46. We support the extension of voluntary conciliation to all strands, but this must be voluntary – compulsory mediation will be counter-productive. Penalties should not be attached to the failure to make attempts to resolve/settle disputes. The DLA believes that it is inherently inequitable that costs should be awarded against a successful claimant in a discrimination case because he or she did not attempt to settle his/her case out of court. This is particularly unjust in cases where a claimant does not settle because the respondent wishes to impose a confidentiality clause on the settlement. The approach the government should take, therefore, is to offer more options than currently exist for parties who are genuinely happy/willing to negotiate.
47. The CEHR should use its powers to provide conciliation for GSF cases across the board.
48. The DLA is aware that there is widespread dissatisfaction with the county courts as a venue for discrimination cases. Court fees and the risks of costs, often disproportionate to the level potential damages, operate as a major deterrent. Court fees are prohibitively expensive. The exemption from fees should be consistently applied to all those entitled and claimants should be advised of their rights. To make justice accessible, procedures should be simplified; for example, issuing should be possible by fax and should not require a fee.
49. The DLA argues that judges should receive training in discrimination law and the issues that are likely to arise in discrimination cases as a pre requisite to hearing discrimination cases. However, the DLA is concerned about designating certain county courts to hear all county court discrimination cases.
50. More needs to be done to improve the county court. The case process needs to be made quicker, less stressful and cheaper. The risks of costs

orders being made against unsupported litigants, in the county courts in particular, and the costs of issuing proceedings in the county courts create an obvious deterrent and obstacle to bringing proceedings.

Multiple Discrimination

51. While the DLR has raised the issue of intersectional discrimination only peripherally, the DLA considers it to be a central issue in discrimination law. Intersectional discrimination currently has no remedy under UK law. This is because, following the Court of Appeal decision in *Bahl v Law Society*, each ground of discrimination must be separately considered and a ruling made in respect of each even if the claimant's experience was discrimination on an indivisible combination of grounds. This submission gives real examples of cases in which the current law does not allow the true experience of a complainant to be expressed.
52. The DLA submits that the grounds on which a complaint of discrimination or harassment may be made must be formulated in such a way as to permit a claim on intersectional grounds. Our submission sets out the details of the way in which this could be achieved.

Parents and Carers

53. Indirect sex discrimination is a clumsy vehicle for protecting the right to care for children. This is because it requires the complex stages of the definition of indirect sex discrimination to be proved. Further, indirect sex discrimination does not protect unmarried men who are carers.
54. The Right to Request flexible working should be extended to employees caring for children in need of care who are between the ages of 6 and 18 as they fall between the gaps of the current legal framework.
55. The Right to Request Flexible Working should be amended, in relation to both carers of children and adults, so that employers must show objective, as opposed to subjective, justification. This would bring these provisions in line with the test of justification under the SDA.

Genetic Predisposition

56. The DLA believes that specific provision should be made for genetic predisposition. It should also be unlawful to require an individual to undergo a genetic test or to disclose the results of a genetic test. (The sole exception should apply where the scientific validity of a test had been established by an impartial arbitrating body, and where insurance applied for was significantly higher than the norm.)

Age Discrimination

57. Appropriately tailored legislation is the appropriate response to age discrimination outside the employment context. The DLA accepts the case for adopting some specific exceptions related to age such as compulsory school age, age criterion for the purchase of cigarettes and alcohol etc, and for access to different social security benefits. But for the most part the DLA takes the view that age discrimination should be lawful only if it is justifiable, and does not agree (para 9.26) that those aged under 18 should not be included within the scope of any age discrimination provisions.

Gender Reassignment

58. We strongly endorse the proposal to extend the protection against indirect discrimination to gender reassignment discrimination, in all the areas in which discrimination on grounds of gender reassignment is unlawful. We equally endorse the proposal to outlaw discrimination on grounds of gender reassignment in the exercise of public functions. The DLA strongly opposes the proposal not to extend protection against gender reassignment discrimination to schools. We especially disagree with the suggestion that such protection is not “necessary, proportionate or appropriate”.

59. We consider that there are serious problems with the proposals not to amend the definition of gender reassignment and, in particular, not to extend it to “perceived” gender reassignment status. This means that persons who do not conform to their gender stereotype, in dress, demeanour etc, may be lawfully discriminated against. We consider that this creates a considerable lacuna in the legislation and any new single equality bill should protect against all forms of gender related discrimination.

60. Further, we consider that there would be practical problems in not protecting other forms of gender identify, including perceived gender reassignment status, particularly outside the employment sphere. The relationships between goods and services providers, and sometimes public authorities, and their customers/clients are transitory, providing little (if any) opportunity to discover whether a person is actually intending to/undergoing gender reassignment or is gender reassigned, as opposed to manifesting another form of gender identity. A service provider/public authority will be acting unlawfully in the case of the first group but not the second without, in all likelihood, knowing into which of the particular groups any particular person falls. This helps no one.

Maternity Leave

61. The DLA has identified several areas where greater clarification of the law is needed to ensure full protection against discrimination on the grounds of pregnancy or maternity leave. In particular, legislation should

- Make clear that a comparator is not needed in claims of discrimination on these grounds;
- Remove the distinction between rights during OML and AML;
- Ensure protection extends to all 'workers' not just 'employees'; and
- Ensure that the right under the SDA for a woman to return to her job or an equivalent post after maternity leave is not undermined by provisions in the MPLR that allow an employer to place a woman returning from AML on a job that is appropriate and suitable for her, where returning to the same job is not 'reasonably practicable'.

Harassment

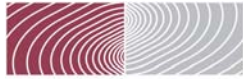
62. The definition of harassment in domestic law should reflect the wording of the EC Directives. In order to be consistent with the definitions in the Race Discrimination Directive 2000/43/EC and the Employment Framework Directive 2000/78/EC, the definition of harassment in a single equality bill should refer to 'unwanted conduct related to' racial or ethnic origin, religion or belief, disability, age or sexual orientation

63. The DLA is strongly of the view, as a matter of principle, that express statutory protection must be provided against harassment in the provision of goods, facilities, services, education in schools, disposal or management of premises and the exercise of public functions, on grounds of sexual orientation, age and disability. We accept that particular issues arise as regards religion or belief but, as the Green Paper points out, "the Human Rights Act 1998 requires the courts to interpret all legislation compatibly with convention rights. These include the right to freedom of thought, conscience and religion (article 9) and freedom of expression (article 10), so these fundamental values are already protected, allowing the courts to strike a proper balance".

64. The DLA does not agree with the exemption of any behaviour from a prohibition on harassment.

65. Third party harassment in the workplace by other workers working for the employer, although not employed by the employer has become increasingly common with the casualisation of the workforce. In many cases instead of focusing on the harassment itself, the tribunal case has become sidetracked into lengthy, expensive and inordinately complex arguments as to which parties can be held legally responsible. The DLA

submits that employers and principals should be made explicitly liable for harassment carried out against their employees or their contract/agency workers, where such harassment is carried out by their contract or agency workers, subject to the usual preventative steps defence.



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CHAPTER 14: HARASSMENT

**The DLA's response and recommendations:
Important issues not adequately covered in the DLR
Harassment**

[Green Paper paras 14.8 – 14.10; 14.20 - 14.21; 14.30]

66. The Green Paper points out that it is part of the basic decent values of our society to protect people from harassment. There are the following inadequacies with the current protection against harassment in employment.
67. The specific definition of harassment does not explicitly cover colour or nationality. The government states its intention to correct this anomaly. In making this change it should treat discrimination related to colour and nationality in all respects the same as that related to race, ethnic or national origins.
68. The specific definition of harassment does not reflect the wording of the Directives. The High Court in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] IRLR 327 pointed out that the definition in the SDA fails to comply with that in the Equal Treatment Directive 2002/73/EC. The DLA urges that the wording of the Directive is used, i.e.,

A person subjects a woman to harassment if, for reasons related to the sex of a person, he engages in unwanted conduct that has the purpose or effect...'

Prior to the *EOC* case, section 4A(i)(a) defined harassment, *inter alia*, as unwanted conduct '*on the ground of her sex*'. This was held to incorrectly implement the Directive, which defines harassment as unwanted conduct '*related to the sex of a person*'. This impermissibly introduces causation into the definition. The government was ordered to recast the definition as a result.

69. In order to be consistent with the definitions in the Race Discrimination Directive 2000/43/EC and the General Employment Framework Directive 2000/78/EC, the DLA recommends that the definition of harassment in a single equality bill should refer to 'unwanted conduct related to' racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Q.73 Can you provide examples of harassment you think is occurring or could occur on grounds of religion or belief, sexual orientation, age or disability, which would fall outside the existing protections in discrimination and other law?
[Green Paper para. 14.1-14.19]

The DLA's response and recommendations

70. The gaps in the current statutory approach to harassment were made clear in the EOC case of early 2007. As is evident from that case, harassment by third parties and harassment related to (but not on) the protected grounds is currently outside the scope of domestic regulation but is within the Race and Employment Framework Directives. The single equality act must remedy this deficiency. We agree, also, that the exclusion from protection of colour and nationality harassment must be remedied.

Q. 74 Do you think that express statutory protection against harassment on grounds of: religion or belief; sexual orientation; age; disability;

should or should not be provided in any of the following: the provision of goods, facilities and services; education in schools; the management or disposal of premises; the exercise of public functions?

Please state your reasons why.

The DLA's response and recommendations

71. The DLA is strongly of the view, as a matter of principle, that express statutory protection must be provided against harassment in the provision of goods, facilities, services, education in schools, disposal or management of premises and the exercise of public functions, on grounds of sexual orientation, age and disability. We accept that particular issues arise as regards religion or belief but, as the Green Paper points out, "the Human Rights Act 1998 requires the courts to interpret all legislation compatibly with convention rights. These include the right to freedom of

thought, conscience and religion (article 9) and freedom of expression (article 10), so these fundamental values are already protected, allowing the courts to strike a proper balance”.

Q.75 Were statutory protection against harassment to be extended to one or more of the above grounds in one or more of the above areas, do you think that specific exceptions would be desirable? If so, please state your reasons why and the types of exceptions, if any, you would like to see in the legislation. [Green Paper para. 14.26]

The DLA’s response and recommendations

72.The DLA does not agree with the exemption of any behaviour from a prohibition on harassment.

Q. 76 Do you think that harassment on grounds of religion or belief should be treated differently from the other protected grounds and that a different definition of harassment would be appropriate in this case? If so, please state your reasons why. [Green Paper para. 14.27-14.28]

The DLA’s response and recommendations

73.Religion and belief do give rise to particular issues as regards any prohibition on harassment given the role played in this context by Article 9 of the European Convention on Human Rights. The DLA is of the view, however, that harassment related to religion or belief ought to be regulated by a single equality act. As the law stands, Jews and Sikhs are protected from harassment outside the employment context by virtue of the RRA but Muslims, who face high levels of harassment, are not. In our view, the prohibition of religious harassment would not result in breaches of Article 9, as courts and tribunals would have to take Article 9 (and Article 10) into account, in particular in interpreting the reasonableness requirement. Where the conduct was intended to violate dignity or create a hostile, etc environment it would fall outside the protection of the Convention in any event.

Q. 77 Do you think there is a valid distinction to be made between harassment in an “open” and in a “closed” environment and that the approach to its prohibition should be differentiated accordingly? Please state your reasons why.
[Green Paper para. 14.29-14.31]

The DLA’s response and recommendations

74. The DLA does not accept the utility of this distinction which implies that people ought to be required to take avoidance action in respect of action which reaches the existing threshold for unlawful harassment.

Q78 Do you have any evidence of harassment by third parties in the workplace in relation to protected grounds other than sex? If so do you consider that it should be dealt with in a similar way? [Green Paper para. 14.29-14.31]

The DLA’s response and recommendations

75. As far as racial harassment is concerned the DLA is aware of frequent abuse of black staff working in mental health institutions and hospitals, with instances of patients insulting black nursing staff and demanding that only white nurses should touch them or deliver their babies. Probation staff have, to our knowledge, been subjected to racist remarks and refusals to co-operate by clients, and black traffic wardens are regularly subject to racial abuse by motorists and pedestrians. Black police officers are frequently subject to racial abuse by white and black members of the public. Black bus drivers are commonly the victims of racist abuse. BME shop assistants face regular verbal racist abuse from certain customers, and there have been cases of BME taxi drivers and mini-cab drivers being abused, assaulted even murdered by customers.

76. The DLA suggests that employers and principals should be made explicitly liable for harassment carried out against their employees or their contract/agency workers, where such harassment is carried out by their contract or agency workers, subject to the usual preventative steps defence.

77. Regarding the amending the SDA in the light of *EOC v Secretary of State for Trade and Industry*, the DLA submits that it need not only be cases of persistent harassment where an employer has had sufficient control to prevent harassment happening.

78. On the basis of the principle of parity, given the obligation correctly and fully to transpose EC Directives, if the SDA must be amended in order to be consistent with the requirements in the Directive then the same protection should apply across all the grounds. While there is strong

existing evidence of third party harassment, in particular on grounds of race and sexual orientation in sectors such as health, education and commercial enterprises, protection against third party harassment should apply to all grounds without the need to find evidence that the problem is sufficiently grave. As regards the responsibility of a service provider towards protection of one customer/service user against harassment by another, the same test as recommended in *EOC v Secretary of State for Trade and Industry* should apply, so that the service provider should be liable if they fail to act to prevent persistent or continuous acts of harassment. Arguably, once the definition of harassment meets that in the EC Directives this would be necessary to meet the requirements of the Race Directive and the Gender Goods and Services Directive, both of which include harassment outside the field of employment.

The evidence and the issues

79. There are two forms of third party harassment in the workplace: (i) by other workers working for the employer, although not employed by the employer, and (ii) by members of the public, e.g. clients, patients, customers.
80. Third party harassment in the workplace by other workers working for the employer, although not employed by the employer has become increasingly common with the casualisation of the workforce. The subject of the harassment may be an employee of a local authority, for example, and the perpetrators of the harassment may be agency staff or employees of contracted-out services. In this scenario and on the current definition of harassment, the subject of the harassment is unable to bring a claim against his/her own employer for such harassment, yet it is his/her employer who has control over the workplace environment.
81. A further complexity is where the employee of one contracted-out service harasses the employee of another one. The protection for contract workers, such as in RRA 1976 s7, works to protect the subject against harassment by the principal (the workplace employer), but does not work in the opposite direction, to make the principal liable for harassment perpetrated by the contract worker.
82. The subject of the harassment may in some circumstances be able to claim against the employer on the basis that the perpetrator is an agent of the employer, e.g. as under RRA 1976 s32(2). However, the meaning and extent of 'agent' under s32(2) and its equivalent in other discrimination legislation is virtually untested, extraordinarily complex, and of uncertain application to this situation.
83. Members of the DLA have numerous examples where clients have been subjected to severe workplace harassment, but instead of focusing on the harassment itself, the tribunal case has become sidetracked into lengthy, expensive and inordinately complex arguments as to which parties can be

held legally responsible. Not only is this unjust, it incurs vast expense for the parties and the tribunal, and it makes workplace resolution far less likely, as each party tries to evade responsibility.

84. The DLA presents two sets of examples as evidence:

- Claimant C. was sent by an agency to work for a large retail chain in a warehouse. The retail chain has a large number of long-term agency staff from a single agency. C. claimed he was severely racially abused and taunted by two work colleagues: X and Y. The supervisors, employed by the retail chain, took inadequate action. X was employed by the retail chain and Y was employed by the agency. C. was forced to issue tribunal claims against both the agency and the retail chain, and become involved in complex preliminary arguments regarding who was legally responsible for what and whom. C. the victim of racial harassment did not understand the legal arguments and became increasingly distressed and depressed at the slow pace of the case and the fact that he was being asked about matters which did not appear to him to be relevant to the key issue of harassment.
- Regarding race there are numerous incidents reported, such as the frequent abuse of black staff working in mental health institutions, and patients in hospital insulting black nursing staff and demanding that only white nurses should touch them, not wanting a black midwife to deliver their baby; probation service clients making racist remarks and refusing to co-operate with black probation officers; frequent racist abuse suffered by black traffic wardens by motorists and pedestrians; Black police officers racially abused by white and black members of the public; BME shop assistants facing regular verbal racist abuse from certain customers; cases of BME taxi drivers and mini-cab drivers being abused, assaulted even murdered by customers; racist abuse of bus drivers. See also *Gravell v. London Borough of Bexley* [2007] UKEAT 0587_06_0203 (2 March 2007)

85. The DLA suggests that employers and principals should be made explicitly liable for harassment carried out against their employees or their contract/agency workers, where such harassment is carried out by their contract or agency workers, subject to the usual preventative steps defence.

86. As a matter of public policy, the courts have been concerned to give employees a remedy where their employers have knowingly subjected them to the risk of harassment from the public which could have been avoided. This situation commonly arises where employees are subjected to harassment by customers, patients, patients' relatives, clients, passengers, tenants and other users of their service.

87. A formula for making employers responsible (on reasonable grounds) was found by the EAT in the cases of *Burton v De Vere Hotels Ltd* [1996] IRLR 596, EAT and *Go Kidz Go Ltd v Bourdouane* 70 EOR 49, EAT. Unfortunately these cases were eventually overruled as not fitting within

the tight definition of direct discrimination. Nevertheless, there appears to be a consensus that such protection would be desirable.

88. Until *Burton* was overruled, it worked well in practice, was understood by all parties, and led to good practice on prevention by employers. In *Burton*, the EAT said that a tribunal should ask itself:

whether the event in question was something which was sufficiently under the control of the employer that he could, by the application of good employment practices, have prevented the harassment or reduced the extent of it.

The EAT comments that:

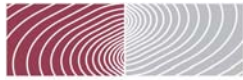
'foresight of the events ... is not determinative of whether the events were under the employer's control'.

89. Clearly in some cases, the fact that harassment had been perpetuated previously by a particular individual would be sufficient to alert the employer to take preventative action, eg in *Go Kidz Go*, where the employee complained about a parent's initial behaviour. In others, harassment would be foreseeable for other reasons, eg in *Burton* itself, where Bernard Manning's attitudes were well known. In yet further examples, harassment might not be foreseeable, but preventative action could be taken to safeguard against its possibility.

90. In *EOC v Secretary of State for Trade and Industry*, the High Court stated that recasting the definition of harassment to reflect the wording in the Equal Treatment Directive would facilitate claims that an employer has subjected an employee to harassment by knowingly failing to protect her from repetitive harassment by a 3rd party such as a supplier or customer.

91. The EAT in *Gravell v London Borough of Bexley* [2007] UK EAT 0587_06_0203 (2 March 2007), in overturning a strikeout by the ET in a case involving racial harassment by service users, ruled that the decision of the House of Lords in *Pearce v Governing Body of Mayfield Secondary School* did not preclude employer's liability for the new separate tort of harassment in the amended RRA.

92. For reasons explained by *Burton*, the DLA submits that it need not only be cases of persistent harassment where an employer has had sufficient control to prevent harassment happening.



Discrimination Law Association

**DISCRIMINATION LAW ASSOCIATION
RESPONSE TO THE DISCRIMINATION LAW REVIEW
REPORT A *FRAMEWORK FOR FAIRNESS*
SEPTEMBER 2007**

CHAPTER 1: PROMOTING COMPLIANCE AND GOOD PRACTICE, SIMPLIFYING DEFINITIONS, TESTS AND EXEMPTIONS

**The DLA's response and recommendations:
Important issues not adequately covered in the DLR: Purpose Clause**

1. When introducing a single equality bill, consideration should be given to the nature and constitutional status of such legislation. Protection from discrimination is fundamental to civic equality and ensuring effective participation in all spheres of public and social life. Those who face discrimination or harassment, whether in the labour market or in accessing goods, facilities or services, are effectively excluded from participating in society as full and equal citizens. It is clear that whether or not individuals actually have equal opportunities depends not only on government actions, but on the action of institutions within civil society – corporations, schools, stores, landlords etc. Discrimination by prejudiced shop owners or real estate agents deny individuals equal citizenship. A single equality act should reflect the role that anti-discrimination laws play in ensuring that all citizens have the same opportunities to participate in society. Any single equality act should be prefaced by a purpose clause drafted along the lines suggested by the equality commissions:

The purposes of this Act are -

(a) To prevent discrimination on any of the grounds, whether singly or in any combination and ensure that every person has an equal opportunity to participate in society, including by means of different treatment as required or permitted by the Act;

(b) To secure full equality in practice and promote the social inclusion of individuals and groups by eliminating and preventing patterns of systemic discrimination and inequality; and the adoption of measures to alleviate the disadvantage related to any of the grounds singly or in any combination;

(c) To ensure respect for and protection of the human dignity of every person;

(d) To provide effective remedies for victims of unlawful discrimination, harassment and victimisation; and

(e) To promote good relations between individuals and groups.

Q.1 Do you have any comments on our intention to keep the existing requirement for a comparator in direct discrimination? [Green Paper paras 1.9 – 1.16]

The DLA's response and recommendations

2. The DLA agrees that the essence of direct discrimination lies in its comparative nature. Any court or tribunal adjudicating on a direct discrimination case must consider whether the claimant has been treated 'less favourably' on the prohibited grounds. Nevertheless, the DLA considers it important to distinguish between:

The formal need to find a comparator in every case; and

A consideration of the type of evidence needed to persuade a tribunal/court that less favourable treatment was on the prohibited ground.

3. As explained in *Shamoon v Chief Constable of the RUC* [2003] IRLR 284 HL, the DLA does not consider it necessary to establish a real or hypothetical comparator in order to establish 'less favourable treatment'. The search for a comparator can be over-emphasised, and whilst it can be useful in some cases, in others it can lead to a sterile line of enquiry.
4. To support this approach, and to prevent misinterpretation and to focus the mind of a tribunal or court on the entirety of the evidence, the DLA recommends:
 - a) The removal of support clauses analogous to Race Relations Act (RRA) s3(4); and
 - b) The removal of the words 'treats or' from the current definition of direct race and sex discrimination, etc.
5. The DLA further recommends that a statutory Code of Practice be drawn up by the Commission for Equality and Human Rights (CEHR) which would stress the need to consider hypothetical rather than actual comparators, and more importantly, to look in the round at all evidence. Such a Code of Practice should give examples of the different ways in which evidence of less favourable treatment can be adduced.

The evidence and the issues

6. The DLA is concerned that the failure to distinguish between:
 - a) The formal need to find a comparator in every case; and
 - b) A consideration of the type of evidence needed to persuade a tribunal/court that less favourable treatment was on the prohibited ground

may be behind the wording of paragraph 1.11 of the Green Paper. The DLA agrees that in order to answer the question, 'Has the claimant been treated less favourably on racial grounds', it is often necessary for a tribunal or court to decide a second question, i.e. 'Would the employer treat a hypothetical comparator in the same circumstances but without the particular characteristic differently?' However, the second question can only be answered by a consideration of all the relevant evidence.

7. Such evidence may comprise:

one or more actual comparators, whose circumstances are almost identical save for a difference of race, etc;

one or more 'evidential comparators', whose circumstances are similar but not identical and which the tribunal may use as 'building blocks' to infer discrimination. (see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, HL);

a combination of other evidence, e.g. statistics (*West Midlands Passenger Transport Executive v Singh* [1988] IRLR 186, CA); racist remarks; failure to follow a Code of Practice (*Igen Ltd v Wong* [2005] IRLR 258, CA); unexplained failure to shortlist a job applicant whose CV exactly matches the requirements of the job etc.

8. Therefore, although the tribunal or court may ask itself the notional second question set out above, it may not be necessary to answer this question by reference to an actual comparator. The danger with the current wording of the definition of direct discrimination combined with the support clauses such as RRA s3(4) or Sex Discrimination Act (SDA) s5(3) is that it focuses the attention of the tribunals/courts on finding an actual comparator to the exclusion of other evidence. This is borne out by what happens in practice, where the first question tribunals frequently ask at case management discussions is 'Do you have an actual comparator'. Then, if the employer explains its different treatment of the actual comparator, the entire case fails. This is legally wrong. The courts have stressed that tribunals should always consider the hypothetical comparator (*Balamoody v UKCC for Nursing Midwifery and Health Visiting* [2002] IRLR 288, CA; *Chief Constable of West Yorkshire v Vento* [2001] IRLR 124, EAT; *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, HL.)

9. This point was more fully explained in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285. In that case Lord Scott said:

... Comparators come into play in two distinct and separate respects... First, the statutory definition of what constitutes discrimination involves a comparison: ‘... treats that other less favourably than he treats or would treat other persons’. The comparison is between the treatment of the victim on the one hand and of a comparator on the other hand. The comparator may be actual (“treats”) or may be hypothetical (“or would treat”) but ‘must be such that the relevant circumstances in the one case are the same, or not materially different, in the other’ ... If there is any material difference between the circumstances of the victim and the circumstances of the comparator, the statutory definition is not being applied. It is possible that, in a particular case, an actual comparator capable of constituting the statutory comparator can be found. But in most cases a suitable actual comparator will not be available and a hypothetical comparator will have to constitute the statutory comparator.

...Secondly, comparators have a quite separate evidential role to play. ... The victim who complains of discrimination must satisfy the fact finding tribunal that, on a balance of probabilities, he or she has suffered discrimination falling within the statutory definition. This may be done by placing before the tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class. Comparators, which for this purpose are bound to be actual comparators, may of course constitute such evidential material. But they are no more than tools which may or may not justify an inference of discrimination on the relevant prohibited ground e.g. sex. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference. But the fact that a particular chosen comparator cannot, because of material differences, qualify as the statutory comparator, ... by no means disqualifies it from an evidential role. It may, in conjunction with other material, justify the tribunal in drawing the inference that the victim was treated less favourably than she would have been treated if she had been the [fully relevant] comparator. [Ibid at [107] – [108]

Thus a tribunal or court can look for an actual comparator or a comparator may have an evidential role when the tribunal or court seeks to decide why the discrimination has occurred. The importance of asking

the question why the discrimination has occurred was explored by Lord Nicholls in his opinion in the same case:

...In practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue)... Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining... Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason-why issue. The two issues are intertwined... This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? [Ibid. at paras 7,8 and 11]

10. In summary, in order to show 'less favourable treatment' it is necessary to make a comparison. However, we do not consider that it is necessary to establish a real or hypothetical comparator in order to establish 'less favourable treatment'. We believe that the search for a comparator, whilst it can be useful in some cases, in others can lead to a sterile line of enquiry.
11. In order to prevent this constant error of approach and emphasis, the DLA has two recommendations:
 - a) The removal of support clauses analogous to RRA s3(4).
 - b) The removal of the words 'treats or' from the current definition of direct race and sex discrimination etc.
12. The comparative approach would be retained by the primary definition of direct discrimination, but the removal of the support clause would prevent misinterpretation. Removal of the verb 'treats' and simply retaining 'would treat', focuses the mind of the tribunal or court on the entirety of the evidence rather than whether a particular actual comparator stands up to examination. Of course, the fact that the discriminator in practice treats an actual comparator less favourably is compelling evidence of direct discrimination. (The above recommendations are also relevant to ensure effective redress for intersectional/multiple discrimination; please see below.)

13. The DLA further recommends that a statutory Code of Practice be drawn up by the CEHR which would stress the need to consider hypothetical rather than actual comparators and, more importantly, to look in the round at all evidence.

The DLA's response and recommendations: Inadequacies in the comparative approach

In a limited but important number of cases, the comparative approach embodied in the 'less favourable treatment' definition has been distorted in its application by the courts and tribunals. The DLA is of the opinion this is due to inadequacies in the current definition of direct discrimination. The DLA therefore suggests that, in addition to the amendments recommended above, the definition of direct discrimination needs to be revised thus:

A person ("A") directly discriminates against another person ("B") if, for a reason related to one or more of the prohibited grounds -

A treats B less favourably than another person would be treated by him in a comparable situation.

The evidence and the issues: Inadequacies in the comparative approach

14. The inadequacies of the comparative approach have emerged most often in cases related to sex discrimination and actual or perceived, current or past, office relationships. For example, if a female employee is dismissed because she has ended a sexual relationship with her male boss, what is the appropriate hypothetical comparator? It does not meet the reality of the situation to consider whether a male employee would have been dismissed had he ended a homosexual relationship with the same manager. A similar situation arises where a female employee is dismissed because of false and unfounded rumours that she is having a relationship with her male boss. The whole point is that such rumours have arisen precisely because she is a woman and are clearly on grounds of and related to her sex. These situations do not always fall within the definition of harassment and thus can unintentionally fall outside protection altogether.
15. This has recently been illustrated in the case of *B v A* [2007] IRLR 576. This case concerned a solicitor in a small practice who employed a secretary/receptionist who he later promoted to become his personal assistant. They had a consensual sexual relationship. When he saw her with another man with whom she had formed a 'regular association' he instantly dismissed her. She claimed for both unfair dismissal and sex discrimination. He appealed against the finding of sex discrimination. The EAT considered that the reason for the dismissal was the relationship

breakdown and that the reason was not because of her sex. They considered that the appropriate comparator was a homosexual male employer and a homosexual male employee and since the homosexual male employee would have received the same treatment there was no sex discrimination operating here. The DLA considers that this case was wrongly decided.

16. Another example where the current definition falls short is the situation where, for example, a black worker is dismissed for starting a fight with a white colleague, when the reason for this is that the white colleague has subjected the black worker to racial abuse and harassment. Clearly this dismissal is for reasons related to the black worker's race, but the comparative approach may well mean the black worker will lose the case, as happened in *Sidhu v Aerospace Composite Technology Ltd* [2000] IRLR 602.

Because of the inadequacies of the current definition to meet these particular examples, the DLA recommends that the definition of direct discrimination should be revised. We suggest the following revised definition:

A person ("A") directly discriminates against another person ("B") if, for a reason related to one or more of the prohibited grounds -

A treats B less favourably than another person would be treated by him in a comparable situation.

<p>The DLA's response and recommendations: Important issues not adequately covered in the DLR - Full, clear and consistent definitions of disability and discrimination</p>
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17. The DLA is disappointed that the government has not considered afresh the definition of disability. There is evidence from our own members, from research conducted on the operation of the law, and from the Disability Rights Commission, of the current definition causing disabled people considerable difficulties when bringing cases. Resources are expended in having preliminary hearings to establish whether or not the claimant comes within the statutory definition of disability before a claim gets anywhere near a determination.
18. It is the DLA's view that the current definition should be replaced with a definition which is based on the social model of disability and which focuses examination on the treatment which has been afforded to a disabled individual rather than whether or not they meet specific criteria for having protection. The DLA suggests that a definition be based on having a physical or mental impairment, with no qualification as to its effect upon an individual or as to the length of time for which it must last (reflecting, for

example, the approach to mobility impairment contained in the EU Air Accessibility Regulations).

19. As well as replacing the definitions in DDA Part 3 (see para 23 below), the DLA recommends the situation in the DDA Part 4 also be addressed. Presently, the definition of discrimination in post-16 education provisions varies according to whether you are concerned with vocational education or, for example, education provided by schools when providing further education for adults under s58 of the School Standards and Framework Act 1998. In relation to vocational education, direct discrimination applies, there is no justification for a failure to make reasonable adjustments, etc. The latter, however, retains the definition first ascribed in the Special Educational Needs and Disability Act 2001. It is vital that these provisions be made consistent.
20. Direct discrimination should apply throughout the disability discrimination provisions, for the sake of consistency and clarity. We would not envisage a significant increase in any claims based on an extension of the principle of direct discrimination, but it is nevertheless important that where less favourable treatment on grounds of disability takes place, there is no prospect of justifying it.
21. There should be no scope for justifying a failure to make reasonable adjustments. In employment and occupation and most of post-16 education, a failure to make an adjustment cannot be justified – either it is a reasonable one or it is not. Again, for the sake of consistency and clarity this should also be the position in relation to the rest of the DDA.
22. In the DLA's view, the DDA does not capture every aspect of discrimination which would otherwise be covered by the Employment Framework Directive. For example, where an employer installs a new IT system, there is no requirement to consider in advance how accessible that system is. An individual could potentially bring an indirect discrimination claim in advance of the system being installed, under the provisions of the Directive, on the basis that it would put disabled people at a particular disadvantage, but there would be no possibility of a reasonable adjustment claim until the system had been installed (and that in any event would be an individualised solution).

Q2 Do you have any comments on our proposal to replace the separate definitions of discrimination in Part 3 of the Disability Discrimination Act with a single definition? [Green Paper paras. 1.17-1.18].

The DLA's response and recommendations

23. The DLA strongly supports the proposal to replace the separate definitions of discrimination in Part 3 of the Disability Discrimination Act with a single

definition. We believe that the current complexity, particularly in relation to public authority functions and private clubs will operate as a deterrent to both as well as to individual disabled people, in understanding the appropriate duties under the Act.

24. However, this should not be done at the expense of any of the current provisions. For example, the more limited approach to reasonable adjustments in relation to applicants for membership of a private club should not be extended to any of the other aspects of discrimination. It is important that these provisions are levelled up and not levelled down.

Q3 Do you agree that we should largely keep the existing approach in relation to discrimination on the basis of perception and association, except for an extension to protect against discrimination on the grounds of association with transsexual people? [Green Paper paras. 1.19-1.25]

The DLA's response and recommendations

25. No, the European Employment Framework Directive already requires discrimination by association and perception in relation to disability and association in relation to age to be covered by the employment provisions. The outcome of the case of *Coleman v Attridge Law*, as referred to in the Green Paper, will address issues of association.
26. There is no reason, in the view of DLA, to extend this approach to race, religion or belief and sexual orientation, but not to disability.
27. We are aware, for example, of treatment afforded to employees where both the employee and the employer believes the employee to be covered by the DDA, and the treatment is on the basis of the employee's impairment, but as they do not actually meet the definition, it is held not to be covered by the DDA. This is inequitable and should not be permissible in an anti-discrimination framework.

Q.4 Do you agree with our proposal to extend indirect discrimination to cover gender reassignment but not explicitly introduce it to disability discrimination law? [Green Paper para. 1.26 – 1.35]

The DLA's response and recommendations

28. No, at the very least the duty to make adjustments should be made anticipatory in the employment context – particularly in relation to physical barriers and practices, policies and procedures.
29. Whilst the Green Paper talks at paragraph 1.34 of the reasonable adjustment duty effectively addressing the barriers which would be dealt with under indirect discrimination, this appears to be based on the service provision duties – where the duty to make adjustments is anticipatory. In the context of employment, where the duty is triggered by an individual requiring an adjustment – and such an adjustment will only be required where reasonable – it is feasible that it may never be reasonable to install, for example, a ramp for one person. On the other hand, an anticipatory duty to make adjustments might require this to be done.

Q5 Do you agree with our proposal to harmonise the definition of indirect discrimination where it applies across the protected grounds? [Green Paper para 1.37-1.39]

The DLA's response and recommendations

30. Yes, but the definition should be one that fully conforms with the definition of indirect discrimination in the EC Directives. The proposals in the Green Paper would achieve harmonisation but would still leave the legislation in Great Britain deficient in terms of giving full effect to the relevant EC Directives.
31. Under the current legislation there are a number of different definitions for indirect discrimination. This is undesirable because it makes the law unnecessarily confusing, and makes it more difficult for potential claimants and respondents to understand their rights and responsibilities. It also complicates matters for lawyers and tribunals, who need to deal with a number of ways of saying much the same thing. Where cases have been decided under one definition, it can be difficult to understand their effect as precedent on other jurisdictions.
32. Differing definitions also mean, as the Green Paper notes, that those protected under one head are less protected than those protected under other heads. This is also undesirable. The same protection should be extended across the strands. Differences between the definitions also create difficulty in intersectional/multiple discrimination cases, where it is difficult to resolve the different tests.
33. The Race Directive, Employment Framework Directive, Amended Equal Treatment Directive and the Gender Goods and Services Directive define indirect discrimination as occurring:

Where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin/having a particular religion or

belief, particular disability, a particular age or a particular sexual orientation/one sex at a particular disadvantage compared with other persons/persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The definition in the EC Directives can be applied prospectively - a new rule or policy that has been announced but not yet applied could, with relevant evidence, be challenged before it comes into operation, i.e., before individual members of the protected group are put at a disadvantage if what is proposed would put persons within one of the protected groups at particular disadvantage compared with others.

34. The DLA recommends that the definition of indirect discrimination in the single equality bill should adopt the formulation in the Directives, so that indirect discrimination would occur where a provision, criterion or practice would put members of one or more protected groups at a disadvantage. This is consistent with the DLA's recommendation regarding the definition of direct discrimination, which should be defined as occurring when on one or more of the protected grounds a person treats another less favourably than they would treat other persons.

35. By adopting a definition that correctly includes prospective indirect discrimination, it would be possible to consider whether the single equality bill could include indirect discrimination on grounds of disability, which might cover certain anticipated acts that would disadvantage disabled people and which cannot be challenged under the duty to make reasonable adjustments.

Q6 Do you agree with our proposal to harmonise the objective justification test? [Green Paper para. 1.40- 1.45].

The DLA's response and recommendations

36. Yes, the test for objective justification for indirect discrimination should be harmonised for all grounds and all activities within the scope of the single equality bill. Currently there are several different tests: both the RRA and SDA include two different tests, depending on how amendments made to comply with EC Directives have been transposed; a third test is used in Part 2 Equality Act 2006 and in the Equality Act (Sexual Orientation) Regulations 2007 which apply to goods and services, premises, education and public functions. It is extremely undesirable and unhelpful to all parties and to courts and tribunals to have different statutory tests for the justification of indirect discrimination.

37. The DLA also recommend that the harmonised test in a single equality bill should adopt the formulation in the EC Directives namely that:

The provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

38. The Green Paper restates the view expressed during the introduction of regulations to transpose the Directives that the words “*proportionate means of achieving a legitimate aim*” carry the same meaning as the above words in the Directives. Even if these phrases carry the same meaning, in our view, the words in the Directives convey a clearer message to potential discriminators, to those who might challenge a provision, criterion or practice, and to the tribunals and courts who must be satisfied that objective justification test is made out. It requires the alleged discriminator firstly to show that the provision, criterion or practice has a legitimate aim; if it does not, for example if its aim is to discriminate, then, without more, it would be unlawful. If it does, then the alleged discriminator must show that it is appropriate in the particular circumstances. If not, then it would be unlawful. And if it is an appropriate means of achieving a legitimate aim, s/he must then show that it is necessary: i.e., are there other means of achieving that aim that do not disadvantage the group in question.
39. The DLA submits that the formulation in the Directives accurately puts into statutory form the approach of the ECJ and UK courts in cases of indirect discrimination and would help employers and the public and private sector providers of services understand what many still regard as a difficult concept. To combat indirect discrimination is necessary if systemic inequalities are to be eliminated; therefore it is essential that the legislation assists those who - not necessarily intentionally – discriminate indirectly to understand when to do so is unlawful.

Q7 Do you agree that there should be a single test of objective justification for disability discrimination in employment and vocational training, goods, facilities and services, housing, education, private clubs and public functions? [Green Paper para. 1.46-1.53]

The DLA’s response and recommendations

40. DLA welcomes the proposal to simplify justification under the DDA. The present test – consisting of both a subjective and objective test – is detrimental to the purposes of the legislation. The DLA agrees that the justification test should be the same as that which is used to justify indirect discrimination.

41. The DLA recommends that that test should be as prescribed in the EC anti-discrimination directives, namely that the conduct has a legitimate aim and that the means of achieving that aim are appropriate and necessary.

Q.8 Do you have any comments on our proposal to establish a single threshold for the point at which the duty to make adjustments is triggered? [Green Paper para. 1.54-1.59]

The DLA's response and recommendations

42. The duty to make adjustments is the cornerstone of the disability discrimination provisions, and recognises that equality cannot be achieved for disabled people by treating everyone alike. The current approach to adjustments, however – with different thresholds triggering the duty, depending upon the area with which the adjustment is concerned – is confusing and unhelpful.
43. We support the adoption of one threshold – substantial disadvantage – through the duties and we believe that this should also apply to the reasonable adjustment duties relating to premises provisions (housing). The threshold for unlawful action should also be changed to 'substantial disadvantage' rather than 'impossible/unreasonably difficult'.

We regard the following question as related and so address it at this point:

Q72 Do you agree with our proposal for requiring disability-related alterations to the common parts of let residential premises? [Green Paper para. 13.1-13.10]

44. The DLA welcomes the commitment by the government to address the extremely difficult position that disabled people find themselves in when they need an adjustment to the common parts of premises in order to remain in their home, but the landlord has not given consent for such an adjustment to be made. The new proposals to provide that landlords cannot unreasonably withhold consent for permanent alterations to be made to the common parts to be made by an occupant – at the expense of the occupant – will address this. We trust however that the CEHR will in a statutory code of practice provide guidance on when it would be reasonable or unreasonable to withhold consent, and that it will have the power to fund cases brought under these provisions.

Q9 Do you agree that the approach to victimisation in discrimination law should be aligned with the employment law approach? [Green Paper para. 1.60-1.61]

The DLA's response and recommendations

45. The DLA supports removing the requirement for a comparator from victimisation claims. A simple 'but for' test is easier to understand and apply.
46. In *Oyarce v Cheshire County Council*, the EAT held that the reversal of the burden of proof rules do not apply to victimisation under the RRA. If this is right, it appears to be a drafting oversight. It is extremely undesirable that the burden of proof rules for victimisation under a single strand is different to the other types of discrimination under that strand, and from victimisation of other protected groups. This anomaly should be corrected.

Q. 12 Do you support or oppose the introduction of a genuine service requirement test for differentiation in the provision of goods, facilities or services, housing and the exercise of public functions? Please give your reasons and examples of what it might cover. [Green Paper para 1.71-1.76]

The DLA's response and recommendations

47. The DLA favours the introduction of a genuine service requirement test in addition to a limited number of specific exceptions if, and only if, the GSR was limited to "ensuring full equality in practice", including by the elimination of specific disadvantage suffered by persons of groups defined by reference to one or more of the protected grounds.
48. If any GSR defence made explicit reference to the need for any differential treatment justified by reference to it to be consistent with a purpose clause as above, there should be no concern that the defence would be open to abuse. Further, a GSR defined in these terms would be compatible with the Race Directive so there would be no requirement to depart from the principle of consistency of treatment across the protected grounds. Not only would a GSR defined in these terms allow the pursuit of "positive action" designed to ameliorate disadvantage, it would also allow the restriction of access to some services to, for example, women or gay men because of considerations of privacy, decency and physical security (from, for example, homophobic assault).

Q.16 Is there a need to retain an exception to allow insurers to treat people differently on grounds of sexual orientation, where supported by sound actuarial evidence, beyond the end of 2008? If yes, what should this seek to achieve and why?

The DLA's response and recommendations

49. This question is answered definitively, in the DLA's view, by the Association of British Insurers (ABI). Chris Morgan, Member of the ABI's Expert Working Group on HIV and Insurance and Managing Director of Compass, the gay financial advisers, is quoted on the ABI website and the Daily Telegraph on 30th August 2007 as having said:

"It is very important that the new sexual orientation regulations do not overshadow the positive changes that have already been made for gay men within the life insurance industry.

The HIV and Insurance guidelines introduced by the ABI require insurance companies to treat gay men fairly when applying for life assurance products already. Therefore the exemption contained within the new legislation should be removed."

50. It is our view that the retention of the exemption cannot be justified in circumstances where the body which represents the collective interests of the UK Insurance Industry does not see a case for it. The clear view of the ABI suggests that the exemption ought to be repealed immediately and the DLA encourages the government to do so.



Discrimination Law Association

**DISCRIMINATION LAW ASSOCIATION
RESPONSE TO THE DISCRIMINATION LAW REVIEW
REPORT A *FRAMEWORK FOR FAIRNESS*
SEPTEMBER 2007**

**CHAPTER 2: GOODS, FACILITIES AND SERVICES, AND
PUBLIC FUNCTIONS**

Q 17. Do you agree that there would be benefits to adopting a harmonised approach to the way goods, facilities and services and public function provisions are structured across all protected grounds?

The DLA's response and recommendations

51. The DLA supports a harmonised approach to addressing discrimination in GFS and public function as long as there is no reduction in the scope of protection and exclusions presently applicable only to discrimination in the provision of GFS or in the exercise of public functions are not extended to cover both sets of unlawful acts.

The evidence and the issues

52. The DLA agrees that a single equality act should adopt a harmonised approach to addressing discrimination in the provision of goods, facilities and services and in the exercising of public functions. This is subject to two qualifications; firstly, that the scope of the protection afforded by the provisions presently protecting against discrimination in the provision of goods, facilities and services and in the exercising of public functions is not thereby reduced and, secondly (and related to our first qualification), that the exclusions presently applicable only to discrimination in the provision of goods, facilities and services or in the exercising of public functions are not extended to cover both sets of unlawful acts. We address these qualifications further below.

53. However, we consider it important to observe firstly that the analysis of the existing law as contained within paragraphs 2.8 and 2.9 of the Green Paper is incorrect. Paragraphs 2.8 states as follows:

“However, the different pieces of discrimination legislation contain differences in the interaction between the provisions on goods, facilities and services and those relating to public functions. In the case of race, sex

and disability discrimination, “public functions” are a residual category of public sector activities which are not otherwise caught by the goods, facilities and services provisions. Only if a public authority is not providing a service is it necessary to consider the public functions provisions.”

54. Its reference to a “residual category” refers to the fact that the public functions provisions create exclusive wrongs in that treatment made unlawful by any other provision of the SDA, RRA, DDA or EA (or would be but for an exemption), will not fall within these ‘public functions provisions’ (by reason of section 21A(9), paragraph 15-16, SDA; section 19B(6), RRA; section 21B(7), DDA; section 52(4)(m), EA and schedule 1, part II, para.s 7-8, Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263). However, paragraph 2.9 of the Green Paper goes on to state that:

“By contrast, in relation to religion or belief and sexual orientation discrimination, bodies performing functions of a public nature will be covered by one set of provisions whether they are exercising a public function, or providing goods, facilities or services in the exercise of a public function.”

55. In fact, the religion or belief and sexual orientation discrimination provisions create exclusive wrongs in the same way so that an act by a public authority may fall under the goods, facilities or services provisions and, where it does not, it will (absent a relevant exemption) fall under the public functions provisions.

56. However, we accept that it would be helpful to have a harmonised approach to the provisions more broadly.

57. As mentioned, the SDA, RRA, DDA, EA and Equality Act (Sexual Orientation) Regulations 2007 outlaw discrimination by public authorities in exercising their functions only where the act complained of does not fall within the goods, facilities and services provisions (or would do so but for an exemption). Because of the way case law has developed some acts which might be described as “public functions” fall within the goods, facilities and services provisions (including, for example, certain of the functions of police officers: *Farah v Commissioner of Police of the Metropolis* [1998] QB 65; *Brooks v Commissioner of Police for the Metropolis & Others* [2002] EWCA Civ 407). The exemptions, however, are differently framed, depending upon whether the claim falls to be considered under the goods, facilities and services provisions or the public functions provisions. There is not always a good reason for this distinction.

58. Further, although less significantly in our view, the RRA and DDA do not define ‘public function’ (as contrasted with a ‘private act’). Section 21A(2)(b) SDA, section 52(2)(b), EA and regulation 8 of the Equality Act (Sexual Orientation) Regulations 2007 define a ‘function’ as a ‘function of a public nature’. However, this meaning is implicit in the RRA and DDA because all functions of ‘core’ authorities will be public functions and private acts done by ‘hybrid’ bodies are expressly excluded from the RRA and DDA (section 19B(4), RRA and section 21B(4), DDA). However, for

consistency and clarity, it would be helpful if the same formulation were used across the grounds.

59. As to the two qualifications we have identified above, firstly, we would want to ensure that the scope of the protection afforded by the provisions presently protecting against discrimination in the provision of goods, facilities and services, and in the exercising of public functions is not reduced by any harmonising exercise. This means that any harmonising would have to level up the protection presently afforded. Thus, for example, the DDA alone expressly provides that the outlawing of discrimination in the exercising of 'public functions' applies to appointments to offices or posts, which, but for the fact that they do not meet any of the conditions prescribed (that is, remunerated posts or appointment or recommended by a specified body), would fall within the office holder provisions under Part 2 of the DDA Section 21B(8), DDA. This provision is directed at, in particular, voluntary office holders (for example, school governors or those on the Board of Governors of NHS Foundation Trusts). In such cases, the duties under the public authority function provisions apply. The provisions cover both the appointment of a person to a post and functions of the public authority in relation to the person whilst in post. We consider that these provisions should be extended to cover all grounds and that there should be no reduction in the protection afforded by the goods, facilities and services and public functions provisions in respect of any of the grounds presently covered. We address age discrimination in paragraphs 330-332 of these submissions.
60. Secondly, we consider that any harmonising exercise should not have the effect of extending the circumstances in which the exclusions presently applicable to discrimination only in the provision of goods, facilities and services or in the exercising of public functions apply (outside of positive action - or balancing measures - which we address in paragraphs 90-112 of this submission). Many of the existing exemptions should be repealed or at least not be extended. Further, any exemptions retained or created must meet the requirements of Article 4(5) of the Gender Goods and Services Directive and the terms of the Race Directive 2000/43/EC (which, in the latter case, permits exemptions - outside of the employment - directed at positive action only).



Discrimination Law Association

**DISCRIMINATION LAW ASSOCIATION
RESPONSE TO THE DISCRIMINATION LAW REVIEW
REPORT A *FRAMEWORK FOR FAIRNESS*
SEPTEMBER 2007**

CHAPTER 3: EQUAL PAY

The DLA's response and recommendations

61. The government accepts that 'Women are crowded into a narrow range of lower-paying occupations, mainly those available part time, that do not make the best use of their skills.' The government appears reluctant to tackle this problem by extending equal pay law, instead preferring to 'spread good practice' by less formal means (paras 3.3 - 3.8).
62. The DLA considers that the law is an important tool in achieving this good practice, and most of the suggestions below address this problem. The shortfalls in the current law, identified below, are at best facilitating the problem, and at worst, encouraging it.
63. These suggestions should not place any unfair or excessive burdens on employers because they will only affect employers who engage in, knowingly or not, bad practice. Equal pay is a fundamental right under European Community law and cannot be sacrificed to convenience. Further, the UK government is obliged by Article 141 to 'ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.
64. There is a broad degree of consensus that the current approach to the gender pay gap is not working. The EqPA has been in place since 1970, fully implemented since 1975. During that period, the wages of full-time women have risen significantly relative to those of full-time men, the hourly wage gap currently standing at less than 20%. But the position for almost half of the paid female workforce – those who work part-time – has barely improved at all since 1970 and these workers suffer a pay gap of almost 40% in terms of their hourly rates. The EOC, in its submissions to the DLR, suggested that the EqPA 'is reaching the limits of its usefulness and isn't working for either individuals or employers'. Similar conclusions were reached by the Trade and Industry Select Committee's Sixteenth Report of 2004-5, *Jobs for the girls: The effect of occupational segregation on the gender pay gap*, which stated that 'the persistent undervaluing of women in the workplace is a major obstacle to the UK's being considered to be a society with true gender equality'. The Select Committee found that there were two 'two overlapping problems:

- a) The first is that the legislation is designed to enable individuals to combat discrimination in pay, and there is no provision for groups of people equally affected to take a case.
 - b) The second is the difficulty of finding comparators in order to establish that others are being paid more for “work of equal value” when occupations are highly segregated, as the comparator has to have the same employer’.
65. The DLA suggests that an adequate response to the gender pay gap involves imposing obligations on employers to eradicate pay discrimination. The conclusion of the Green Paper (para 3.7) that ‘at present, the evidence does not support legislation mandating equal pay reviews’ is in our view irrational given the weight of support for such reviews and is indicative more of an apparent hostility in the Green Paper to the value of comparative study than any reasonable analysis of the international evidence.
66. Obligations on employers must include obligations to review existing pay structures; to determine the extent of and reasons for pay gaps between men and women; to publish the results of the review; and to take timely, transparent and adequate steps to eliminate any such pay differences which are tainted by sex discrimination. These obligations must be carried out in conjunction with trade unions whose enforcement role will be vital, given the impossibility of the CEHR or any other body(ies) adequately policing the employer function. We support the TUC’s call for the statutory equality representatives with the right to information in connection with equal pay.
67. The following remarks relate to individual pay claims which must continue to be made available alongside proactive equal pay obligations. Many of the proposals we make should resolve differences between EC and domestic law. An underlying theme in the suggestions is to simplify the law making it more understandable and accessible by those who use it.
68. Our principal suggestions concerning individual equal pay claims are that:
- The comparator-based approach should be retained in modified form but should operate in addition to, not (as at present) instead of, a discrimination-driven approach;
 - It should be possible to challenge discrimination in contractual terms (including pay) by reference to a hypothetical comparator under the normal provisions of a single equality act.
 - Such discrimination-based claims could include challenges, *inter alia*, to disproportionate pay differences. They would also benefit women in very predominantly female workplaces, women whose jobs have been contracted-out, and those who, for other reasons, have no suitable actual comparators for the purpose of a comparator-based challenge.

- The decision in *Robertson v Defra* (which is in our view incompatible with EC law) must be reversed by statute.

Q.22 Do you agree that allowing the use of hypothetical comparators would be unlikely to give any benefit in practice?
[Green Paper para.3.25-3.29]

The DLA's response and recommendations

69. The DLA's view is that sex discrimination in pay ought to be challengeable *either* by reference to a suitable comparator, where one is available, or (where there is no suitable comparator or where for some other reason a claimant wishes to proceed other than by reference to an actual comparator), by means of the standard anti-discrimination legislative structure. Hypothetical comparators do not fit readily within the comparator-driven approach (whose advantage to the claimant is that the existence of an actual comparator permits the 'equality clause' mechanism and places the onus of disproving discrimination on the employer). They must, in our view, be made available to women who wish to challenge pay discrimination in the manner open to those who wish to challenge race or disability discrimination etc in contractual terms. Women must be allowed to use the discrimination-led (normal) approach as an alternative to the comparator-driven approach for the following reasons.

70. The requirement for a real comparator limits the effect of the equal pay legislation:

a) In segregated occupations: As the law stands, female cooks in a shipyard may compare their jobs to painters or engineers, whilst cleaners at a coal mine may compare themselves to clerical staff, and seamstresses in a motor factory compare themselves to repair workers.¹ But where these occupations are segregated, a comparison for equal pay is impossible. So the cook or the cleaner working for an all- or predominantly-female outside contractor,² or the seamstress in an all- or predominantly-female sweatshop, has no claim to equal pay and cannot at present challenge sex discrimination in relation to pay (where, for example, she is told in terms that she and other staff would be paid more if they were male). This is a growing problem in 'contracting-out' scenarios.

1 See, respectively, *Hayward v Cammell Laird Shipbuilders (No 2)* [1988] AC 894, HL; *British Coal v Smith* [1996] ICR 515, HL; *Neil v Ford* [1984] IRLR 339, IT (unsuccessfully), *The Independent* 14 May 1991, *The Guardian* 11 March 1991 (successfully).

2 *Lawrence v Regent Office Care* Case C-320/00, [2003] ICR 1092, ECJ; see also *Allonby v Accrington & Rossendale College* Case C-256/01, [2004] ICR 1328, ECJ, (college lecturers).

b) Where the pay is disproportionately unequal: Discriminatory pay can operate beyond different pay for equivalent work. In three illustrative scenarios below, there is sex discrimination that the Equal Pay Act 1970 cannot address:

- Although a woman can compare herself to a man doing less valuable work, and achieve the same level of pay as him,³ she cannot claim for proportionally more pay than he receives.⁴
- A woman may be doing less valuable work to a man, but receive disproportionately lower pay than him. For instance in the US case, *County of Washington v Gunther* 452 US 161 (Sup Ct 1981), male prison officers had more onerous duties than female prison officers. However, a job evaluation study recommended that the women's pay should be 95% of the men's. The men were paid their worth in full, whilst the women were paid just 70% of the men's pay. In the US, just as in the UK, the Equal Pay Act 1963 demands a real comparator. However, the Supreme Court ruled that the female prison officers could make a claim of sex discrimination using Title VII (the loose equivalent of the Sex Discrimination Act 1975), which does not demand a real comparator.⁵
- As above, save that the two occupations respectively are predominantly female and male, suggesting indirect discrimination.

71. The requirement for a comparator in all cases is in breach of our Community obligations. As shown in the pregnancy discrimination cases, where there is sex discrimination but no logical comparator, the ECJ has ruled that the claim should succeed, even in the absence of a comparator. (This is in contrast to the statement at para 3.28 of the Green Paper that the ECJ requires a real comparator.) For instance, in *Alabaster v Woolwich plc* Case C-147/02, [2004] ECR I-0000, ECJ; *Alabaster v Barclays Bank (No 2)* [2005] EWCA 508 the claimant lost a pay rise because she was absent on maternity leave. To accord with EU law, and specifically an ECJ ruling, the Court of Appeal implemented this ruling by disapplying section 1 of the EqPA 1970, so that *Alabaster's* claim could proceed without the need for a comparator (real or hypothetical). This purposive approach of the ECJ suggests that wherever unequal pay is caused by sex discrimination, it should be actionable.

72. As things stand, victims of discriminatory pay who have no comparator must call upon EC law and request that a tribunal disapplies section 1 of

³ *Murphy v Bord Telecom Eireann* Case 157/86, [1988] ICR 445, at § 10 ECJ; contrast *Waddington v Leicester Council for Voluntary Service* [1977] ICR 266, at 270-271 EAT.

⁴ *Evesham v North Hertfordshire Health Authority* [2000] ICR 612, CA.

⁵ In fact, the claimants used Title VII because, at the time, the Equal Pay Act did not cover municipal workers: but the point (that Title VII can be used without a comparator) stands.

the EqPA 1970 (as in *Alabaster*). This is hardly a clear or satisfactory position to maintain.

73. The Equal Treatment Amendment Directive 2002/73 (which encompasses real and hypothetical comparators) applies to pay. To comply, either the EqPA should allow hypothetical comparators, or the SDA should allow for discriminatory pay claims.
74. The solution to the current problems facing individual equal pay claimants is, as set out above, to allow alternative claims under comparator-led and discrimination-led approaches (such as currently correspond to the EqPA and the SDA models). The comparator-led approach is inadequate by itself, but its abolition and replacement, as distinct from supplementation, by a discrimination-led approach would amount to regression. It is well established that, in straightforward equal pay claims, the claimant need show no more than a difference in pay with that of her comparator to establish a *prima facie* case. By establishing a *prima facie* case the claimant raises a presumption of sex discrimination which the employer must rebut.⁶ Some of these cases will not fall into the direct/indirect discrimination analysis and are peculiar to equal pay law. Here, a claimant shows that she is paid less than her comparator for doing equal work, but without having to show the reason why. No one else in the workplace bar the claimant and her comparator comes into this equation.⁷ In these cases there are no significant statistics to show a disparate impact on women generally, and there is not necessarily an apparent reason for the pay difference. Even if the cause is not an overtly discriminatory one, there can still be sex discrimination when there are only two persons in the equation, one woman and one man.⁸
75. It follows that we support the retention of a contractual approach. It is clear from the examples above, however, that this approach must be supplemented in order to allow women to challenge sex discrimination in relation to pay and contractual conditions where, for one reason or another, no actual comparator is available or suitable. There is no reason why such claims ought not to be allowed under the normal approach, the choice of comparator or non-comparator approach to be left to the claimant in order to avoid the creation of additional unnecessary barriers to justice.

⁶ 'The scheme of the [Equal Pay] Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex.' Per Lord Nichols, giving the judgment in *Glasgow City Council v Marshall* [2000] ICR 196, at 203 HL.

⁷ See *eg Brunnhofer v Bank der Österreichischen Postsparkasse* Case C-381/99, [2001] IRLR 571, at § 28.

⁸ *eg Capper Pass v Lawton* [1977] QB 852, EAT; *Pickstone v Freemans* [1988] ICR 697, HL; *Barton v Investec* [2003] ICR 1205, EAT.

Q.19 Do you agree that the distinction [between contractual and non-contractual pay matters] should be retained? [Green Paper para. 3.16-3.20]

The DLA's response and recommendations

76. For the reasons set out above we think that *a* (rather than *the current*) distinction ought to be retained between contractual and non-contractual cases. However, we do not agree with para 3.19 of the Green Paper that damages for injury to feelings and aggravated and exemplary damages ought not be available in comparator-driven claims, or that different time limits should apply to them. The normal rules apply in any case of unlawful discrimination in relation to pay/contractual terms on grounds other than sex and the retention of less favourable provisions in (sex-based) equal pay claims almost certainly amounts to indirect discriminatory against women contrary to EC law. Restrictions in legislation that have disproportionate impact on women are in breach of Community Law unless justified. See *R v. Secretary of State for Employment Ex parte Equal Opportunities Commission* [1995] 1 AC 1, HL.

77. The reasons for justification provided by the Green Paper are that it would be an 'excessive and unfair burden on employers' (para 3.19), and the short-term uncertainty created by a break from the old law (para 3.18). For the reasons set out below we disagree and propose that the normal rules be applied to comparator-driven, as well as discrimination-driven, pay/contractual term challenges.

- a) Time Limits: As the law stands, the six-year (five- for Scotland) time limits can be in breach of Community Law. In *Preston v Wolverhampton Healthcare NHS Trust (No 2)*[2001] 2 AC 455, at §§ 10-12 the House of Lords held that in claims first presented in 1994, pension credit should be backdated to 8th April 1976. As noted above, the government responded to the ECJ judgment by replacing the two-year rule with the six- (or for Scotland, five-) year rule, which brings such claims into line with breach of contract. But the House of Lord's judgment reveals that, in cases of pensions at least, even the amended rule may contravene Community law.
- b) Damages: If the pay difference was not the result of 'deliberate discriminatory intent' (para 3.19) a tribunal is unlikely to make an award for exemplary, aggravated damages, or for injury to feelings. If it was, then these awards may be wholly appropriate. Thus, there is nothing 'unfair' about allowing these damages to be awarded in appropriate cases.
- c) Excessive burden on employers: It has been reiterated, both by the ECJ [*Seymour-Smith* [1999] ICR 447, at § 75, ECJ] and the House of Lords [per Lord Keith, *R v. Secretary of State for Employment Ex parte Equal Opportunities Commission* [1995] 1 AC 1, at 30, HL] that Equal pay 'is a fundamental principle of Community law.'

- d) No short-term benefits: The government states: ‘Any benefits of simplification are unlikely to be seen in the short term’ (para 3.18). This could be said for any ‘simplification’ or consolidation process. In fact, retaining the current distinction will produce long-term uncertainty, as more exceptions are created by ECJ case law.

Q.20 Do you consider there are further areas of the law of equal pay developed by case law which it would be helpful to codify? [Green Paper para 3.21-para 3.22]

The DLA’s response and recommendations

Objective Justification - The Definition

78. The new generation of discrimination Directives state that a defendant may ‘objectively justify’ the challenged provision, criterion or practice by showing (i) a *legitimate aim*, and that *the means of achieving that aim are* (ii) *appropriate and* (iii) *necessary*. This formula codifies ECJ case law, especially *Bilka-Kaufhaus v Weber von Hartz* Case 170/84, [1987] ICR 110, which itself is rooted in the Community law principle of proportionality, and is generally known as the ‘*Bilka test*’. The test has been transposed into the domestic legislation, save for the EqPA 1970 as ‘a proportionate means of achieving a legitimate aim’. Unfortunately, the Court of Appeal has fallen short of implementing the full meaning of the *Bilka test*, suggesting that this formula means ‘*reasonably necessary*’, which is a dilution of the test.⁹ As such a tribunal, when applying the balancing test, should consider ‘fairly obvious alternatives’¹⁰ but an employer is not bound to show that its practice was the only possible one available.¹¹ This language of compromise over-complicates the matter, and most importantly, glosses over the purpose of the legislative policy and the *Bilka test* which is to find the least discriminatory way to achieve the legitimate aim.

79. The problem is illustrated by the case of *Enderby v Frenchay Health Authority*, [1991] 1 CMLR 626, at 663 and 668, EAT; Case C-127/92, [1994] ICR 112, ECJ where the employer was trying to justify a difference in pay between speech therapists (98% female) and pharmacists (63% female). The pharmacists were paid about 40% more than the speech therapists. The reason given was market forces. But the evidence was that only an extra ten per cent pay was needed to recruit a sufficient number of pharmacists. The EAT applied accounted for the reasonableness of this defence test and weighed the 40% difference in pay against the need for

⁹ *Hardys v Lax* [2005] ICR 1565, at § 32, CA; *Cadman v Health and Safety Executive* [2004] EWCA 1317, at §§ 30-31, CA, citing *Barry v Midland Bank* [1999] ICR 319, at 336, CA.

¹⁰ *Allonby v Accrington and Rossendale College* [2001] ICR 1189, at § 28, CA.

¹¹ *Hardys v Lax* [2005] ICR 1565, at § 32, CA.

sufficient pharmacists and held that the difference in pay was justified. But the ECJ held that the pay difference could only be justified to the proportion that market forces required (ten per cent). The existence of the less discriminatory alternative meant that the practice (a 40% pay difference) could not be justified. Under the *Bilka* test, proportionality means *no more than necessary*.

80. The DLA recommends that Section 1(3) EqPA should be replaced with the following:

(3) An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is neither directly nor indirectly discriminatory.

(4) A pay-related factor which would put women at a particular disadvantage when compared with men will not satisfy section 1(3) [or whatever] unless they correspond with a real need on the part of the employer, which is not itself discriminatory, and where they are necessary and proportionate to the achievement of that aim.

81. The DLA does not agree that existing caselaw on equal pay should be codified as this will inevitably result in the codification of that which is inconsistent, as well as that which is consistent with, EC law. Further, codification will result in ossification in an area of law which is constantly subject to fresh interpretation by the ECJ.

The Scope of the Comparison

82. Under the EqPA the comparator must be in the 'same employment', which includes (section 1(6)) an 'associated employer'. Community law, under Article 141 EC, is broader, allowing for a comparator who is in the same establishment or 'service', whether public or private, and whose terms originate from the same legislative provisions or collective agreement (*Defrenne v Sabena (No 2)*, Case C-43/75, [1976] ICR 547, at § 40, ECJ). The direct effect of Article 141 allows claimants to try either route in domestic tribunals. Thus, the new version should encompass this rule from *Defrenne v Sabena (No 2)*.
83. Unlike section 1(6) of the EqPA 1970, Article 141 covers the situation where both the claimant's and comparator's employers are *not* companies. This facilitates public sector claims (*South Ayrshire Council v Morton*, [2002] ICR 956, CS).
84. But Article 141 only applies where the claimant and comparator share a single source of pay (such as legislation or a collective agreement). This curbs its impact on contracted-out workers (*Lawrence v Regent Office Care*, Case C-320/00, [2003] ICR 1092, ECJ; *Allonby v Accrington and Rossendale College*, Case C-256/01, [2004] ICR 1328, ECJ). For instance, in *Allonby*, the law facilitated the employer's manoeuvre of

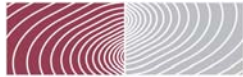
(predominantly female) part-time workers onto lower pay. Disparate pay between the sexes remains a problem in the United Kingdom, and adversely affects women particularly in segregated occupations and part-time work, as the government acknowledges (at §3.4). So the DLA recommends allowing comparisons to be made between contracted out workers who share the same ultimate principal employer, as in cases such as *Lawrence* and *Allonby*. As the law stands, employers are encouraged to pay less to predominantly female occupations and part-time workers. It should also be noted that the proper application of the transfer of undertakings regulations and the two tier workforce agreement ought to stop contracted-out women workers from suffering resulting pay inequality. That they have failed to do so indicates that additional protection is required for this vulnerable group.

85. The decision in *Robertson v DEFRA*, [2005] ICR 750, CA should be reversed for policy and legal reasons. First, the decision insulates government departments from equal pay law, where there is discriminatory pay across these departments. It also suggests that private employers can insulate themselves from equal pay law by 'departmentalising' their various operations, with the result that traditionally female occupations will be undervalued and underpaid.
86. After many battles, female cooks in a shipyard could compare their jobs to painters, whilst cleaners at a coalmine may compare themselves to clerical staff, and motor factory seamstresses may compare themselves to repair workers.¹² *Robertson* suggests that an employer may locate its cooks, cleaners and seamstresses in separate establishments with separate bargaining, and then restore these predominantly female occupations to inferior pay, turning back the clock some 30 years and frustrating the harmonising ambition of Article 141.
87. *Robertson* is also questionable legally. The decision is rooted in the absence of a discriminatory motive,¹³ which is not a matter for the comparison. (It may be relevant at the objective justification stage where *inter alia* it can be weighed against the discriminatory effect).
88. Further, the decision may not comply with Community Law. Unlike *Lawrence* and *Allonby*, *Robertson* was a case with a single source of pay (the government). Any distinction between departmentalised workers and a 'single source of pay' becomes somewhat blurred where there is separate bargaining but undoubtedly a single ultimate source of the payment, the employer. Where private sector employers do this, but retain some control over its workers, by say the use of mobility clauses, the distinction between the autonomous establishment and the ultimate employer becomes even more blurred. The ECJ in *Lawrence* was concerned that it could not identify a body responsible for the inequality

12 See, respectively, *Hayward v Cammell Laird Shipbuilders (No 2)* [1988] AC 894; *British Coal v Smith* [1996] ICR 515; *The Independent* 14 May 1991, *The Guardian* 11 March 1991.

13 [2005] ICR 750, CA, at § 35.

which could restore equal pay. No such problem exists in single-employer cases.



Discrimination Law Association

**DISCRIMINATION LAW ASSOCIATION
RESPONSE TO THE DISCRIMINATION LAW REVIEW
REPORT A *FRAMEWORK FOR FAIRNESS*
SEPTEMBER 2007**

CHAPTER 4: BALANCING MEASURES

Q.23 What evidence is there of the extent to which the current “positive action” provisions are being used? Do you consider that the current provisions limit the actions that employers and others would like to take? [Green Paper para. 4.36-4.38]

Q.24 Do you agree that it would be helpful for organisations seeking to make progress towards their goals of tackling under-representation and disadvantage to be able to use a wider range of voluntary balancing measures? [Green Paper para. 4.39-4.47]

The DLA’s response and recommendations

89. The DLA supports the proposal for a broader framework for positive action. We repeat the observations made in our submission to the Discrimination Law Review in March 2006. These include:

- a) The DLA strongly recommends that the government use the opportunity of the new equality legislation to comply with the Convention on the Elimination of Racial Discrimination/Convention on the Elimination of All Forms of Discrimination Against Women obligations to adopt special positive measures, where appropriate, but, of course, to do so across all grounds. Such measures must not be regarded as exceptions to the anti-discrimination rule but must be regarded as tools for achieving substantive equality.
- b) The present weakness and opacity of the positive action regime means that employers are often confused about the extent to which they can use positive action and, in the case of disability, are so nervous about scope for positive action that they fail to appreciate that positive action in the case of disability is not – other than in local government – unlawful.
- c) The data suggests that many private employers in London are utilising positive action schemes in line with diversity management theories that

may in fact be in danger of falling foul of the artificially tight existing legislative restrictions.

d) The DLA advocates the creation of clear and strong positive action regime. The importance of positive action to the achievement of substantive equality, together with a clear statement that it will not amount to unlawful discrimination, should be included in the preamble/purpose clause.

90. The DLA welcomes the government's proposal to permit positive action measures to prevent or compensate for disadvantages or to meet special needs linked to the protected grounds, which mirrors the positive action provisions in the Race Directive article 5 and the Employment Framework Directive article 7. This is broader and more flexible than the current provisions:

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the [protected grounds].

91. The Green Paper does not explain what it is meant by "a wider range of voluntary measures" and the proposal itself lacks clarity.

The evidence and the issues

Current law

92. The current anti-discrimination legislation permits any person to *train* persons from a protected group to help them compete for jobs or to *encourage* them to apply for opportunities in jobs where there is evidence of under-representation of the racial group to which they belong or their sex, or, as a member of a particular racial group or one sex, they are under-represented, or where to do so prevents or compensates for disadvantages linked to sexual orientation, religion or belief and age.

93. Existing legislation also permits measures providing access to facilities or services (and any ancillary benefits) to meet the special needs of particular racial groups and religion or belief groups in relation to their education, training or welfare.

94. In relation to gender equality, the SDA permits the reservation of seats or the creation of extra seats on trades unions and other elective bodies.

95. Also, measures may be adopted to reduce inequality in the numbers of men and women elected as representatives of political parties – this last provision, enacted in the SDA 2002, is the first positive action measure to make use of a 'sunset clause', whereby once the Act has achieved what it set out to do, it may be repealed.

96. Since the DDA does not protect those who are not disabled, it is lawful to discriminate in favour of a disabled person although employers rarely do so. In addition, the DDA requires employers to make “reasonable adjustments” for a disabled person put at a substantial disadvantage by a provision, criterion or practice, or a physical feature of premises.

Weaknesses in current provisions

97. The weaknesses which have been identified have come from the use of positive action measures to improve race and gender equality where they have existed for over thirty years. (The provisions for the other protected groups are too new to have had any impact yet).

98. The provisions under the RRA and the SDA are now considered too restrictive and outdated for a number of reasons:

- a) The positive action provisions are premised on the fact that particular racial groups and women (but also men) lack the right education, training and skills, which has been the result of historical disadvantage. This might have been the situation thirty years ago and it remains a problem. However, increasingly ethnic minority persons and women will have the relevant qualifications and skills yet still suffer from a higher unemployment rate or pay gap.
- b) The application to ‘particular work’ is too restrictive. It can apply to journalism but not to a career in broadcasting; or to bricklaying or carpentry but not to jobs in the construction industry.
- c) Importantly, the positive action measures cannot be used for recruitment, selection or promotion to a job. Consequently apprenticeships (which are included in the definition of employment) and other on the job training schemes cannot be used as positive action measures.
- d) Existing positive action measures are specific to a single ground and are not capable of dealing with positive action where disadvantage is based on intersectional/multiple discrimination. The Equalities Review highlighted the real disadvantage in the labour market of Pakistani and Bangladeshi women. If an employer wanted to adopt measures to encourage Bangladeshi women to apply for particular posts where few if any Bangladeshi women were currently employed in that type of work, the employer would need to show under-representation of women and under-representation of Bangladeshis, neither of which may be the reality as there may well be women, and Bangladeshi men doing that type of work.
- e) In some circumstances, achieving more equitable statistical representation is not enough to bring about sustainable change. To prevent or compensate for disadvantages may require more than training or encouragement, especially where the disadvantage derives from institutional patterns of direct and indirect discrimination and harassment. Further there are other legitimate aims for which positive

action should be permitted: to improve social cohesion or public confidence or to achieve rapid cultural or institutional change.

- f) In relation to the positive action in the form of facilities or services to meet special needs, this is limited to special needs in relation to education, training and welfare. Although 'welfare' seems a broad category, it is narrowly interpreted and has excluded for example, competitions and awards which recognise talent and achievement and courses which are aimed at the integration of ethnic minority women.

The DLA response

99. The DLA supports the proposal for a broader framework for positive action. We repeat the observations made in our submission to the Discrimination Law Review in March 2006:

Positive Action

- a) The retention of the broadly symmetrical approach in domestic anti-discrimination legislation has had the effect of restricting the scope of positive action measures or "practical flanking measures" which would encourage and attempt to secure fair participation in society. There has always been a fear that the extensive use of measures, associated pejoratively with affirmative action or positive discrimination, would disrupt the aim of formal equality of treatment. This is reflected in the narrow exceptions for positive action in the RRA, which were designed merely to prevent any acts done to meet certain "special needs" of persons of a particular racial group from being deemed unlawful rather than to encourage or require steps to be taken to redress historical disadvantage. When looked at through the more appropriate prism of removing structural disadvantage, positive measures enhance rather than vitiate the equality principle.
- b) The adoption of truly positive measures, as distinct from the narrow domestic exceptions, is recognised as important in several international instruments. The Race and Employment Framework Directives contain specific positive action provisions which permit the maintenance or adoption of specific measures to prevent or compensate for any disadvantage linked to the relevant protected grounds. Though wider than the restrictive domestic provisions, the approach taken in the Directives is *permissive* rather than *directive*. By contrast both the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) place an obligation on the state, where appropriate, to adopt special measures for the purposes of guaranteeing the full and equal enjoyment of human rights and fundamental freedoms to racial groups and to women. The DLA strongly recommends that the government use the opportunity of the new equality legislation to comply with the

CERD/CEDAW obligations to adopt special positive measures, where appropriate, but, of course, to do so across all grounds. Such measures must not be regarded as exceptions to the anti-discrimination rule but must be regarded as tools for achieving substantive equality.

- c) The experience in other jurisdictions, Canada and South Africa for example, demonstrates the effectiveness of the use of a positive action mechanism coupled with a substantive equality guarantee. In Canada, a common cross-ground framework permits positive action to be used to combat existing disadvantage across all the equality grounds where necessary. This approach has the virtue of consistency and clarity, and reflects the reality that positive action may be necessary to combat disadvantage at different times for the different grounds in different ways.
 - d) The present weakness and opacity of the positive action regime means that employers are often confused about the extent to which they can use positive action and, in the case of disability, are so nervous about scope for positive action that they fail to appreciate that positive action in the case of disability is not – other than in local government – unlawful. The need for wider positive action provisions, based on preventing or compensating for disadvantage, rather than narrowly defined specific measures has been highlighted by recent research. The data suggests that many private employers in London are utilising positive action schemes in line with diversity management theories that may in fact be in danger of falling foul of the artificially tight existing legislative restrictions.
 - e) For the reasons stated above, the DLA advocates the creation of clear and strong positive action regime. The importance of positive action to the achievement of substantive equality, together with a clear statement that it will not amount to unlawful discrimination, should be included in the preamble/purpose clause. In so far as there might be concerns about transgression of the boundary between positive action and unlawful discrimination, compliance with the substantive equality principle can be enforced by the courts by reference to the preamble/purpose clause.
100. Also, the restriction of positive action to training and encouragement means that there is very little incentive for employers to invest in training persons who cannot be retained at the completion of their training. The distinction between an apprentice/other trainee and a positive action trainee also results in the anomaly that, whilst both may receive training from the same employer, the former are guaranteed employment and the latter are not.
101. Notwithstanding the restrictions, employers and service providers do use positive action. There are a number of organisations which devise and implement positive action programmes in both the public and private sectors, such as PATH Ltd and the Windsor Fellowship with success. Path

Ltd. record that 95% of their trainees find employment and 75% of those are employed by the training provider. As the Green Paper points out the Home Office has actively encouraged police forces to use positive action through two plans, *Dismantling Barriers* and *Breaking Through*.

102. Thus, the issue is not the extent to which the provisions are being used but whether they can be said to deliver the desired outcomes; some employers believe that they do not.

103. For example, the Metropolitan Police Force has advised that despite enormous and successful efforts to boost recruitment of police officers from visible ethnic minority (VEM) communities, the Home Office target of 25 percent representation by 2009 was not realistically achievable. To achieve the Home Office target for VEM officers, it would mean that over the next five years the recruitment intakes would have to comprise of 68 percent VEM recruits, against the current target of 17 percent (MPA Press Release 22 July 2004).

104. The DLA therefore welcomes the government's proposal to permit positive action measures to prevent or compensate for disadvantages or to meet special needs linked to the protected grounds, which mirrors the positive action provisions in the Race Directive article 5 and the Employment Framework Directive article 7:

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the [protected grounds].

This is broader and more flexible than the current provisions:

- a) The constraints of the current provisions are removed and it should make it easier for employers, service providers and others to take positive action.
- b) 'Disadvantages' is wider than under-representation and ought to permit competitions and awards or the types of activities mentioned above where the objective to be achieved is something other than under-representation or particular educational, training or welfare need.
- c) It ought to allow for measures such as 'tie breaks' where, all things being equal in a selection for a job or admission to university, the employer (or university) may select a candidate with a protected characteristic in order to address disadvantage. In this respect, the proposal is wider than the current provisions.

105. The Green Paper does not explain what it is meant by "a wider range of voluntary measures" and the proposal itself lacks clarity. For the provision to be effective it must be workable, and this means that clarity is

needed for employers and service providers who typically will want to know:

- a) The types of measures which may be used or any limits or restrictions;
- b) The meaning of disadvantages: the Sexual Orientation and Religion or Belief Regulations permit training or encouragement to prevent or compensate for disadvantage linked to sexual orientation or religion or belief. 'Disadvantages' is not defined. The DTI Explanatory Notes for the Sexual Orientation and Religion or Belief Regulations, in explaining the positive action provisions in regulations 25/26 gives some examples:

For example, regulation 25/26 can thus be relied upon by showing that persons of a particular sexual orientation / religion or belief are under-represented in jobs or trade organisations, or that there is evidence of widespread harassment or discrimination in jobs or trade organisations."

The initial ACAS guides to these regulations interpreted 'disadvantage' as under-representation without further guidance as to how this should be established in relation to those grounds in particular for which direct monitoring is rarely likely to be appropriate or acceptable to the workforce;

- c) The meaning of special needs, how they are identified and any limits or restrictions relating to circumstances in which they may be identified.
106. In relation to any form of positive steps, employers and service providers are risk averse: they will not adopt measures which may be legally challenged. The Green Paper acknowledges that clarity about the purpose of "balancing measures" will be needed but states that it is not proposed to put the details of the measures which will be permitted on the face of the legislation as this would depend on the facts of each case.
107. This ignores the fact that the lawfulness of the measures will be governed by and interpreted in the light of ECJ jurisprudence. It is here where the problems may arise. The ECJ jurisprudence on positive action (*Brieche v Minister of Education* C-409/95; *Marschall* [1997] ECR I-6363 C-158/97; *Badeck and others* [2000] ECR I-1875 C-407/98; *Abrahamson and others* [2000] ECR I-5539) permits training, encouragement, nursery assisted places for women and tie breaks i.e. where there are 2 (or more) candidates of equal merit the employer may select the candidate from the 'under-represented group' but the measures must be appropriate and necessary and reconcilable as far as possible with the principle of equal treatment. In particular in relation to tie breaks:
- There must not be a policy of automatic and unconditional preference;
 - Each candidate must be subjected to an objective assessment; and

- The individual circumstances of each candidate must be taken into account.
108. It is not clear in which circumstances ECJ law would permit an employer to fast-track members of 'disadvantaged groups' within their selection, appointment or promotion procedures.
109. In Case C-158/97 *Badeck* [2000] ECR I-1875 the ECJ accepted that it could be lawful to have a policy of calling all qualified female applicants to the interview stage, in a situation where women were under-represented in the relevant sector. Therefore, some equally qualified male candidates would not have been called to interview. This decision suggests a degree of flexibility for 'fast-tracking' initiatives, although in the same case the Court affirmed the general requirement that no automatic and unconditional preference be applied at the point of selection for employment.
110. The DLA does not agree that ECJ jurisprudence should be codified at this time, as it is still evolving in this area: the jurisprudence is based on gender equality and mainly in the field of employment. We are not aware of any cases brought under the Race Directive or Employment Framework Directive, so it is not known if different interpretation will be adopted, where there is not the obvious 50-50 representation model. For example, we would hope that 'disadvantage' would be interpreted more widely than statistical under representation or special need and that achievement of social objectives such as cohesion, integration, public confidence would be regarded as legitimate aims. Also it is not known how this broad provision will be applied to education, housing, health services, provision of goods and services that are within the scope of the Race Directive.

DLA Proposal

111. The DLA proposes that primary legislation should include a broad provision for positive action and that this is supported either by regulations or a code of practice or both which provides for greater clarity on the types of measures which may be permitted. However, it will be important to secure balance between clarity which is not prescriptive and flexibility which makes it easier to adopt measures.

Q.25 Do you agree that measures to meet special needs in relation to education, training or welfare or any ancillary benefits should be permitted in respect of all protected groups? [Green Paper para. 4.48]

<h3>The DLA's response and recommendations</h3>
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112. Yes, the DLA supports the proposal that all protected groups should benefit from measures to meet particular needs, but the measures should

not be restricted to meeting needs in relation to education, training, welfare and other benefits.

113. Under the current provision in the RRA76 s.35, 'special needs' is interpreted as needs which are either exclusive to the protected group or special in the sense that the need is experienced to a much greater degree by members of that group: they do not need to be unique to that group.

114. The DLA supports the proposal for a broader framework for positive action, which should permit measures such as competitions and awards which recognise talent and achievement rather than address any particular needs e.g. Orange Broadband Prize awarded annually for the best original full-length novel by a female author.

Q.26 Do you agree with the proposals for the issuing of guidance by the Commission for Equality and Human Rights, but that the Commission should not have a role approving positive action programmes? [Green Paper para. 4.49-4.51]

The DLA's response and recommendations

115. We agree that the CEHR should not have a power to approve positive action schemes. This would be cumbersome, slow and more likely to deter rather than to encourage an employer or service provider to adopt positive action measures.

116. The CEHR already has the power to issue guidance and codes of practice on positive action measures under the current law. This is set out in the Equality Act 2006 s.14, which would, of course, be amended in due course to refer to the single equality act, once enacted.

Q.27 Do you agree that we should have a power to continue the operation of the current provision (political shortlists) beyond 2015 if this is still necessary and proportionate?

Q.28 Do you agree that we should widen the scope of voluntary positive measures for political parties to target the selection of candidates beyond gender? [Green Paper para. 4.52-4.58]

The DLA's response and recommendations

117. The DLA proposes the continuing and/or broadening if necessary the scope of permitted voluntary positive action in the selection of candidates by political parties.
118. In relation to race, religion or belief, sexual orientation or age, the low representation of members of a particular group as councillors and MPs is a more complex issue than the Green Paper might lead us to believe.
119. Whether, and to what extent, the activities of political parties are covered by existing anti-discrimination legislation is unclear. While the House of Lords is soon to rule on the application of provisions in the RRA to certain Labour Party procedures, in *Ahsan v Watt (on behalf of Members of the Labour Party)*, the DLA recommends that political parties should be explicitly brought within anti-discrimination legislation so that any discrimination which occurs in the selection process or in any other of their activities may be challenged.
120. Second, we agree that political parties can do more by way of mentoring, shadowing, outreach, encouragement etc. Political parties should be encouraged to take full advantage of positive action provisions in the legislation. These measures would not require new or additional measures – just sustained commitment and leadership.
121. Third, we consider that selection criteria referring to protected grounds other than gender are more problematic: who is an ethnic minority, which faiths, what age groups would count for the purposes of the shortlist?



Discrimination Law Association

**DISCRIMINATION LAW ASSOCIATION
RESPONSE TO THE DISCRIMINATION LAW REVIEW
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SEPTEMBER 2007**

CHAPTER 5: PUBLIC SECTOR EQUALITY DUTIES

Q29 Do you agree that the race, disability and gender duties should be replaced by a single duty on public authorities to promote race, disability and gender equality? [Green Paper paras. 5.11-5.24]

The DLA's response and recommendations

122. The DLA supports the proposal to replace the three statutory public sector duties with a single equality duty subject the specific proviso's set out in the paragraph below. As headlined in our submissions to the DLR in March 2006, we regard multiple/compound/intersectional discrimination as a particularly invidious manifestation of discriminatory treatment of which the legislation has so far failed to take account. We were therefore deeply disappointed to note that multiple discrimination is only referred to in the consultation paper in relation to dispute resolution and was not treated as an area in which legislative reform was required both in terms of prohibition and remedy. A single equality duty would permit public authorities to address the lived experiences of those discriminated against in ways which cut across two or more strands. This would protect Muslim men, Bengali women, black gay men and elderly disabled persons from detrimental treatment meted out on the basis of their intersectional identities.

123. The DLA's support for the single equality duty is subject to the following caveats:

- a) The single duty ought to be extended to cover all discrimination strands. There is now absolutely no justification for the two-tiered system of legal regulation which would be reinforced by the failure to extend the duty to the new strands in a new piece of equality legislation. Harmonisation is very long overdue. If there is evidential support for the prioritisation of a particular strand (whether old or new) by a particular public authority this can be done within the context of a single duty of general application. Again, particular regard should be had to section 3 of the Fredman and Spencer response.

- b) The general duty ought to apply to all public authorities. The principle of proportionality is easily capable of taking account of the nature, size and resources of any relevant public authority.

The evidence and the issues

124. As acknowledged at paragraph 5.11 of the Green Paper, the current race equality duty was introduced as part of a political recognition that the elimination of entrenched systemic discrimination required legislative measures which enjoined public bodies to proactively alter practices and structures which operated to the detriment of racial minorities.¹⁴
125. The passage of the new section 71 RRA in 2000 was an acknowledgement of the relative impotence of anti-discrimination laws which merely provided remedies to individuals after the unlawful discrimination had already occurred. Section 71 represented a new dawn: discrimination ought to be avoided and not merely compensated for retrospectively. The aim sought to be achieved by the new duty applicable to all public authorities was to have a strong, clear, effective and enforceable duty which placed race equality at the heart of public authorities' policy considerations.¹⁵
126. The race equality duty was intended to mark a major change in the law. The gender equality duty which came into force on 6th April 2007 was couched in similar terms save that the gender duty extended to harassment.¹⁶ The main distinction between the gender and race duties on the one hand and the disability duty, which took effect from December 2006, was the fact that the disability duty reflects the asymmetrical protection offered to disabled persons under the DDA.¹⁷ The amendment of s.71 of the RRA to create a more extensive positive duty, and the

¹⁴ Minorities is used here not simply in a numerical sense. It is used to indicate those categories of persons who have been historical disadvantaged or marginalised on grounds of race.

¹⁵ See **Speech of Mike O'Brien, Parliamentary Under-Secretary of State for the Home Department, HC Standing Committee D, 2nd May 2000**: *"The Bill is one of the most significant steps that the Government will take on race equality in Britain, and is probably the biggest step taken since the Race Relations Act [1976]. The Bill will create a positive duty on all public authorities to promote race equality. It will be a major change in law. The Government sees this new duty as a way of trying to eliminate discrimination in public services, not only in the internal organisational structure of public authorities but in the delivery of services to ethnic minorities. ...In considering any new element of Government policy, a Minister must consider the implications for ethnic minorities and race equality generally...The public services must recognise that it is no good simply paying lip-service to race equality: they must ensure that race equality is at the heart of their organisation's considerations when providing services – it should be part of the mainstream of policy consideration. The new duty will be a significant step forward...Equality is important in the delivery of services to all the people of this country and should be pursued in a way that is consistent with our belief that we must become a successful multiracial society."*

¹⁶ Perhaps explicably, s.76A(1)(b) SDA does not contain a requirement akin to that contained in s. 71(1)(b)RRA, to promote good relations between persons of different racial groups. In all other senses material to this response, the duties are analogous.

¹⁷ See in particular s.49A(1)(d)-(f) DDA.

subsequent enactment of the other two duties, represented something of a milestone in equality protection from which the DLA is anxious that the government does not seek to retreat. Whereas Chapter 5 of the Green Paper contends that there is no intention to erode existing levels of protection against discrimination, our analysis is that the proposals, as currently articulated in relation to public sector equality duties, will have precisely that effect. The aim of our response, as we hope is evident from our answers to the specific consultation questions below, is to point to ways in which the proposed changes to the nature of the general and specific duties are consistent with the emasculating rather than the strengthening of those duties.

127. The DLA agrees in principle with the suggestion, made at paragraph 5.14 in relation to the race equality duty, that “the general duty is too weak in the extent to which it requires action to be taken, and too unspecific about the outcomes it seeks to achieve”. This criticism applies to all of the general duties. The difficulty, as alluded to by Fredman and Spencer, is that the obligation for a public authority to have “due regard” to the relevant duty’s complementary aspects only requires such an authority to give consideration to the need to promote equality rather than to act to promote equality.¹⁸ Similarly, the DLA agrees that the current specific duties are insufficiently focussed upon delivering tangible equality outcomes. However, it is inconceivable in our view that the proposals contained in the Green Paper could have the effect of remedying these defects. The DLA adopts, in broad terms, the stance taken by Sandra Fredman and Sarah Spencer in their “Response to the Discrimination Law Review Proposal on Public Sector Equality Duties”, July 2007 but sets out its responses to the consultation questions below.

Q30 Do you agree that it would be helpful to provide a clear statement of the purpose of a single public sector duty which public authorities should use as a foundation for taking action to promote equality and good relations

Q31 Do you agree with our four areas set out in the proposed statement of purpose? If not, please give your reasons and any alternative suggestions.

The DLA’s response and recommendations

128. The DLA has long advocated the use of purpose clauses in relation to equality legislation (See original submissions, March 2006). The DLA would therefore support a clear statement of purpose in relation to the public sector duty. However, this ought to be tied to a clearly worded

¹⁸ See Fredman and Spencer, “Beyond Discrimination: Its Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes”, [2006] EHRLR 6 at p.600.

purpose clause and/or preamble to the legislation which makes specific reference to the need to tackle structural and historic disadvantage suffered by particular groups, often at the intersection of a number of grounds. The DLA is concerned that paragraph 5.30 may be seen as equating *parity* of treatment with *equality*. The aim of such a statement ought not to be to suggest that all groups of persons ought to be meted out similar treatment. Rather it ought to explain carefully that there will be circumstances in which differential treatment can be justified (see in particular our response to Chapter 4).

129. The DLA agrees that such a statement should give full effect to the four equality goals set out by Fredman and Spencer in *Beyond Discrimination: Its Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes*. It ought not to attenuate the principle of substantive equality by conflating it with parity of treatment.

Q32 Do you think that the proposed statement of purpose adequately captures the need for work to build good relations and promote positive attitudes within and between groups and underpins efforts to build integration and cohesion?
[Green Paper para. 5.25-5.30]

The DLA's response and recommendations

130. The fourth of the "dimensions of equality" referred to at paragraph 5.29 is adequate as an aspirational statement. However, it is difficult to envisage the realisation of this goal in the absence of the effective positive action measures referred to in our response to Chapter 4 above. Further, the DLA would suggest that specific work will need to be done to build good relations and promote positive attitudes in respect of race, religion or belief and sexual orientation in particular.

Q33 Do you agree that a single public sector equality duty should require public authorities to identify priority race, disability and gender equality objectives and take proportionate action towards their achievement? If not please give reasons and any alternative suggestions. [Green Paper para 5.31-5.33]

The DLA's response and recommendations

131. It is suggested at paragraph 5.31 that the government wishes to consider requiring public authorities to focus on taking action in a limited number of priority areas. The DLA supports the creation of a specific duty on all public authorities to which the general single duty applies to set out overall objectives for complying with that duty. This would be a welcome extension of the specific gender duty¹⁹. However, this support is subject, first, to the application of the single duty to all strands. We actively disagree with the proposal to limit the identification of priorities to race disability and gender. Secondly, we do not support a proposal which would result in identified priorities being set in stone to the exclusion of necessary and proportionate action in other areas. The duty should apply in principle to all of the authorities functions. The authority must then perform the exercise of determining which areas require action in accordance with the necessity and proportionality tests. This is why the DLA emphatically supports the concept of proportionality as a touchstone.

Q34 Do you agree that public authorities should be required to review their priority equality objectives at least every three years? If not, please give your reasons and any alternative suggestions. [Green Paper para. 5.34-5.40]

The DLA's response and recommendations

132. The DLA does not in principle object to the proposed review cycle. As indicated below, the DLA supports the preservation and fortification of enforceable specific duties rather than recourse to nugatory "principles": See in particular Section 2 of the Fredman and Spencer response.

¹⁹ Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006, Articles 2(4)-(5).

Q35 Would it be helpful for strategic equality outcomes to be set by the appropriate national Government? If so, what would be an appropriate way of doing this? [Green Paper para. 5.41]

The DLA's response and recommendations

133. The DLR agrees in principle with the EOC's contention that equality goals should be set in the first instance at the national level so as to avoid inchoate initiatives by a variety of public authorities which do not serve overall equality objectives. Notwithstanding this commitment in principle, it is our view that public authorities ought obviously to be able to deviate from such nationally identified goals where local evidence suggests that other targets are appropriate in specific localities.

Q36 We would welcome views on the proposed new approach to supporting effective performance of a single public sector equality duty by requiring proportionate action towards the achievement of priority equality objectives, and on the four key principles we have identified. Do you prefer this approach, or an extension of the type of specific duties adopted so far in the race, disability and gender equality duties? Please give your reasons

Q37 If you prefer an extension of the type of specific duties adopted so far in the race, disability and gender equality duties, which elements of the specific duties do you think should be retained for a single public sector equality duty and why? [Green Paper para 5.42-5.46]

The DLA's response and recommendations

134. The DLA has expressed above its strong objection to the removal of enforceable specific duties for the reasons articulated by Fredman and Spencer in their response at Section 2. It ought to be noted that the specific race equality duty had previously been criticised as ineffective by Spencer and Fredman and other equality campaigners and practitioners. The race equality schema involved the imposition of a duty upon specified public authorities to (a) publish a race equality scheme which must provide details of the procedural arrangements for the fulfilment of the general duty; and (b) carry out periodic reviews of the assessments of policies and functions relevant to the performance of the general duty. It is the overwhelming view of equality lawyers that the specific race equality duty

could only be enforced by a court at the behest of the CRE.²⁰ The inadequacy of the current specific race lies in the fact that:

- a) It posits an obligation to make arrangements to assess impact rather than to carry out such an assessment;
- b) Where monitoring is required, there is no consequential obligation to take action in light of what is revealed by the monitoring process.
- c) It places an extraordinary burden on the statutory regulator (the CRE) to ensure compliance by a significant number of public bodies.²¹

135. Whereas the obligations under the gender equality duty are more onerous, there remains too significant a focus on process and inadequate attention to outcomes. It is important to recognise, however, as Fredman and Spencer do, that there is always going to be a need to place procedural obligations upon public authorities. To fail to do so will deprive the authorities of statutory rules as to compliance with the general duty and would make it impossible to measure and/or challenge failures to take pre-requisite steps. The absence of requirements as to outcomes is a significant part of what renders the specific duties toothless. The specific duties therefore require to be sharpened and strengthened, not diluted. The DLA cannot understand how a proposal to replace the weak specific duties (compliance with which is at least reviewable by a court at the instance of the relevant Commissions) with non-enforceable principles can possibly be taken to improve the operation of the duty. In this sense the DLA agrees with the streamlined approach prescribed in Section 2 of the Fredman and Spencer response and would adopt and support the six steps outlined.

Q38 Do you think that the proposed single public sector equality duty should apply to all public authorities? If not, please say how you think it should be targeted and give your reasons. [Green Paper para. 5.47-5.56]

The DLA's response and recommendations

136. The single duty, as defined above, ought to apply to all public authorities.

137. The DLA further submits that the principled application of the necessity and proportionality tests will protect all public authorities, whatever their size or function from liability where action is not required on the evidence gathered.

²⁰ See in particular s.71E RRA. See also s.76B(4) which specifically excludes private law action for breach of the specific gender duty.

²¹ Fredman and Spencer say the number is 43,000 in *Beyond Discrimination: Its Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes*, [2006] EHRLR 6 at p.602.

138. Legislative measures ought to be taken to extend the definition of “public function”, which was narrowed in YL [2007] UKHL 27 in so far as it applies to the HRA and to the equality enactments.

Q39 Do you think that a single public sector equality duty should be extended to cover (a) age; (b) sexual orientation; and/or (c) religion or belief? Please state your reasons, including examples of the types of disadvantage you believe are experienced by people because of their age, sexual orientation or religion or belief which could be addressed effectively through such a duty.

Q40 Might there be disadvantages to extending the duty to any of these groups? If so, please give examples. [Green Paper para. 5.57-5.72]

The DLA’s response and recommendations

139. For the reasons expressed above, and for the reasons give by Fredman and Spencer in their response, the duty should definitely be extended to cover all equality strands. There is no justification for excluding the new strands. In addition, the fact of multiple discrimination requires this extension. Giving priority to any particular strand or combination of strands ought to be justified by reference to evidence gathered at either the local or national level.

140. In consequence the DLA does not regard there to be any disadvantages of the extension of the duty. In relation to the approach to the new strands discussed at 5.61-5.72, the DLA would like to make a number of points.

141. None of the issues raised at paragraphs 5.61-5.63 in relation to age can be taken to obviate the extension of a duty to age. Rather the points raised (in particular in relation to differential priority objectives for persons of different ages) highlight the need for a duty in respect of age which is carefully calibrated to meet specific needs of those in different age groups. Further consideration ought to be given, in consultation with bodies specifically charged with protecting the rights and welfare of children, as to whether the treatment of children ought to be excluded.

142. If the need for an extension of the single duty to cover sexual orientation was previously unrecognised, paragraphs 5.64-5.66 amply demonstrate that need. The DLA is concerned that the government has felt it necessary to suggest at paragraph 5.67 that public authorities would not be required to promote homosexuality or devalue the importance of marriage. Such a suggestion in a consultation document intended to pre-figure the shape of equality protection in the future would appear to be a

retrograde attempt to pander to homophobic prejudice. There are no suggestions of a similar nature made in relation to any of the other strands. That would be and would be seen to be inexcusable. So too should be the statement in relation to homosexuality.

143. In relation to religion or belief (and sexual orientation) the DLA accepts that there may be particular difficulties in data collection and that there may be difficulties attendant upon an attempt to avoid the predominance of particularly outspoken groups. However, these difficulties do not obviate the requirement for a duty in respect of all equality strands. Mediation of the potential tyranny of the majority, the powerful and/or the vocal is the part of the function of public authorities involved in the process of local governance. This is why the DLA would encourage the government to take practical and effective measures to implement #Fredman and Spencer's fourth equality goal, the facilitation of full participation in society.

Q41 Over what timescale do you think a single public sector duty and any extensions to it should be implemented to ensure we have learned as much as possible from the recently introduced duties on disability and gender

Q42 Do you think public authorities should be given the option to implement any new approach in advance of it becoming a legal requirement, enabling those authorities who have already taken an integrated approach to build on existing work? [Green Paper para. 5.73-5.74]

The DLA's response and recommendations

144. Whereas it is the DLA's views that a single extended public sector duty should be created immediately, the DLA also recognises that there would be much benefit to be gained by a consultative process which permits the scope and character of the duty, particularly as it may require to be satisfied differently in relation to different strands, to be carefully considered. A time scale which would facilitate adequate consultation with stakeholders ought to be adopted. The DLA can see no reason not to encourage public authorities to take lawful steps to implement an integrated approach in advance of a legislative requirement to do so.

Q43 Do you think there should be a single enforcement mechanism for the proposed single equality duty, enabling the Commission for Equality and Human Rights to issue a compliance notice with or without an assessment, as appropriate in the circumstances, enforceable in the county court or Sheriff's court in Scotland? If not please give your reasons. [Green Paper para. 5.73-5.83]

The DLA's response and recommendations

145. The DLA agrees with and adopts the views of Fredman and Spencer in Section 6 of their response and the views expressed by the CRE at pages 8-9 of their "*Briefings on Discrimination Law Review: Equality Duties*". The DLA seeks to stress that the supervisory jurisdiction of the High Court ought not to be ousted without clear and compelling reasons. In relation to the equality duties, there are none. The decided case law on the s.71 race equality duty has been instrumental in providing guidance as to the proper interpretation of the scope and content of the duty and the role of the court in adjudicating upon a challenge to compliance.

146. There are a number of examples of the invaluable role played by the court, including regarding the significance and prospective nature of the duty: This was clarified and underlined by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 at [274].

"It is the clear purpose of s.71 to require public bodies to whom the provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanism for ensuring the fulfilment of the aims of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter. In the context of the wider objectives of anti-discrimination legislation, Section 71 has a significant role to play. I express the hope that those in government will note this point for the future." (Emphasis added).

147. Additionally, the requirement to have regard to all three complementary aspects of the duty was set out by Elias LJ in *R(Elias)* at first instance and Burton J in *R (BAPIO & Anor) v Secretary of State for the Home Department and Secretary of State for Health* [2007] EWHC 199 (QB). In *Elias* it was said that:

"It is nowhere suggested that there was any careful attempt to assess whether the scheme raised issues relating to racial equality, although the possibility was raised; nor was there any attempt to assess the extent of any adverse impact, nor other possible ways of eliminating or minimising such impact."

148. Similarly in *BAPIO*, Burnton J held there to have been a breach of the s.71 duty where:

- a) No formal race equality impact assessment (as required by the Defendant's RES) was made available before the changes to the Immigration Rules under scrutiny took place²²;
- b) There was no record of who examined and discussed the issues which would have been material to such an REIA either before the changes were made or announced or before the changes were laid before Parliament²³;
- c) No reference was made in correspondence with the CRE to any informal assessment having been made before the rule change was announced or took place²⁴;
- d) It was to be inferred that there had been no significant examination of the race relations issues involved in the changes since there was no written record of such an examination.²⁵

149. In the circumstances, it is the DLA's view that a recommendation to place the burden of enforcement solely on the CEHR can only be consistent with an intention to render the duty less effective and to subject its (lack of) discharge to less rigorous scrutiny. The DLA respectfully reminds the government of the very clear and good reasons for creating an enforceable public duty in the first place.

Q44 What do you think should be the role of public sector inspectorates in assessing compliance with public sector equality duties? [Green Paper para. 5.84-5.90]

The DLA's response and recommendations

150. The DLA endorses the position adopted by Fredman and Spencer at Section 4 of their response.

²² **ibid, para. 67.**

²³ **ibid, para. 68.**

²⁴ **ibid, para. 68.**

²⁵ **ibid, para. 69.**

Q45 What issues would you like to see included in practical guidance on how public sector procurement can be used to achieve equality outcomes in the delivery of public services by the private sector, whilst ensuring that the guidance works well for business? [Green Paper para. 5.91-5.100]

The DLA's response and recommendations

151. The DLR accepts that procurement is a function of public authorities and that the obligations under the existing race, disability and gender general duties include the way authorities carry out procurement. The DLR concludes that there is no need to clarify on the face of the legislation that the public sector equality duties apply to procurement. The only question asked in the Green Paper relates to the content of non-statutory guidance.
152. There is now wide consensus that public sector procurement can be an extremely effective lever for change in the private sector. Yet there is little evidence outside a small number of local authorities, that equality is yet a consistent feature of public sector procurement.
153. This state of affairs cannot be the result of there being no available guidance, since the CRE, DRC and EOC have each published detailed guidance with numerous examples dealing specifically with equality and procurement, setting out how the race/disability/gender general duties impact on the carrying out of procurement within the rules and requirements of EU law. The Green Paper suggests that the existing guidance is unclear and ineffective, which our evidence contradicts, yet the government is not recommending any further measures other than more guidance.
154. Therefore, the DLA does not believe that providing further guidance is sufficient to remove whatever the factors are that make authorities reluctant to embed equality considerations into their procurement processes.
155. DLA disagrees with the DLR's conclusion that legislation on procurement is not needed for two reasons:
- a) This conclusion is based on the current general duties. However, under the proposals for a new legal framework for a single equality duty (see Green Paper paras 5.25 – 5.46), the duty would not apply to all of a public authority's functions as now, but only to those functions that the authority had made a priority. There would be no certainty that procurement would be one of an authority's priorities or the action it adopts to achieve its priorities.
 - b) Secondly, the Green Paper omits the fact that there are still diverging views on key issues, such as whether procurement is a function of a public authority or ancillary to its functions, or how

generally a public authority should incorporate equality considerations into its procurement processes.

156. The DLA recommends that there should be a separate specific provision in the single equality bill requiring designated public authorities to build equality on the protected grounds into all aspects of their procurement of works, goods and services. This would provide clear statutory authority and would support the need to meet equality duties in contracting out public services.

The evidence and the issues

Introduction

157. Public authorities currently spend more than £125 billion purchasing goods, works and services from external suppliers; all indications are that this sum, and the reliance on private and voluntary sector bodies to provide a range of public services, will only increase. There is now little disagreement, including from the private sector, that public sector procurement can be an extremely effective lever for change in the private sector; this is the real business case for equality, striking at the core concern of enterprises of all sizes, namely the opportunity for business.

158. The Green Paper para 5.96 of refers to HM Treasury's Budget Report for 2005, which stated, "*the Government should promote the incorporation of race equality into public procurement within current legal and policy frameworks*" (p. 99), as well as the 2006 report of the Women and Work Commission (p. xvi) which recommended that "*Public authorities should ensure that their contractors promote gender equality in line with the public sector Gender Duty, and equal pay in line with current legislation. This intention should be flagged up in contract documents to ensure that it is built into contractors' plans and bids.*" and the February 2007 final report of the Equalities Review (p.119) which proposed that "*The new public sector duty should incorporate a specific requirement for public bodies to use procurement as a tool for achieving greater equality.*"

159. In 1999, the Better Regulation Task Force in its Review of Anti-Discrimination Legislation, while rejecting any statutory obligation on private sector organisations to monitor their workforce, recommended that the government should use its 'purchasing and funding muscle' to promote equality practices among contractors and suppliers, with review of UK or EC procurement policies if necessary.

Background

160. Public procurement in the UK is regulated by EU Rules, including EC Treaty principles of non-discrimination (between enterprises in different Member States), equal treatment, proportionality and transparency, EC procurement directives and relevant decisions of the ECJ, UK public contracts regulations and other national laws and policies including *value for money* and *best value*.

161. The Green Paper accepts that procurement is a function of public authorities. “This means that in carrying out procurement public authorities need to have due regard to the need to eliminate unlawful discrimination and to promote equality, as well as continuing to ensure compliance with the legal and policy framework for public sector procurement.” (para. 5.92)
162. The equality commissions have recognised the importance of procurement in the way public authorities carry out their functions, and all three commissions have issued detailed guidance to help public authorities understand what they need to do at each stage of the procurement process in order to comply with their equality duties, seeking to reassure public authorities that promoting equality can fit and does not conflict with EU Rules and UK laws and policies.
163. The commissions agree that the equality duties require a three-pronged approach to public procurement:
- Not spending public money to maintain discriminatory practices but instead to support and encourage equality of opportunity;
 - Including equality requirements into the obligations of contractors where appropriate for the effective performance of the contract; and
 - Incorporating equality considerations into each stage of the procurement process so far as is consistent with EU Rules and UK legislation.
164. Using public sector contracts to tackle private sector discrimination is not new.
- In the United States a series of Executive Orders by successive Presidents beginning with President Roosevelt in 1941 have required non-discrimination and affirmative action by federal contractors and have introduced increased sanctions for non-compliance including cancellation of the contract and disqualification from future contracts. Some, but not all, states and municipalities have adopted similar policies.
 - Under the Canadian Federal Contractors Program, employers who want to bid for contracts worth at least CAN \$200,000 must agree to follow the Employment Equity Act (EEA) which requires positive measures to correct the conditions of disadvantage and special measures to accommodate differences. Failure to comply with this undertaking can result in disqualification from future contracts. Provincial governments have enacted similar laws.
 - In Northern Ireland, in the 1970’s the UK government did not hesitate to use its purchasing power to change private sector employment practices to improve job opportunities for members of the Catholic community. In 1972 all government contracts required contractors to undertake not to practice religious discrimination. Fair Employment

legislation in 1976 and 1989 established systems for identifying employers who failed to comply with non-discrimination obligations and the government adopted strict rules prohibiting public authorities from contracting with “unqualified persons”, that is NI firms that failed to comply with statutory registration, monitoring and reporting requirements concerning fair employment opportunities for Catholics and Protestants.

- In the UK in 1969, a clause was inserted into all government contracts requiring contractors in the UK to conform to the employment provisions of the 1968 Race Relations Act and to take all reasonable steps to ensure that their employees and sub-contractors do the same. Similar clauses have been used since that time.

165. Model standard conditions of contract for central government departments and agencies can be found on the Office of Government Commerce (OGC) website. The condition not to discriminate unlawfully on all protected grounds (not yet mentioning age) applies to the contractor’s workforce generally. There is no evidence, however, that government departments have taken or currently do take any real steps to monitor and enforce this condition.

166. The recent EC Directive (2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts), which replaces earlier procurement directives, is based on ECJ case law which “clarifies the possibilities for the contracting authorities to meet the needs of the public concerned including in the environmental and/or social area...” (recital (1)). The question of disqualification of contractors raised in the Green Paper (para 5.94) is specifically referred to in recital (43):

“Non-observance of national provisions implementing the Employment Framework Directive and the Amended Equal Treatment Directive concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.”

167. The DLA submits that this brings breach of national anti-discrimination legislation on employment squarely within the grounds on which a contractor may be excluded from participation in a contract under Article 45(2) (c) and (d) of the Directive. The Green Paper appears to make this more complicated than it should be. For example, there is no requirement in the Directive that the breach is “serious” and no requirement for disqualification to be “objectively justified” on any additional basis. The DLA supports a simple approach starting with the right to disqualify for a finding of unlawful discrimination tempered by a proportionate assessment of any measures to prevent future discrimination taken or about to be taken since such finding, which is the approach contained in the equality commissions’ guidance documents.

168. The UK (and separate Scottish) Regulations intended to transpose the 2004 EC Directive, without a preamble or other guide to interpretation equivalent to the preamble in the Directive, do not fully reflect the EU's acceptance of social issues as valid matters to be taken into consideration in public procurement.

169. The Green Paper refers to the OGC Note on Social Issues in Purchasing which, as the first official government guidance to be published on this issue, was very welcome. In our view, however, this Note is more restrictive regarding social issues than the preamble to the Directive. It omits the wider scope for incorporating equality requirements in Part B services contracts, such as those for education, health services, social services, leisure services and catering, and it is more restrictive regarding the content of contract conditions than the earlier Interpretative Communication by the EC

DLA response to the Green Paper's proposals

170. The DLA disagrees with the DLR's conclusion that legislation on this issue is not needed, for two reasons.

171. Firstly, this conclusion is based on the current general duties. However, under the proposals for a new legal framework for a single equality duty as set out in the preceding pages (paras 5.25 – 5.46) of the Green Paper, the duty would not apply to all of a public authority's functions as now, but only to those functions that the authority had made a priority. Neither the proposed statement of purpose for a single public sector equality duty (para 5.29) nor the four key principles (para 5.44) would necessarily bring procurement within an authority's priorities or the action it adopts to achieve its priorities.

172. Secondly, the Green Paper omits the fact that there are still diverging views (notably between the OGC and the equality commissions) on key issues such as whether procurement is a function of a public authority or ancillary to its functions or how generally a public authority should be incorporating equality considerations into its procurement processes. Whether because there are diverging views or whether the issues are lack of political will at central government level or the lack of confidence, knowledge and skills within individual public authorities, there is little evidence outside a small number of local authorities that equality is yet a consistent feature of public sector procurement.

173. The DLA therefore advises that if the government is sincerely committed to the use of public procurement to secure change in the private sector, more is needed than another layer of guidance on top of the existing equality duties or a new single equality duty. The DLA submits that there should be specific provision in the single equality bill requiring designated public authorities to build equality on the protected grounds into all aspects of their procurement of works, goods and services. This provision should be separate from the provision defining the public sector equality duty or from any measure setting out specific duties. It should

apply to a list of designated authorities set out in separate regulations, so that there could be no uncertainty as to when, how and by whom it must be complied with. As a matter of good public administration and meeting its fiduciary duties, an authority would need to consider relevance and proportionality but with a baseline that equality matters should be taken into account in the development, announcement, selection, tendering, award, management and enforcement of all of its contracts. The following suggested text could be used as a starting point for such a provision.

"Equality in Procurement"

Every designated public authority, in the procurement of works, goods or services, shall take all reasonably practicable steps to eliminate unlawful discrimination and harassment and to promote equality of opportunity.

For the purposes of this section a designated public authority is a body specified or described in regulations made by the Secretary of State.

The Secretary of State shall make regulations to assist public authorities to comply with subsection (a); such regulations may contain minimum non-discrimination and equality requirements for the tendering, award and enforcement of public authority contracts.

Section 14 of the Equality Act (Codes of Practice) shall be amended to enable the CEHR to issue a code of practice in connection with this section and regulations made under this section.

Before making regulations under subsection (c) the Secretary of State shall consult all persons likely to have an interest including but not limited to members of the business community, representatives of small businesses, employers and employers' organisations, trade unions, the CEHR, equality groups, groups representing users of public services, government departments, local authorities, health authorities and trusts, governing bodies of educational institutions, audit and inspection bodies.

174. The regulations could include standard equality questions for pre-qualification selection questionnaires (along the lines of the approved 6 questions for local authorities) and model minimum equality-related contract conditions, including conditions relating to equality obligations on any sub-contractors. The statutory code of practice could include pro-forma impact assessment check-lists to assist authorities to identify equality aspects of a proposed contract, guidance on information to be provided in OJEU notices and other advertisements, guidance on disqualification for breach of anti-discrimination laws and non-selection for poor equality performance on previous contracts, guidance on determining relevance of equality issues to the subject of the contract and how to reflect that in the specification, guidance on determining relevant and proportional equality criteria for evaluating tender submissions. The code should include guidance on how this *equality in procurement duty* should apply to existing contracts, for example PPP or PFI contracts with 15 or more years left to run. Crucially, the code of practice should include

guidance on monitoring and enforcement of the equality aspects of the specification and contract conditions. Regulations should ensure that the National Audit Office and the Audit Commission would inspect and report on compliance with the *equality in procurement duty*.

175. To enact a separate statutory requirement for public procurement would not, of course, remove procurement as one of the ways a public authority carries out its functions from an authority's general equality duty. It would provide clear statutory authority for the need to incorporate non-discrimination and equality into the procurement processes. It would support the ways in which public authorities meet their equality duty in the contracting out of public services.

176. Even with new clear statutory requirements, action will continue to be needed to secure good practice.

a) Firstly, all public authorities currently subject to the race, disability and gender equality duties should ensure that any person within the authority that plays any role in procurement should be trained on the content and implications of their equality duties.

b) Secondly, looking at the experience in Northern Ireland and the experience in Great Britain, the DLA's conclusion is that the key to encouraging good practice is clear strong commitment by government ministers requiring their departments to demonstrate high standards and giving leadership on this issue to the public authorities for which they are responsible. If, as is considered in the Green Paper, national equality objectives are established for public authorities subject to the existing equality duties or a single equality duty there should be an 'equality in procurement' objective.

177. The DLA would not disagree, of course that in addition to new statutory provision and leadership, practical guidance, especially if it can be endorsed by the OGC and DCLG, will be extremely valuable.

<p>The DLA's response and recommendations: Important issues not adequately covered in the DLR - Developing the capacity of SMEs</p>
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178. There is a further important equality matter that arises in the context of public procurement, which the Green Paper mentions only fleetingly, namely the development of capacity of SMEs, especially those that are owned or led by members of ethnic minorities, women, disabled people, LGBT men or women, members of disadvantaged religious groups. Taking steps to improve opportunities for SMEs, including those owned or led by members of protected groups, to bid for and to win public sector contracts should occur to comply with the proposed *equality in procurement duty*. For example, authorities should consider whether their packaging, advertising, and procurement procedures generally disadvantage all or

some SMEs and make changes where appropriate. Additionally, to improve opportunities for a wider range of suppliers would properly come within the scope of an authority's equality duty. In meeting the duty to promote equality of opportunity, a public authority, possibly cooperating with others in the same locality or with similar functions, could offer training to improve technical expertise and understanding of public procurement; authorities could arrange open days to introduce SMEs to their major main contractors who are likely to sub-contract aspects of their public contracts.



Discrimination Law Association

**DISCRIMINATION LAW ASSOCIATION
RESPONSE TO THE DISCRIMINATION LAW REVIEW
REPORT A *FRAMEWORK FOR FAIRNESS*
SEPTEMBER 2007**

**CHAPTER 6: PROMOTING GOOD EQUALITY PRACTICE IN
THE PRIVATE SECTOR**

Q46 Do you think that an “Equality Standard” would be beneficial to businesses, employees and customers? Would you prefer an independently assess accredited standard or a non-accredited good practice and compliance tool? Please give reasons for your answer. [Green Paper para. 6.1-6.10]

**The DLA’s response and recommendations:
Important issues not adequately covered in the DLR -
Private sector**

179. The DLR’s consideration of the private sector has been disappointingly limited, entailing a ‘light touch equality tool’ that would either be a voluntary assessed accredited standard or merely an equality compliance/check tool (ECT). Moreover, the precise nature of the ECT is not set out in the Green Paper.
180. The introduction of the three equality duties in the public sector has created a divide between public and private sector employees - the latter making up the majority of the workforce. Private sector employers tend to look at diversity only if they have the resources and a management that is in tune with the ‘business case’ argument – or if they have recently faced a discrimination claim in a tribunal.
181. The key is to strike a balance by developing a scheme that has certain regulatory elements but which involves expending only limited levels of resources in compliance and monitoring.
182. Without the making of the accreditation compulsory or the introduction of some form of monitoring procedure the ECT will have no greater impact than existing legislation and will therefore be ineffective in achieving diversity goals.
183. The DLA proposes that the Equality Act (Codes of Practice) be amended to include a provision enabling the CEHR to issue a Code of

Practice to cover equality and the promotion of diversity within the private sector.

184. Further, the DLA proposes that provision should be made in the equality act for Regulations to be issued in relation to compliance with, monitoring of and sanctions for non compliance with the Code of Practice. The DLA sets out two possible models of compliance: ‘the MOT model’ and ‘the companies model’ (for a detailed discussion of the various options, see para 200). If either of the three options, or some other compulsory monitoring exercise were adopted under the new equality act provisions, or possibly under expanded reporting requirements in the Companies Act 2007, the DLA’s proposal is that any failure by an employer to consider the Code of Practice and submit an Equality Report or Return should be admissible in evidence in any claim of unlawful discrimination. The tribunal should be able to draw adverse inferences from any failure to comply, having regard to the nature, size and resources of the employer. Furthermore, existing and new employee should have the right to a copy of the employer’s Equality Review/Return as part of his/her contractual documentation of initial employment particulars.

The evidence and the issues’

185. To the extent that the Discrimination Law Review touched upon the issue of the private sector, its proposals were disappointingly limited. Broadly speaking, whilst acknowledging the business case for diversity and the fact that many private organisations are ignorant of this point, the only proposal was for a ‘light touch equality tool’ that would either be a voluntary assessed accredited standard or merely a compliance tool.

186. It was widely acknowledged, prior to the DLR, that the introduction of the three equality duties in the public sector had created a divide between public and private sector employees - the latter making up the majority of the workforce. Under the current dual regime, public sector employers have to address issues of diversity by force of legislation, but private sector employers tend to look at diversity only if they have the resources and a management that is aware of, and in tune with, the ‘business case’ argument – or if they have recently faced a discrimination claim in a tribunal. The DLA suggests that this dual regime is unacceptable if there is to be real and lasting progress on the issue of diversity.

187. It is recognised that a considerable financial and administrative burden would be incurred by employers (and government) if equality duties were to be introduced in the private sector to the “necessary degree of accuracy”. However it is equally true, given the finding of the Hepple Report that voluntary codes and guidance consistently fail to deliver widespread improvements. It would seem to be obvious that the key is to strike a balance by developing a scheme that has certain regulatory elements but which involves expending only limited levels of resources in compliance and monitoring.

188. Given this conclusion, it is disappointing to see that the DLR appears to reject without debate the imposition of any sort of duty on the private sector on the grounds of burden to employer. It does this in apparent reliance on the experience of the public sector equality duties, without any consideration of whether an alternative type of duty, with a different reporting and monitoring structure, would be less onerous and or cheaper for employers/government to comply with and monitor.
189. The Green Paper proposes the development of a light touch “equality check tool”²⁶ (‘ECT’) for employers to use and consider introducing a voluntary equality standard scheme for businesses, which could be an independently assessed accredited standard or a non-accredited good practice and compliance tool.
190. In addressing this ‘dual regime’ problem the Green Paper suggests the ‘ECT’ as at least a partial solution. The precise nature of the ECT is not set out in the Green Paper, save that from para 6.7 it is clear that the proposal does not envisage the ECT requiring any data for monitoring, and hence any additional costs. This point is followed through in para 6.10 of the Green Paper, in which it is noted that some of the cost of an accredited scheme could be recouped from those businesses seeking accreditation.
191. It is presumed that the section headed ‘Good equality practice in the private sector’ (paras 6.3 – 6.6) gives some idea as to what might be included in the ECT as good practice. For example, para 6.5 refers to a number of ‘network’ organisations, some of which supply the type of guidance or checklists that might provide guidance in drafting the ECT. The DLA notes that these ‘networks’ undoubtedly provide useful platforms for discussion and dissemination of ideas about diversity issues.
192. However in order to action the proposed ECT – either the voluntary/accredited model or the good practice/compliance model – at least one individual within the employer’s organisation is required to take the following steps (‘the Steps’): -
- a) Realise there is a need for diversity issues to be addressed;
 - b) Search the internet for useful resources;
 - c) Choose and join an appropriate network (many require registration before key information can be accessed);
 - d) Read through many pages of documents on the relevant website(s);
 - e) Determine which information is relevant and download it;
 - f) Ensure that the information is disseminated throughout the management and/or workforce;
 - g) Ensure that the management and workforce ‘buy in’ to the concept of equality and diversity and the benefits that will result;
 - h) Implement the information;

²⁶ Paragraph 6.2 DLR: note too the use of the phrase ‘Equality Standard’ instead of “ ‘light touch “equality check tool” ” at the end of the section headed ‘Tools to promote good practice’ (paragraphs 6.7 – 6.10)

- i) Review and monitor the implementation of the information at regular intervals.
193. Steps (a) and (f)-(i) require a significant amount of motivation on the part of the employer, which – under the present regime – is frequently absent. This is obvious from the number of discrimination claims that come through the Employment Tribunal system where the employer has not addressed the issue of diversity all, or has only addressed it in a cursory fashion.
194. This failure may be due to complete ignorance on the part of the employer about diversity issues; perhaps less usually to a blatant discriminatory attitude on their part; or, finally perhaps, the attitude of many employers that they are already ‘fair’ and therefore that there is no need to look at any ‘tools’ or ‘checklists’.
195. What is clear is that those companies which already pride themselves on having good diversity strategies - e.g. Barclays and BT - will probably embrace a voluntary accredited ECT scheme, but other employers, with fewer employees and less resources, will not.
196. The proposed voluntary/accredited or good practice/compliance models of ECT will not, by themselves, address the lack of motivation problem. In answer to the first of the proposals on equality in the private sector, then, an ‘equality standard’ or ‘equality check tool’ may be beneficial to businesses, but without the making of the accreditation compulsory or the introduction of some form of monitoring procedure the ECT will have no greater impact than existing legislation and will therefore be ineffective in achieving diversity goals.

DLA Proposal in Response

197. At the base of any system of enforcing, encouraging, reporting or monitoring on diversity there needs to be a ‘standard’ or ‘duty’ (or ‘equality check tool’, even).
198. The DLA proposes that the Equality Act (Codes of Practice) should be amended to include a provision enabling the CEHR to issue a Code of Practice to cover equality and the promotion of diversity within the private sector. Regulations should provide for the CEHR to consult all persons likely to have an interest in such a code, including but not limited to trade unions, the CBI, other members of the business community, including representatives from small businesses, and the Women and Work Commission. Thus far the DLA takes the stance adopted by a number of other organisations that have expertise in dealing with discrimination issues on a daily basis.
199. At the minimum, any such Code would need to include:
- General guidance on equality and diversity issues.
 - A tool or checklist for use by the employer. The checklist would incorporate the following requirements:

- That a periodic review of equality and diversity should be carried out at least every three years.
- That the diversity of the workforce should be monitored.
- That an equality and diversity plan should be produced.
- That the steps taken by the employer to progress and implement the plan should be set out.
- The latter three points should be set out in an Equality Report.
- Comprehensive illustrations and examples should be given on the level of information required in the Equality Reports, which should differ depending on the size and administrative resources of the employer organisation e.g. over 250 employees; between 50 and 249 employees; under 50 employees. By differentiating the level of information required depending on the size of the organisation, the financial and administrative burdens on employers would be fair and proportionate.

200. Further, the DLA proposes that provision should be made in the equality act for regulations to be issued in relation to compliance with, monitoring of and sanctions for non compliance with the Code of Practice, along one of the following two models:

- a) Submission of Equality Reports and monitoring of compliance carried out by independent bodies: 'the MOT model'. The Green Paper has made reference to a number of 'networks'²⁷ whom it suggests might be able to act as providers of 'endorsement' or 'quality marks' for the ECT voluntary/accredited model. The DLA suggests that this system could go further, in the following way:
- The CEHR would act as a licensing authority of organisations – either commercial or voluntary – such as those mentioned in the Green Paper²⁸.
 - The licensed organisations would be responsible for receiving and reviewing/monitoring the Equality Reports>Returns in return for a fee from the employer (fee dependent on size and resources of organisation)²⁹.
 - A certificate of compliance - an 'equality MOT certificate' – would be issued to the employer.
 - The licensed organisation would, in turn, report to the CEHR with details of the employers to whom it had issued compliance certificates

²⁷ See paragraph 6.5 and 6.7 of DLR

²⁸ On a large scale, the Ministry for Transport through the Vehicle and Operator Services Agency (VOSA) approves about 18,300 garages to be MOT Test Stations. Vehicle examiners are trained and examined by VOSA. See http://www.direct.gov.uk/en/Motoring/OwningAVehicle/Mot/DG_4022109. On a smaller scale, for the Tenancy Deposit Protection Scheme, the government has awarded contracts to three DPS providers who are subject to strict controls.

²⁹ Analysis would have to be carried out into whether the fees alone would provide sufficient revenue for the licensed organisations to function independently of any additional grant. It is tentatively suggested that this might be a financially viable option given the number of private employers who would have to comply, and the fact that in the DLR it was suggested that 'assessment costs' could be levied for the voluntary/accredited ECT model.

and any employers who had failed to provide the requisite information or a full report.

- The licensing organisation would have delegated power, as part of the licensing procedure, to require the submission of further information; and it would have locus in the Employment Tribunal to seek an order for compliance where there was procedural default i.e. failure to submit report/make a return on time; failure to complete all categories of information in report/return.
- Acting on the reports provided by the licensed organisations, the CEHR would only become involved in compliance where there was failure to comply with the content of the Report/Return, rather than late or incomplete Reports/Returns.
- As part of the licensing procedure the CEHR would undertake monitoring of licensed organisations by way of audit and sample checking of Reports/Returns.
- Licenses could be revoked in the event of breach of the terms of the licence conditions, which would include accuracy of information provided.

The primary legislation would need to include provisions enabling the CEHR to licence organisations in the manner described above, power to withdraw licensed status and power to take compliance measures; and permitting the licensed organisations to take preliminary compliance measures.

Benefits of such a system would include the need for the CEHR to monitor only the licensed organisations, not individual employers, and to take compliance proceedings only in cases where there has been non-procedural default. This would result in significant long term savings in the financial and administrative burden to the CEHR over the 'public sector model' at (a) above.

b) Submission of Equality Returns: the 'Companies model'. This would involve each employer submitting a 'Return' to either the CEHR or an organisation controlled by the CEHR, with a compliance procedure that includes power to make a demand for the Return; and power to seek an order from the Employment Tribunal enforcing compliance coupled with a system of punitive fines. Again, the information in the Returns would differ depending on the size of the employer organisation. Comprehensive checking of the information supplied on every Return would not take place. However a system of orders from the Tribunal and fines would provide the means to ensure procedural compliance. This enforcement procedure could be operated relatively economically with an automated system of Returns. Samples of Returns could be checked in detail – rather like the system of checking on VAT returns – to ensure that the content of the report was compliant with the Code of Practice. Proportionately higher penalties and sanctions for default in the detailed content of the Return would provide the motivation that private sector employers lack when addressing diversity issues.

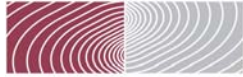
201. Again, amendments to the proposed primary legislation would be needed to permit the CEHR or a separate organisation controlled by the CEHR, to issue returns; to require employers to submit the Returns and to provide for a system of sanctions including the right for the CEHR to take enforcement proceedings through the Employment Tribunal. Regulations would provide more detail as to the content of the Returns, the enforcement powers and the relevant Employment Tribunal Procedures.
202. If either of these options, or some other compulsory monitoring exercise were adopted under the new equality act provisions, or possibly under expanded reporting requirements in the Companies Act 2007, the DLA's proposal is that any failure by an employer to consider the Code of Practice and submit an Equality Report or Return should be admissible in evidence in any claim of unlawful discrimination. The tribunal should be able to draw adverse inferences from any failure to comply, having regard to the nature, size and resources of the employer.
203. In addition, it is suggested that each existing and new employee should have the right to a copy of the employer's Equality Review/Return as part of his/her contractual documentation of initial employment particulars. This would require an amendment to s1 of the Employment Rights Act 1996 (from which employers falling into the category of public employers under the public sector equality duty provisions would need to be excluded). This would give employees a simple and effective remedy if they felt that their employer had not addressed diversity issues, and perhaps more importantly such a duty would serve as a reminder or prompt to employers to address diversity.

Q47 We would welcome your suggestions for other ways in which good equality practice could be encouraged and embedded in the private sector. [Green Paper para. 6.11-6.12]

The DLA's response and recommendations

204. The Green Paper, paragraphs 6.11 and 6.12 discusses various methods of embedding information in relation good equality practice in the private sector. The Northern Ireland model, from which some of the elements set out in the suggestion above were drawn, is rejected as being too costly and burdensome. However the DLA's view is that (i) a Code of Practice could be simple, and effective, and with the gathering of information contained in a standard form Report or Return, the burden would be reduced; and (ii) it is vitally important that the failure of private employers to embrace good equality practice is considered in its historical context. Looking at the recent history of anti-discrimination provisions, the proposals now put forward in the Green Paper are only slightly more onerous than the current regime. There is little in the proposed scheme that is going to encourage those that currently ignore the discussion on diversity to addressing the issue.

205. With the introduction of one of the three suggested models above, the employers would instantly be aware of their obligations in relation to diversity, however it is acknowledged that the necessity to inform employers of 'the business case' remains.
206. Although the suggestion that good practice can be encouraged and embedded without introducing new legislation, it is the view of the DLA that unless private sector employers are subject to some form of compulsion in relation to diversity, any social re-education programme to shift their opinions would need to be huge. For example, a publicity campaign of the proportions of the 'AIDS' campaign in the 1980s might possibly succeed where 30 years of discrimination legislation has failed.
207. The experience of employment law practitioners is that a vast number of private employers have the attitude that apart from drafting a one paragraph equal opportunities statement, they do not have to engage with diversity issues until a discrimination claim is brought against them. The DLA's view is that the proposal put forward by the DLR simply does not address this fact.



Discrimination Law Association
DISCRIMINATION LAW ASSOCIATION
RESPONSE TO THE DISCRIMINATION LAW REVIEW
REPORT A *FRAMEWORK FOR FAIRNESS*
SEPTEMBER 2007

CHAPTER 7: EFFECTIVE DISPUTE RESOLUTION

**The DLA's response and recommendations:
Important issues not adequately covered in the DLR -
Enforcement and remedies**

208. Effective enforcement of anti-discrimination law is a fundamental part of any reform of anti-discrimination law. Unenforced and unenforceable discrimination law can do more harm than good. Responsible employers need to be supported, not undermined, and the best way to do this is to embed good equality practice and for employers to have the confidence that anyone who tries to undercut them by going against anti-discrimination law will be sanctioned. (We refer to “employers” only as these are the great majority of claims, but we include service providers.)
209. A core part of anti-discrimination law is the redress that is available before a tribunal for victims of discrimination. The DLR has not included to any significant extent remedies in the employment tribunal. EU law requires that sanctions against discrimination be “effective, proportionate and dissuasive”. It is the DLA's view that the current regime fails to meet this requirement in a number of respects.
210. We support the early resolution of disputes wherever possible, and improving accessibility, efficiency and effectiveness of procedures for resolving discrimination cases.
211. The DLA supports the inclusion of the following powers of the employment tribunal:
- a) The power to order reinstatement or reengagement unless there is also an unfair dismissal case;
 - b) The power to recommend changes of practice based on the evidence the tribunal has considered in an individual case which would benefit persons other than the individual complainant. (This power exists in the Fair Employment and Treatment Order 1998 Northern Ireland.)
 - c) The power to grant interim relief similar to tribunal powers in respect of union-related dismissals pursuant to TULRCA 1992.

- d) The introduction of extra-statutory guidelines for injury to feelings as opposed to for injury to health, including coverage for inflation in minimum award amounts.
- e) The power to make exemplary awards. In order to avoid over-compensating the victim, such awards could be put towards a fund to help support victims of discrimination and employers who want to make progress in the equality field.

212. All findings of unlawful discrimination or harassment by the Employment tribunal should be publicly available and easily accessible. This information could be used by public authorities in relation to procurement, licensing, other qualifying bodies, and other relevant activities.

The evidence and issues

A level playing field for employers and service providers

213. We agree with the government's statement that in an ideal world all employers, service providers and the like would understand, support, and comply with anti-discrimination legislation and no enforcement would be necessary. We also agree that this is not the way the real world works. In practice, effective resolution of disputes and enforcement of anti-discrimination law is a fundamental part of any reform of anti-discrimination law.

214. If the DLR were to result in the best possible anti-discrimination law on paper, but there was no effective enforcement, it would render the entire process otiose. Further, unenforced and unenforceable discrimination law can do more harm than good.

215. However, employers' great concern is that there be a level playing field. (We shall refer to "employers" only as these are the great majority of claims, but we include service providers.) Employers need to allocate resources to meet the needs of anti-discrimination law. An employer striving towards the best anti-discrimination law practice needs to be sure that their competitors have to do the same. Otherwise, the responsible employers will be undermined and under-cut by unscrupulous employers who ignore anti-discrimination law, secure in the knowledge that there will be no sanction. This will have serious consequences for the employer, employee and the economy. Responsible employers need to be supported, not undermined and the best way to do this is to embed good equality practice and for employers to have the confidence that anyone who tries to undercut them by going against anti-discrimination law will be sanctioned.

216. We support the early resolution of disputes wherever possible. However, we know from our members that, of all employment law, most

discrimination issues are the hardest to resolve early. Employers are often reluctant to admit (perhaps to themselves) that they have discriminated unlawfully, while most victims of discrimination first of all want their claim to be believed - that the discrimination or harassment did happen. Discrimination is an emotive subject in our society.

217. We also support improving accessibility, efficiency and effectiveness of procedures for resolving discrimination cases.

Remedies in employment disputes

218. A core part of anti-discrimination law is the redress that is available before a tribunal for victims of discrimination. The DLR has not included to any significant extent discussion of remedies in the employment tribunal. EU law requires that sanctions against discrimination be “effective, proportionate and dissuasive”. It is the DLA’s view that the current regime fails to meet this requirement in a number of respects.

219. There should be a power in the employment tribunal to order reinstatement or reengagement unless there is also an unfair dismissal case. Many victims of discriminatory dismissals lack the continuity of employment required to bring unfair dismissal claims and are thereby, without justification in our view, precluded from applying for reinstatement or re-engagement. In many cases, re-engagement in gainful employment may be more important to a potential complainant than a pecuniary award.

220. There should be a power in a tribunal to recommend changes of practice based on the evidence the tribunal has considered in an individual case which would benefit persons other than the individual complainant. (This power exists in the Fair Employment and Treatment Order 1998 Northern Ireland.) Such a power would at least recognise the need for “dissuasive” sanctions and would form part of the arsenal of tools which can be used to address group/systemic disadvantage. The power to recommend systemic change should also be paralleled in GFS and other justiciable cases.

221. Employment tribunals should have the power to grant interim relief similar to tribunal powers in respect of union-related dismissals pursuant to TULRCA 1992.

222. The DLA is concerned that the current system fails to provide an adequate and effective remedy. Awards in discrimination cases do not, as a general rule reflect a reasonable relationship of proportionality to the harm suffered by the Claimant. In 2006, the average award for injury to feelings was £5,660 and the median was £4,875. The introduction of extra-statutory guidelines for injury to feelings as opposed to for injury to health (where the JSB guidelines are already used), perhaps along the lines of the JSB Guidelines for awards in personal injury cases, would help ensure that the amounts awarded under this head more fully reflect the degree of

harm suffered. Any minimum award guidelines must ensure protection against inflation.

223. Further, the DLA recommends that employment tribunal have power to make exemplary awards. In order to avoid over-compensating the victim, such awards could be put towards a fund to help support victims of discrimination and employers who want to make progress in the equality field.

224. Under European law, as a minimum, the employer must compensate the employee for the actual losses suffered – PI, loss of earnings, injury to feelings etc. We cannot lawfully move away from this claimant-centred approach to damages, nor would it be in the public interest to do so. But a larger employer can, too often, “buy” the right to discriminate which brings the law into disrepute. Exemplary awards would be a powerful sanction and would make, in effect, all employers equal before the law.

225. In relation to disability discrimination, for example, the costs of complying with the reasonable adjustment duty may often be far more than an employer will ever have to pay out in compensation and so the weak remedies act as a disincentive. In the government’s recent consultation on Access to Air Travel for Disabled Persons and Persons with Reduced Mobility, the following point was made about the fine levels to be imposed on air operators for breach of the regulation:

“In considering the level of fine, we have taken account of the impact of non-compliance on passengers and the cost of rectifying non-compliance. Articles 3, 4(1), 4(4), 8(1) and 13 are fundamental to the principle of non-discrimination and offences connected with these are likely to merit a fine higher than £5,000 if the penalty is to be “effective, proportionate and dissuasive”.

226. Article 5 concerns the designation of points of arrival and departure at an airport. As this is likely to require investment, a fine of less than £5,000 may not provide a financial incentive to install the necessary facilities.

<p>The DLA’s response and recommendations: Important issues not adequately covered in the DLR - Access to justice</p>
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227. For equality laws to be meaningful, individuals who consider that they have been subjected to unlawful treatment must have the means to secure legal redress. European and international law makes clear that this is a fundamental obligation of the State in any scheme to prohibit discrimination.

228. Individuals and groups must have good knowledge of their rights to secure redress; as well as access to skilled advice and assistance, including, where appropriate, legal representation; procedures should be clear and simple without financial barriers. Those who adjudicate must be well-trained, not only to understand the law as it appears on paper but how breach of the law impacts on people's lives.
229. Discrimination cases are notoriously hard to win. Research demonstrates that race discrimination cases, in particular, remain the least likely to succeed of all tribunal cases with statistics demonstrating that only 16% of race discrimination cases win at Tribunals. This figure compares extremely poorly with the success rate of other cases of cases, e.g. redundancy (43%) and the success rate of success across all jurisdictions in the Employment Tribunals (43%). Our experience is, too, that many claimants with good claims of discrimination desist from bringing proceedings because of the unavailability of representation in the vast majority of cases and, in the case of County Courts claims in particular, the costs of bringing claims. Legal aid is not available for employment tribunal claims and for small claims in the County Courts – where most discrimination claims are litigated.
230. Failure to ensure real access to legal redress, including skilled advice, has the effect of allowing discrimination to continue unchallenged. Policies in several different areas is coalescing to create a situation in which the gains that a single equality act provide will be undermined by the absence of any support for individuals who wish to challenge unlawful practices.
231. The DLR is being undertaken during the period of transition from the existing commissions to the new CEHR. Whilst some of the previous commission provided significant support for legal advice, information and representation, the government has made clear that the CEHR will support only a small number of 'strategic' cases. Funding for local law centres, historically specialist in discrimination law, is being cut and many law centres forced to close.
232. In addition to this, changes in the funding for legal aid, being introduced by the Legal Services Commission, will mean that legal service providers are only able to provide an average of 4.5 hours of advice and assistance on to an individual who faces discrimination. This is manifestly inadequate. Those who face discrimination are more likely to be vulnerable people who have additional needs that must be met in order ensure the case is prepared properly. Migrant workers and workers from BME communities may need interpreters, as well as translation of legal documents. Individuals from marginalised groups have more precarious and atypical financial arrangements so working out their eligibility can take time, they may be holding down one, two or even three poorly paid jobs. Many not have a stable/fixed address. The fixed fee scheme does not take any of this into account. While other areas of law will have vulnerable clients, they will be part of a broader client base. It is in the very nature of discrimination that Claimants will be from the most marginalised and vulnerably sectors of society. This is also an area, where, as the judiciary

have often noted, the law is incredibly complex. Skilled, impartial and expert preparation is vital to winning such a case. Particularly when confronted with well-funded Respondent solicitor firms instructing barristers, including QCs. In our experience, four hours is not even sufficient for taking initial instructions on many routine discrimination cases. Preparing questionnaires and analysing the statistical data given in replies to questions can take that time alone. In the experience of DLA members, discrimination case going to a hearing can routinely take over 40 hours, even when handled by specialists.

233. We expect the effect of the changes being introduced by the Legal Service Commission will be a drastic reduction, if not complete disappearance, in the legal advice and assistance available to victims of discrimination and harassment seeking to secure and protect their legal rights. This is because the new system is based on the assumption that practitioners will balance the extra work in complex cases with easier routine cases. However, practitioners who specialise in complex areas like discrimination will be at a greater disadvantage than those who do general work. Thus, specialists will be general work to balance their books and so reduce their capacity to do specialist cases. Those who don't do specialist cases have no incentive to take them on. The payment in goods and services cases is set at level below that given for employment cases. Thus, even where practitioners continue to provide advice and assistance for employment cases, they are unlikely to do so for non-employment cases.

234. We consider that if any single equality act is to be truly effective and command widespread support, the rights afforded by it must be truly effective. This means they must be enforceable by victims of the unlawful acts created by any single equality act. This means that the new Commission for Equality and Human Rights should be sufficiently resourced to be able to represent claimants, particularly in the more complex or challenging claims or where particular claimants would otherwise be very disadvantaged in the litigation process. Further, law centres, racial equality councils and others operating in the voluntary sector, who support many presently otherwise unrepresented claimants in discrimination cases, must be sufficiently well funded to continue with that work.

<p>The DLA's response and recommendations: Important issues not adequately covered in the DLR - Disputes in the workplace</p>
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235. The Green Paper refers to the independent review led by Michael Gibbons regarding employment dispute resolution. The use of alternative dispute resolution is mooted as a potentially effective remedy in employment disputes. The DLA has already provided initial submissions to

the Gibbons' review. The DLA expects that the government may offer new options for resolving disputes which are not currently available.

236. The parties should be provided with a clear impartial guidance about the pros and cons of the various options. Funding should be available to ensure individual Claimants have access to independent advice. Individuals rarely have the resources available to employers and this "inequality of arms" needs to be addressed when reviewing the options available. It needs to be acknowledged that legal redress may be the most appropriate option in many cases. It is essential that parties are not misled through over enthusiasm to guide them away from Employment Tribunals.
237. It is strongly urged that penalties are not attached to failure to make attempts to resolve/settle disputes. It is inherently inequitable that the award for discriminatory actions should be reduced because the claimant did not attempt to settle his/her case out of court. There are also very good public interest grounds for allowing discrimination cases to proceed without hindrance including the imposition of penalties. It may also be contrary to EU Law, which requires that the loss and damage caused by discrimination to be made good: *Marshall v Southampton [No.2]*. It is also inherently inequitable that costs should be awarded against a successful claimant in a discrimination case because he or she did not attempt to settle his/her case out of court. This is particularly unjust in cases where a claimant does not settle because the respondent wishes to impose a confidentiality clause on the settlement.
238. Imposing penalties to force parties to settle will simply bring statutory dispute resolution procedures back in by the back door. Parties would take advice as to how best to protect their position on this aspect and to appear to be attempting to settle disputes. The current statutory procedures have shown that the imposition of penalties and other mandatory requirements do not encourage genuine attempts to reach resolution. Settlements only occur where each party willingly enters into negotiations or discussions. Forcing unwilling parties to talk to each other does not in our experience result in a settlement.
239. The approach the government should take, therefore, is to offer more options than currently exist for parties who are genuinely happy/willing to negotiate. This would be the most cost effective and efficient way of approaching the issue. It must be recognised that whilst the system should support a conciliated resolution to some disputes, there are a significant number of disputes which cannot be resolved internally, however the system is configured. For instance, where an employee alleges that they were sexually harassed and the employer denies this; forcing parties through reconciliation/mediation just adds to the time, cost and stress to the parties.

Q.48 Can you suggest ways in which Alternative Dispute Resolution could be used more effectively or widely to resolve discrimination disputes in the field of goods, facilities, services, premises and the exercise of public functions?
[Green Paper para 7.13-7.19]

The DLA's response and recommendations

240. The CEHR has the potential power to provide conciliation for GSF cases across the board. The DLA suggests this is something that should definitely be set up, (particularly given that the CEHR will only be funding strategic cases.
241. In respect of GFS, the law is, if not in crisis, simply not working effectively. We whole-heartedly echo the government's concern that there are very few claims. There are far fewer GFS cases in all applicable strands than employment cases and, therefore, we welcome a wider choice of remedies, for complainants. Discrimination cases are complex and multi-faceted and different forms of dispute resolution may be appropriate in some cases whilst in other they would not. Legal cases will remain necessary in some cases. Ombudsmen can be of very limited use in the private sector.
242. Discrimination cases concern matters of social principle and justice. Such cases have a wider positive impact on achieving equality and diversity and social cohesion in particular communities. An individual should therefore be entitled to have his or her complaint of discrimination determined by court. Discrimination cases also help in securing improved behaviour of an offending party. This has been particularly the case in respect of public bodies. The effect of one discrimination case for one claim can often have a "ripple" effect on a particular sector.
243. Without firm legal precedent, customers and service providers will not have certainty in the law, causing confusion, disputes and cost.
244. In addition, the mere threat of the possibility of legal action acts as a deterrent to the vast majority of employers and service providers, and is the driver for good preventative practice.
245. Further, vulnerable groups look to the law to protect them. They need to see the courts making judgments in anti-discrimination law for the law to retain their respect. Traditionally-disadvantaged groups are now less willing to accept discrimination; The DLA agrees with the government that as a society we can be proud of this. But raising groups expectations and then failing to deliver is a recipe for disillusion and a danger to community cohesion.

246. We support the extension of *voluntary* conciliation to all strands, but this must be voluntary – compulsory mediation will be counter-productive. Penalties should not be attached to the failure to make attempts to resolve/settle disputes. The imposition of penalties and other mandatory requirements do not encourage genuine attempts to reach resolution. Settlements only occur where each party willingly enters into negotiations or discussions. The system supports a conciliated resolution to disputes. However it should be recognised that there are a number of disputes which cannot be resolved in this manner, however the system is configured. For example, this may particularly be the case in respect of sensitive harassment cases. Forcing parties to conciliate or mediate merely adds time, cost and stress of the parties.

Q.49 Can you suggest ways in which the role of Ombudsmen might be used more effectively to resolve discrimination disputes? [Green Paper paras 7.13 – 7.25]

The DLA’s response and recommendations:

247. The DLA suggests that consideration should be given either to properly funding ACAS or a similar body to carry out this kind of function for both employment and non-employment cases. Members report very different experiences with ACAS reps, some are excellent whilst others lack basic knowledge of anti-discrimination law and give misleading advice. This is despite the fact that, in practice if not in theory, ACAS have been concentrating its resources on discrimination.

Q.50 Do you have any views on our proposals for enhancing discrimination expertise in the county and sheriff courts? [Green Paper paras. 7.20-7.25 and 7.28-27.]

The DLA’s response and recommendations

248. The DLA is aware that there is widespread dissatisfaction with the county courts as a venue for discrimination cases. Court fees and the risks of costs, often disproportionate to the level potential damages, operate as a major deterrent. Court fees are prohibitively expensive. The exemption from fees should be consistently applied to all those entitled and claimants should be advised of their rights. To make justice accessible procedures should be simplified, for example, issuing should be possible by fax and should not require a fee.

249. The DLA argues that judges should receive training in discrimination law and the issues that are likely to arise in discrimination cases as a pre requisite to hearing discrimination cases. However, the DLA is concerned about designating certain county courts to hear all county court discrimination cases.
250. We support the governments desire to expand the use of assessors.
251. Courts should have the power to award exemplary damages.
252. The DLA does not have an agreed view on whether employment tribunals should be given jurisdiction to hear claims presently heard in the County Courts.

The evidence and issues

Improving the knowledge of courts

253. The DLA agrees that discrimination cases that lead to litigation must be handled as efficiently and effectively as possible. This applies in the county/sheriffs courts. If new equality legislation is enacted, there will be a major task to train staff and members of employment tribunals and staff and judges in county courts/sheriff courts. Despite over 30 year of anti-discrimination legislation, DLA members as advocates still find that they need to educate employment tribunal panels or county/sheriff court judges.
254. Complainants who do bring cases in the county court are often very disheartened by judges' lack of knowledge of the relevant anti-discrimination laws. For example, one member reported that a housing lawyer had to persuade a judge that the Disability Discrimination Act *did* apply to private as well as public bodies. Fortunately, the lawyer had the back up of discrimination specialists in her organisation. It is clear that the present arrangements are not providing true access to justice for victims of discrimination and harassment.
255. The Green Paper notes that “[e]mployment tribunal chairs also receive additional training before being able to deal with discrimination cases, whereas judges do not routinely receive specialised training in discrimination law” (para 7.22). We consider that judges, too, should receive training in discrimination law and the issues that are likely to arise in discrimination cases, certainly as a pre requisite to hearing discrimination cases.
256. The use of lay assessors in RRA cases has made judges more aware of the impact of discrimination or harassment, and there does not appear to be any good reason not to require lay assessors for all discrimination cases. We support the governments desire to expand the use of assessors.

Specialist Discrimination Courts

257. The DLA is concerned about designating certain County Courts for the hearing of all County Courts cases, for a number of reasons. Firstly, we consider that all courts should acquire knowledge of discrimination law and the issues arising because sometimes such issues arise without notice and the courts must be empowered to address them fairly and justly, as they arise. Secondly, and related to our first observation, discrimination claims may arise in existing claims, issued in non-designated courts and thus create jurisdictional problems. A recent example may be seen in the case *Lewisham LBC v Malcolm* [2007] EWCA Civ 763 (disability discrimination and tenancy rights) referred to above, where Lewisham LBC was the claimant bringing possession proceedings against the disabled Defendant. If the proposals for designated courts to hear discrimination claims were introduced this would not affect where this possession action was commenced (because Lewisham, the claimant, did not rely on the DDA), but in defending the claim the Defendant successfully relied on his rights under the DDA (see, too, *Manchester City Council v Romano* ([1995] 1 WLR 2775). Thirdly, County Courts administer justice locally and designating certain courts would have the effect of centralising justice in discrimination cases and may make it even harder for some claimants to bring claims. If only certain County Courts were granted jurisdiction over discrimination claims, some claimants would invariably have to travel to them and this may make accessing justice for some claimants even more difficult and expensive. This would discriminate against those with mobility issues, particularly the disabled. The Green Paper indicates that, if designated courts were to be introduced in all cases (they already exist in race discrimination cases, section 57(2), RRA), it would “be necessary to make arrangements to ensure that a reduction in the number of courts dealing with these cases did not restrict access to justice, e.g. by unreasonably increasing travelling distances” (para 7.24). We would want to be sure that such arrangements were in place before potential claimants were deprived of access to their local courts. Further, particularly for claimants with a disability that impacts on their mobility, venues should be nearest to the Claimant’s dwelling and not the Defendant’s registered office, which may be hundreds of miles from where the incident occurred.

Improving the accessibility of courts

258. More needs to be done to improve the county court. The case process needs to be made quicker, less stressful and cheaper. The risks of costs orders being made against unsupported litigants, in the County Courts in particular, and the costs of issuing proceedings in the County Courts create an obvious deterrent and obstacle to bringing proceedings.

259. The exemption from fees should be consistently applied to all those entitled and claimants should be advised of their rights. Court fees are

prohibitively expensive for many Claimants. Because an anti-discrimination law case asks for at least two remedies (compensation and declaration), the fee is doubled and is over £220 per case, even where compensation is likely to be under £1,000. Courts are profoundly inconsistent on their approaches to fee exemption. Disabled clients in particular report sometimes getting respect and help from court staff and sometimes being humiliated and even discriminated against.

260. Procedure should be simplified for both parties. Issuing a claim is unduly difficult compared to the employment tribunal, and disabled claimants, in particular, find this a real barrier to justice. Issuing should be possible by fax and there should be no fee payable on issue.

Representative actions in GFS cases

261. The Civil Procedure Rules and the Employment Tribunal Rules (Employment Tribunals (Constitution and Rules of Procedure etc) Regulations 2004 provide the courts and tribunals with wide case management powers over claims with multiple claimants (see, especially, CPR r19.11 and Group Litigation Orders). Further, the equality Commissions and now the Commission for Equality and Human Rights have power to bring proceedings in their own name for the purposes of seeking rulings on issues of principle that may affect many people (see, for example, *R (on the application of the Equal Opportunities Commission) v The Secretary of State for the Trade and Industry* [2007] IRLR 327). We consider these powers are essential to ensure that multiple party litigation is properly managed and points of principle are justly and proportionately resolved.

262. However the DLA does not have an agreed position on representative actions in GFS cases.

Remedies in GFS cases

263. Remedies in GFS are insufficient. Compensation is usually low. As in employment, we recommend that the court has the power to award exemplary damages which are not awarded to the claimant.

<p>The DLA's response and recommendations: Important issues not adequately covered in the DLR - Employment case management</p>

264. The DLA has several additional comments regarding the need to strengthen the efficient and effective handling of litigation in the employment tribunal, including that:

- Case management should be improved, including the ordering of necessary disclosure of documents from employers at interim stages, which would in the long-term save time and money;

- In order to simplify cases and reduce the formalistic approach requiring every aspect of a case to be set out in writing at the outset, following *Enfield LBC v Sivanandan (2000) 637 IRLB 13, EAT* everything should be made clear by the time of the full hearing by means of an exchange of witness statements, following full and proper disclosure;
- There needs to be investment in training for Chairs and employment tribunal staff in discrimination law, including raising awareness of the extreme inequality of arms between Claimant and Respondent;
- The practice of different chairs making contradictory orders on the same case should be discouraged;
- The employment tribunal should make more use of their power to fund medical reports on section 1 Disability Discrimination Act and to ensure that claimants are aware of this power.
- Indirect discrimination would benefit from better case management. Parties could be encouraged to identify areas of disagreement before the hearing.

The evidence and issues

265. Considerable attention needs to be given to the way cases are handled by the employment tribunal. The employment tribunals need to improve case management. Effective case management is particularly important in discrimination cases, both in securing substantive justice in the determination of a case, and in saving time. One difficulty at present is the reluctance of some tribunal Chairs at interim stages to order the necessary disclosure of documents from employers. This can occur because a Chair at an interim stage inevitably does not have the deep knowledge of the case of the legal representative seeking disclosure. It also arises from an inherent desire to save time and costs. However, this is a false economy. Almost inevitably, the tribunal at the final hearing orders disclosure of documents refused at earlier stages. Such documents tend to reveal the true strength of each party's case. The failure to order full disclosure at interim stages therefore often prevents early settlement of cases. Late orders for disclosure can also cause hearing lengths to exceed their allotted time, causing long delays. It is also unjust. The former President of the EAT has said (*Enfield LBC v Sivanandan (2000) 637 IRLB 13, EAT*) that given the evidential difficulty in discrimination cases, employment tribunals should be generous in making orders for disclosure by employers.

266. Discrimination cases can be simplified by fewer requirements to formally set out in writing every aspect of the case at the outset. Unfortunately, many ETs take an excessively formalistic approach, requiring very detailed and legalistic particularisation of discrimination claims by claimants. This approach defeats the objective of accessibility and informality in the ET system. The former President of the EAT has

said there is a difficult balance to be drawn between requiring particularity on the one hand, and going too far, so as to render the proceedings technical, legal and pure matters of form on the other. ET procedures are designed to give relative ease of access to unrepresented parties to make their complaints. When too much is put in writing, ultimately the trial of an action will dissolve into an examination of a whole series of documents rather than concentrating on the main issues in the case. Everything should be made clear by the time of the full hearing by means of an exchange of witness statements, following full and proper disclosure. (*Enfield LBC v Sivanandan* (2000) 637 IRLB 13, EAT).

267. Employment tribunal Chairs dealing with these interim matters may not always have extensive experience of large discrimination cases and the handling of evidence in those. The DLA recommends more intensive training is made available.

268. Currently discrimination cases are disproportionately affected by a lack of resources, partly because they are amongst the longest hearings. Two examples to illustrate:

- one of our members reports that their two most recent 5 day discrimination hearings were cancelled by the same tribunal office only one day before the hearing and re-listed many months later. This causes extensive waste for parties and the employment tribunal itself.
- Another reports that trying to persuade the employment tribunal to re-list a discrimination case for longer than one day can take over one month; the hapless employer and employee did not know if they had to attend a listed hearing until a few days before the hearing was due. Both parties had to make extensive arrangements to attend (including the Claimant endangering his new job by taking time off during an important induction); in the end the employment tribunal did cancel the hearing but only very close to the hearing date. This could have been avoided by the employment tribunal dealing with requests for re-listing promptly and understanding the great resources parties put into arranging to attend hearings.

269. The practice of different chairs making contradictory orders on the same case should be discouraged. Members report hearings being listed, cancelled, re-listed and cancelled again due to different chairs considering the file (often without any requests from the parties). This adds very considerably to the parties' costs.

270. There needs to be investment in training for Chairs and employment tribunal staff in discrimination law. For instance, our members report that in maternity cases (under the SDA) it is common for the employment tribunal to reject an unfair dismissal case for maternity reasons on the incorrect ground that one years continuous employment is necessary. This takes considerable time and cost to remedy.

271. Indirect discrimination would benefit from better case management. Parties could be encouraged to identify areas of disagreement – such as

disproportionate impact – before the hearing. This would allow both parties to concentrate their resources on the areas of disagreement and reduce the length of the substantive hearing.

272. The employment tribunal needs to be trained to understand that, generally, there is extreme inequality of arms between Claimant and Respondent (and sometimes the other way around, although rarely). Especially when Legal Services Commission-funded Claimants are limited to 4.5 hours legal help, extensive directions puts the Claimant at a significant disadvantage. Chairs need training on Legal Services Commission rules. Chairs should consider the resources available to parties before making onerous directions.

273. The employment tribunal should make more use of its power to fund medical reports on section 1 Disability Discrimination Act and to ensure that claimants are aware of this power. This is currently a barrier to access to justice for disabled claimants. The employment tribunal could consider a list of experts and instruct the appropriate expert itself. This would save both parties costs and provide certainty.

Q51 Do you think that the powers of the Additional Support Needs Tribunals for Scotland should be extended to include consideration of disability discrimination cases in education?
[Green Paper para. 7.26-7.27]

The DLA's response and recommendations

274. Yes, the DLA welcomes this proposal. When schools were made subject to non-discrimination duties in 2001, rights to auxiliary aids and services were excluded on grounds that such provision would be made for pupils through the SEN framework. However, the evidence shows that disabled pupils are losing out – increasing numbers either do not have a statement of SEN or do not fall within the definition of special educational needs. The exclusion of rights to auxiliary aids and service has led to a gap in provision for disabled children, which can mean that where this support is not delivered; disabled children can experience barriers to their participation in school life and difficulties in accessing teaching and learning. The lack of effective support can also mean that disabled children may have to be educated in specialist settings.

The DLA's response and recommendations: Important issues not adequately covered in the DLR- the rights of children under the DDA

275. Children should be given the ability to take DDA claims in their own name. This is particularly important for children in care where the local

authority is both the 'parent' and potentially the body against which a disability discrimination claim is brought.

276. Tribunals should be given the power to award compensation for disability discrimination in pre-16 education

277. DDA claims in relation to education cases should be heard in specialist tribunals. Given the link between exclusions and special educational needs, disability related exclusion appeals should be heard by special education needs and disability tribunals.

The evidence and issues

278. In England and Wales, children should be given the ability to take DDA claims in their own name. At present, in England and Wales it is only a parent who can bring disability discrimination cases on behalf of a disabled child, and not the child themselves. In Scotland, DDA cases can be brought by children when they have the capacity to do so and such capacity is presumed to exist at age 12. The fact that competent children in England and Wales have no right to challenge discrimination themselves raises issues under Article 6 of the European Convention on Human Rights (right to a fair hearing) where their parent refuses to take action under the DDA despite their child wishing them to do so. Disabled children in the care of the local authority are in a particularly invidious position since the local authority is their 'parent' and potentially also the body against which a disability discrimination claim might be brought.

279. Tribunals should be given the power to award compensation for disability discrimination in pre-16 education. In cases brought under race or gender legislation, a child can claim compensation for injury to feelings or any other damages incurred as a result of the discrimination. In cases brought under the DDA, however, compensation is explicitly ruled out.

280. Providing tribunals with the power to award compensation would put disabled children in the same position as those who are discriminated against on one of the other grounds – at present there is a disparity in remedies available to disabled children. In England and Wales the SENDIST/SENTW do have a broad range of powers to order schools to do a range of things. However, these powers may not provide an effective remedy to disabled children who are about to or have just left the school concerned, as there is not likely to be anything the responsible body can practically do to put things right for that child other than pay compensation.

281. DDA claims relating to education cases should be heard in specialist tribunals. There is a major issue regarding individual access to justice in education cases across all strands. Any appeal against a permanent exclusion which a parent alleges is contrary to discrimination law must be appealed to an independent appeal committee established by the Local Education Authority. These panels are neither legally qualified nor legally chaired, and appear to have limited training. This is of considerable concern given that they are dealing with a child being deprived of their

education. Admissions cases are also dealt with outside of the tribunal system by admission appeal panels which are of similar composition.

282. The DLA supports the recommendation made by the Council on Tribunals in its special report on exclusion and admission appeal panels that disability related exclusion appeals should be heard by special educational needs and disability tribunals because of the link between exclusions and special educational needs and that they have legally qualified chairs and a regional structure.

283. There should also be an effective means of enforcing the decisions of the SENDIST – such as the power to judicially review a failure of an educational institution to comply with a SENDIST order, as is available in respect of orders under SEN legislation.

Q.52 Can you provide us with evidence illustrating any difficulties of gaining legal redress in cases of multiple discrimination?

Q.53 Are there particular issues you would want to see addressed in relation to multiple discrimination claims?

[Green Paper paras 7.31- 34]

The DLA's response and recommendations

284. Intersectional discrimination (sometimes called multi-dimensional or multiple discrimination) happens when someone experiences discrimination on more than one ground and the grounds interact with each other in such a way that they are completely inseparable, so that it is not possible to identify the grounds separately. For example when a disabled person over 60 is treated less favourably as an *older disabled person*, or where a young person who is disabled is treated less favourably because she is a *disabled young person*. That is, a person is treated less favourably because of the inseparable combination in their case of their age and their disability.

285. While the DLR has raised the issue of intersectional/multiple discrimination only peripherally, the DLA considers it to be a central issue in discrimination law.

286. Intersectional/multiple discrimination currently has no remedy under UK law. This is because, following the Court of Appeal decision in *Bahl v Law Society*, each ground of discrimination must be separately considered and a ruling made in respect of each even if the claimant's experience was discrimination on an indivisible combination of grounds. In the context of current UK law and the imperative to operate within the EC Equality Directives, the DLA recommends that a number of adjustments to existing provisions should be made.

287. The grounds on which a complaint of discrimination or harassment may be made must be formulated in such a way as to permit a claim on intersectional grounds.

- a) This could, for example, be contained in the definition of 'protected grounds'.
- b) Multiple comparisons should be expressly permitted, allowing the courts to combine consideration of two or more grounds. A clause could be included in any new single equality act stating:
"For greater certainty, a discriminatory act or practice includes an act or practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds."
- c) Clauses requiring that 'the circumstances in the one case are the same, or not materially different, in the other' should be omitted. (See paras 6-13 above on 'direct discrimination', and the related discussion).
- d) The words 'treats or' should be omitted from the definition of direct discrimination. (See paras 6-13 above on 'direct discrimination', and the related discussion).
- e) Where there are any differential provisions, for example, any specific justifications, exceptions or genuine occupational requirements that apply to one ground for discrimination these should, in effect, be treated as cumulative and apply to all the grounds involved in a multiple discrimination case. Here similar wording to that used in Germany could be used:
"Discrimination based on several of the grounds...is only capable of being justified...if the justification applies to all the grounds liable for the difference of treatment."
- f) In awarding damages for cases of multiple discrimination, the court or tribunal could be given discretion to increase the amount awarded in relation to injury to feelings to reflect the impact of the treatment being based on intersectional/multiple grounds.

288. It has been suggested that it is problematic to prove intersectional/multiple discrimination because there is no clear comparator. As discussed in paras 6-13 above, the DLA does not consider it necessary to establish a real or hypothetical comparator in order to establish 'less favourable treatment'. This approach applies equally to intersectional/multiple discrimination:

- The definition of direct discrimination requires less favourable treatment to be proved but it is not compulsory to prove this by producing an actual comparator who has been treated differently / better.
- An actual comparator is useful, but other evidence can prove direct discrimination.
- The case of *Shamoon* points out that 'evidential comparators' can be used by the tribunal or court as building blocks from which, with

other evidence, such as remarks by the respondent that ‘all Muslim men are terrorists’, they can infer direct discrimination.—The hypothetical comparator is simply someone who does not have the relevant characteristics). In an intersectional case, it is simply someone who is not of the combined characteristics.

The evidence and the issues

Evidence of intersectional/multiple discrimination

289. Intersectional/multiple discrimination is believed to be widespread because people’s identity is not one-dimensional, yet there have been few cases where it has been raised directly. In the past a few cases were successful in arguing intersectional discrimination and having two grounds recognised (see case examples given in Advising ethnic minority women about discrimination at work, EOC, April 2005.)

290. However, case law has now ruled out this possibility. In 2004, the Court of Appeal in *Bahl v the Law Society*, a ruling which binds the lower courts, ruled on the correct way to deal with intersectional discrimination. In this case an Asian woman claimed that she had been subjected to discriminatory treatment as an Asian woman. This judgment makes it clear that each ground has to be separately considered and a ruling made in respect of each even if the claimant experiences them as inextricably linked. This led to Ms Bahl failing to prove that discrimination had occurred as she could not identify which aspect of her claim related only to one characteristic. Other cases since then have been lost for the same reason (see *Network Rail v Griffiths-Henry* [2006] IRLR 865).

291. To avoid this problem in practice, lawyers have had no choice but to take up cases on the strongest ground and ignore the other aspects. Thus, they will craft the case to meet the limitations of the law, rather than the true experience of the complainant. However, it is not always possible to do this.

292. The Discrimination Law Review suggests that

- the only people concerned about this are ‘academic commentators’,
- they have no evidence that people are losing or failing to bring cases because they involve more than one protected ground, and
- that permitting multiple claims would complicate the law and place additional burdens on business and the public sector.

293. The DLA brings together practicing lawyers who primarily act for claimants. Members are concerned about the law’s inability to address the problems arising from intersectional discrimination.

294. While intersectional discrimination has been an issue for discrimination practitioners for many years, as the number of grounds in discrimination

law have increased, so the potential for bringing multiple-ground cases has become more apparent. The need to ensure that discrimination based on multiple identities was properly recognised and effectively challenged, was used as a strong argument for the establishment of a single equality body, now the CEHR. Having institutional support on its own, however, does not change the legal position.

295. The DLA presents several real examples sent in by our members recently:

- A, a young Muslim man, dressed in traditional dress, was dismissed from a call centre job during his probation period. In the short time he was there, several incidents occurred which indicated other staff viewed him as a 'potential terrorist'. For example, a female colleague, who stumbled across him unexpectedly in a corridor one day when he was praying, screamed. Her explanation of her reaction and the general context of remarks made to A, indicated that she had been terrified because momentarily she had not recognised him and had seen an image which she associated with Muslim terrorists. There was no reason whatsoever to associate A. with terrorism, and the connection was clearly made solely because he was a young Muslim man in religious dress. He brought a claim for religious + sex discrimination. The employer was able to defend the case by separating the issues of religious and sex discrimination. They said: (a) they employed other men and (b) they had just taken on a Muslim woman. It was clear the real problem was that he was the combination. In reality, only Muslim men are associated with terrorism and likely to come across this sort of prejudice. (Indeed, probably only young Muslim men.) The case settled so the issue was not tested in the ET.
- B was a young female sales person who complained of harassment in her job by a middle-aged female supervisor, who kept accusing her of flirting and used derogatory language ('whore' on one occasion.) B. says she does not flirt. The supervisor does not harass other (older) female staff, so it is not a case purely of sex discrimination. Nor does she harass young male staff, so it is not a case purely of age discrimination. Clearly, the harassment was aimed at her because she was a 'young woman' and it has taken the form of remarks which are unlikely to have been made to a young man or older woman. The client chose not to pursue this case.
- C was a black woman who had been subjected to harassment. A photographic image of a black woman in a bikini with a gorilla's head was circulated on an office e-mail with the question 'Is this (*client's name*) on holiday? Clearly that image was very specifically directed at a 'black woman'. It was not directed at black people generally and it was not directed at women generally. This case was settled.
- D was a gay man was subjected to comments such as 'all gay men have AIDS and should live on an island'. That would not have been made to a lesbian or a heterosexual man.

- E was a Black service woman who had been passed over for promotion on a number of occasions. Whilst she could point to a white woman of equivalent qualifications and experience who had reached the grade that she sought as well as a Black man of equivalent qualifications and experience, no Black service women had ever been promoted to this grade. In order to establish that she had been subjected to discrimination she needed to be able to compare her treatment on both grounds of gender and race simultaneously.

296. Two of the above examples relate to harassment. The need to prove harassment on intersectional/multiple grounds is less problematic as, under the separate tort of harassment, there is no need for a comparator. It is essential, nevertheless, that if the unwanted conduct is on intersectional grounds then the complaint of harassment can be brought on intersectional grounds.

297. In addition to these specific examples, there are a number of studies that focus on particular areas of intersectional/multiple discrimination. The *Equalities Review* (p.64) notes that, multiple markers of disadvantages can drastically reduce the probability of being employed. Disabled people have very low rates of employment when their disability is accompanied by other factors, such as lone parenthood, belonging to an ethnic minority group, or a lack of educational qualifications. The employment penalties suffered by Pakistani and Bangladeshi women is greater than that of women as group or Pakistani or Bangladeshi men, Evidence of the disadvantage that comes from the combination of ethnicity and gender is also highlighted in report by the EOC *Moving on up: The way forward* (March 2007), and the Fawcett Society *Black Minority Ethnic Women in the UK* (February 2005).

298. A report by the National AIDS Trust notes that when discrimination against people living with HIV becomes combined with another ground for discrimination, the disadvantage experienced often becomes more acute. They found that ‘all African people with HIV suffer racism and xenophobia. *Outsider Status: Stigma and discrimination experienced by Gay men and African people with HIV* (C Dodds, P Keogh, O Chime, T Haruperi, B Nabulya, W Sseruma & P Weatherburn, Sigma Research and NAT, 2004 at p.25).

299. A report commissioned by the Joint Equality and Human Rights Forum on intersectional discrimination *Re-thinking Identity: the Challenge of Diversity* (ed. Katherine Zappone, commissioned by the Joint Equality and Human Rights Forum, June 2003) concluded that:

People with multiple identities...are not adequately protected by current legislation...Even with harmonised legislation, people with multiple identities that increase their social vulnerability and marginalisation may require an ‘intersectional approach’ to equality and human rights claims...This approach has been defined as ‘taking account of the historical, social and political context, and

recognising the unique experience of the individual based on the intersection of all relevant grounds'. The most common approach to discrimination claims is one that tends to focus on a single ground.
(p.148-149)

What reforms are needed?

300. If the reality of discrimination and inequality in the 21st century is to be tackled the law must find a workable solution. In the context of current UK law and the imperative to operate within the EC Equality Directives there do appear to be a number of adjustments to our existing provisions that could be made.

301. It has been suggested that it is problematic to prove intersectional/multiple discrimination because there is no clear comparator. This is not in reality a problem and shows a misunderstanding of how discrimination law works and is proved. We discuss this further in the section on direct discrimination, (see paras 6-13 above) but in summary:

- The definition of direct discrimination requires less favourable treatment to be proved but it is not compulsory to prove this by producing an actual comparator who has been treated differently / better.
- An actual comparator is useful, but other evidence can prove direct discrimination.
- The case of *Shamoon*, points out that 'evidential comparators' can be used by the tribunal as building blocks from which they can infer direct discrimination. An evidential comparator is a comparator whose circumstances are not identical to those of the claimant.
- In intersectional discrimination cases, it is likely that a tribunal will infer discrimination from such evidential comparators as well as other evidence, e.g. remarks such as 'all Muslim men are terrorists'.
- The hypothetical comparator is simply someone who does not have the relevant characteristics). In an intersectional case, it is simply someone who is not of the combined characteristics.

302. The grounds on which a complaint of discrimination or harassment may be made must be formulated in such a way as to permit a claim on intersectional grounds.

- a) This could, for example, be contained in the definition of 'protected grounds'.
- b) Multiple comparisons should be expressly permitted, allowing the courts to combine consideration of two or more grounds. A clause could be included in any new single equality act stating: *"For greater certainty, a discriminatory act or practice includes an act or practice*

based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.”

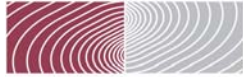
- c) Clauses requiring that ‘the circumstances in the one case are the same, or not materially different, in the other’ should be omitted.
- d) The words ‘treats or’ should be omitted from the definition of direct discrimination. (See para 4 above on ‘direct discrimination’, and the related discussion).
- e) Where there are any differential provisions, for example, any specific justifications, exceptions or genuine occupational requirements that apply to one ground for discrimination these should, in effect, be treated as cumulative and apply to all the grounds involved in a multiple discrimination case. Here similar wording to that used in Germany could be used:
”Discrimination based on several of the grounds...is only capable of being justified...if the justification applies to all the grounds liable for the difference of treatment.”

303. In awarding damages for cases of multiple discrimination, the court or tribunal could be given discretion to increase the amount awarded in relation to injury to feelings to reflect the impact of the treatment being based on intersectional/multiple grounds.

Would this overburden the courts or tribunals?

304. The DLA does not consider that implementing our recommended changes would overburden the courts or tribunals. Anyone who does try to bring a case based on an unnecessary number of grounds would quickly be ruled out as a potential vexatious litigant at a pre-trial stage. The court / tribunal will have to hear all the facts in any event and the fact that it can reach a decision on grounds of multiple discrimination would be more likely to save time as it would not have to reach a series of separate conclusions. It would simply be a matter of giving the court / tribunal the appropriate legal label to comfortably fit the type of discrimination truly suggested by the facts. DLA members with practical experience are quite convinced that permitting claims for intersectional discrimination will not increase the number of cases being brought: it will simply ensure a just and appropriate outcome.

305. It would truly be invidious and damaging to community relations if – using an example cited above – young Muslim men were unsuccessful in their discrimination claims because of a deliberate government decision to exclude the possibility of such claims succeeding.



Discrimination Law Association
DISCRIMINATION LAW ASSOCIATION
RESPONSE TO THE DISCRIMINATION LAW REVIEW
REPORT A FRAMEWORK FOR FAIRNESS
SEPTEMBER 2007

CHAPTER 8: THE GROUNDS OF DISCRIMINATION

Q54 Do you have any comments on whether we should remove the list of ‘capacities’ from the definition of disability?
[Green Paper paras. 8.3-8.6]

The DLA’s response and recommendations

306. The DLA welcomes the removal of capacities from the definition of disability in the DDA. This has indeed been the subject of much confusion and a removal of this would in some ways reflect the recent judgment of the EAT in the case of *Paterson v Commissioner of Police of the Metropolis*, which looked at the effect of Mr. Paterson’s dyslexia on his working life and in particular his taking of examinations.

307. However, removing the list of capacities is insufficient to deal with the significant problems caused by the current definition of disabilities– it is merely tinkering with a definition which needs a wholesale revision. The DLA suggests that the Guidance on definition of disability, produced by the Secretary of State, should provide detailed guidance on how tribunals are to approach the question of day to day activities in the absence of the capacities.

Q.55 Do you have any comments on our approach to addressing the needs of parents and carers? [Green Paper paras 8.7 – 8.20]

**The DLA’s response and recommendations:
Amendments to the right to request flexible working**

308. At present, employees can request flexible working to care for those, aged 18 and over who are in need of care. This is similar to the flexible working procedure for parents and carers of children, which applies to children under 6.

309. Employees do not have a right to request flexible working to care for non-disabled children between the ages of 6 and 18. This needs to be remedied so that parents of non-disabled children aged 6 and over can request flexible working to care for them. There is no logical reason for this lacuna.
310. The right to request flexible working should be extended to employees caring for children in need of care who are between the ages of 6 and 18 as they presently fall within a gap between the two provisions.
311. The DLA also proposes that the right to request flexible working be amended, in relation to both carers of children and adults, so that employers must show objective, as opposed to subjective, justification. This would bring these provisions in line with the test of justification under the SDA.
312. One compelling reason is that it is highly confusing for employers and employees to have two parallel - but very different - obligations/rights. Some employers believe that all they have to do is go through the flexible working procedure and reach a decision based on their own views about the viability of the request. While this is correct under the Flexible Working Regulations it will not satisfy the test of justification under the SDA. Such a change would therefore clarify the law in this area.

The evidence and the issues

313. According to Carers UK 5.2 million people in the UK provide unpaid care for partners, relatives or friends in need of help because they are ill, frail or disabled, with 3.9 million being of working age. Approximately 10% of male employees and 14% of female employees are carers. A quarter of all women in their 50s and almost 1 in 5 men of this age are carers. 1 in 5 gives up work to care; this is often associated with loss of income, pension and long-term financial security. This is a loss to employees and employers.
314. Working carers are clustered in lower level jobs. They are more likely to be unqualified, and less likely to hold university degrees, than other people in employment. This suggests that carers' access to skills and qualifications may have been neglected.
315. By comparison to the rights of carers, the legal rights of women caring for children have developed enormously over the past 10 years. This is in line with society's recognition of the need for families to reconcile work and family life. There is a right, for both women and men, to request flexible working. An unjustified refusal of flexible working to a working mother is likely to be indirect sex discrimination. Less favourable treatment of part-time workers is a breach of the Part-Time Workers Regulations and indirect sex discrimination unless it can be justified.

316. There are a growing number of employees who are caring for both children and adults in need of care, which makes the reconciliation of work and family life twice as difficult.

Existing legal rights

317. At present, employees can request flexible working to care for those, aged 18 and over, who are in need of care. This is similar to the flexible working procedure for parents and carers of children, which applies to children under 6.

318. Employees do not have a right to request flexible working to care for non-disabled children between the ages of 6 and 18. This needs to be remedied so that parents of non-disabled children aged 6 and over can request flexible working to care for them. There is no logical reason for this lacuna.

319. It is now well recognised that women are primary carers of children and it is indirect sex discrimination to refuse flexible working to female employees or to treat those working flexibly (such as part-time) less favourably.

320. The evidence shows that caring for adults in need of care also falls disproportionately on women. By analogy, an unjustified refusal of flexible working to an employee caring for an adult may be able to claim indirect sex discrimination. Similarly, less favourable treatment of a female carer may be indirect discrimination.

321. There is also a case before the European Court of Justice (*Coleman v Attridge Law*) arguing that the EC Employment Framework Directive applies to discrimination on grounds of the disability of someone other than the employee (for example a mother of a disabled child who is treated less favourably because of her son's disability). If this case succeeds it could, through the Age Regulations apply to carers of children and older people under the Age Regulations. However, this case will only deal with direct discrimination and harassment; it will not address flexible working.

322. Indirect sex discrimination is a clumsy vehicle for protecting the right to care for children. This is because it requires the complex stages of the definition of indirect sex discrimination to be proved. Further, indirect sex discrimination does not protect unmarried men who are carers. There is thus a strong argument for making the legal position of carers clear to both employers and employees rather than arguing that carers are protected under either the indirect sex discrimination provisions of the SDA or on the basis of association under the DDA and the Age Regulations.

Proposals

323. The DLA also proposes that the Right to Request Flexible Working be amended, in relation to both carers of children and adults, so that employers must show objective, as opposed to subjective, justification.

This would bring these provisions in line with the test of justification under the SDA.

324. One compelling reason is that it is highly confusing for employers and employees to have two parallel - but very different - obligations/rights. Some employers believe that all they have to do is go through the flexible working procedure and reach a decision based on their own views about the viability of the request. While this is correct under the Flexible Working Regulations it will not satisfy the test of justification under the SDA. Such a change would therefore clarify the law in this area.

Q57 Do you agree that there is no current justification for legislating to prohibit genetic predisposition discrimination?
[Green Paper paras. 8.23-8.31]

The DLA's response and recommendations

325. No, the DLA suggests that specific provision should be made for genetic predisposition. This might not amount to an impairment for the purposes of any DDA definition of disability, but even if it did, there would nevertheless be a need for specific provisions to ensure that testing is not taken into account by employers etc.

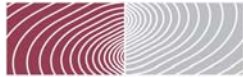
326. The DLA regards para 8.28 of the the Green Paper as misleading. Whilst the Human Genetics Commission does not think that amending the DDA is appropriate, it has clearly stated that it does think legislation is needed. The HGC wrote an open letter to the Chair of the Equality Review in December 2006 stating:

Although there is no evidence that genetic discrimination is currently widespread in the UK, the HGC is acutely aware that as technology and techniques become more sophisticated, the potential for discrimination will increase. For this reason the Commission has been recommending that appropriate regulatory measures are established so that the framework exists in advance of potential widespread discrimination occurring.

327. The DLA also suggests that legislation is needed now. We also agree that more needs to be done through legislation than simply extending the DDA protection to those with genetic pre-conditions. We recognised that this in itself would not address all the particular disadvantages associated with genetic predisposition.

328. We recommend that in addition to prohibiting discrimination against people on the basis of genetics, it should be unlawful to require an individual to undergo a genetic test or to disclose the results of a genetic test. (The sole exception should apply where the scientific validity of a test

had been established by an impartial arbitrating body, and where insurance applied for was significantly higher than the norm.)



Discrimination Law Association

**DISCRIMINATION LAW ASSOCIATION
RESPONSE TO THE DISCRIMINATION LAW REVIEW
REPORT A *FRAMEWORK FOR FAIRNESS*
SEPTEMBER 2007**

**CHAPTER 9: AGE DISCRIMINATION BEYOND THE
WORKPLACE**

Q.59 What instances of unfair age discrimination outside the workplace, against people of any age, are you aware of?

Q. 60 Is legislation is the most appropriate and proportionate way of tackling harmful age discrimination? What would be the likely costs of legislation?

Q. 61 Do you have any views on how, if we decide to legislate, we can target the legislation to avoid unintended consequences and disproportionate burdens on both public and private sectors? [Green Paper paras. 9.1-9.22]

Q. 62 Do you have any comments on any of the issues which would arise with a legislative approach to tackling age discrimination? [Green Paper paras. 9.23-9.33]

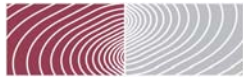
The DLA's response and recommendations

329. In our view, appropriately tailored legislation is the appropriate response to age discrimination outside the employment context.

330. The DLA agrees that age differentiation is appropriate in the examples provided in the Green Paper, para 9.9. We also agree, however, that (para 9.10) "there are also instances where different treatment based on age leads to people of different ages experiencing unfair treatment or outcomes", that this is particularly a problem for older people and (para 9.12) that "non-legislative measures ... may not be sufficient to tackle discriminatory attitudes and behaviours" in particular in the context of health and social care provision and financial services. We would, therefore, favour a broad prohibition on age discrimination subject to a general justification defence whose function would be to distinguish

between age-appropriate treatment (such as, for example, the targeting of particular health care services to those who will benefit most from them), and unfair discrimination which disadvantages people unjustly by reference to their age, which undermines dignity or operates on the basis of stereotype.

331. The DLA accepts the case for adopting some specific exceptions related to age such as compulsory school age, age criterion for the purchase of cigarettes and alcohol etc and for access to different social security benefits, but for the most part takes the view that age discrimination should be lawful only if it is justifiable and does not agree (para 9.26) that those aged under 18 should not be included within the scope of any age discrimination provisions.



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CHAPTER 10: GENDER REASSIGNMENT

Q.62 Do you agree that we should prohibit discrimination on the grounds of gender reassignment in the exercise of public functions? [Green Paper paras. 10.10-10.11]

The DLA's response and recommendations

332. As we have mentioned in paragraph 55 of these submissions, we strongly endorse the proposal to extend the protection against indirect discrimination to gender reassignment discrimination, in all the areas in which discrimination on grounds of gender reassignment is unlawful.
333. We also strongly endorse the proposal to outlaw discrimination on grounds of gender reassignment in the exercise of public functions.
334. However, we have many other concerns about the proposals in the Green Paper for addressing (or not) gender reassignment discrimination.

Q. 63 Do you agree that it is unnecessary to include school pupils and education in schools in any extension to protection on grounds of gender reassignment?

The DLA's response and recommendations

335. We strongly oppose the proposal not to extend protection against gender reassignment discrimination to schools. We especially disagree with the suggestion that such protection is not "necessary, proportionate or appropriate" (para. 10.12).
336. A recent report, commissioned by the Equalities Review, found that discrimination against transgendered pupils is "rife" (Engendered Penalties: Transgender and Transsexual: People's Experiences of Inequality and Discrimination" (Feb 2007), Stephen Whittle, Lewis Turner and Maryam Al-Alami, p 17), revealing that protection is indeed "necessary" and would, plainly, be "proportionate" and "appropriate".

337. The rationale for the Green Paper’s proposal not to extend rights to trans pupils, where they are discriminated against, is also bemusing. The Green Paper states that “there are already duties on schools and local authorities under education law and guidance, and obligations and individual rights under the Human Rights Act, which protect pupils” (para. 10.12). That, of course, is true in respect of all pupils (including those discriminated against on the grounds of sex, race, disability, religion or belief and education), but that is no justification for not providing non-discrimination rights to them. There is no basis for excluding discrimination connected to gender reassignment, alone, from the protections afforded against discrimination in schools.

Q.64 Are there any circumstances in which you consider that it is necessary for organised religions to treat people differently on grounds of gender reassignment? Please explain what they are.

The DLA’s response and recommendations

338. Only where the guarantees in Article 9 ECHR apply and the requirements of Article 4(5) of the Gender Goods and Services Directive are met.

339. As to religion and belief, firstly, we do not agree that the Gender Goods and Services Directive does not extend to (any) goods, facilities or services of the type provided at places used for the purpose of organised religions, such as churches, mosques and synagogues. The Directive will extend to those goods and services falling within the parameters of Article 50 of the EC Treaty. As the case law under Article 50 makes clear, Article 50 is not concerned with the nature of the organisation providing the service, or indeed its intentions, (though that may be relevant to whether an economic activity is being performed) but the nature of the service provided: If for remuneration, Article 50 is engaged. As such, some goods and services provided by places used for the purpose of organised religions will be covered, for example, leisure facilities, provided at a cost, in a church hall. There is therefore no basis in law for excluding all the goods and services provided by places used for the purpose of organised religions from the protection afforded against gender reassignment discrimination (in implementing the Directive or otherwise).

340. Further, we consider that there is no justification otherwise for generally allowing organised religion to treat people differently on the grounds of gender reassignment. Whilst there may be circumstances in which, to ensure that a religious organisations rights and freedoms under Article 9, ECHR are balanced and appropriately protected, treating trans people differently may be (but rarely) justified, we consider that any exemption should meet the stringent requirements of Article 4(5) of the Gender Goods and Services Directive (“This Directive shall not preclude differences in treatment, if the provision of the goods and services

exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”)

341. It is our view, therefore, that “the right balance” is struck by applying strictly the limitations in Article 9, HRA and the exemption in Article 4(5) of the Directive, which together provide a framework for determining how to resolve any conflict of rights.

Q. 65 Do you agree that we should keep the existing definition of gender reassignment?

The DLA’s response and recommendations

342. No. We consider that there are serious problems with the proposals not to amend the definition and, in particular, not to extend it to “perceived” gender reassignment status. This means that persons who do not conform to their gender stereotype, in dress, demeanour etc, may be lawfully discriminated against (subject only to the limited protection afforded by the sex discrimination provisions which may not cover such discrimination, see: *DWP v Thompson* [2004] IRLR 348). We consider that this creates a considerable lacuna in the legislation and any new single equality bill should protect against all forms of gender related discrimination.

343. Presently the SDA adopts a very narrow concept of transgenderism, extending to transsexuals only, though the rationale for the decision in *P v S and Cornwall County Council* [1996] IRLR 347 indicates clearly that the Equal Treatment Directive and accordingly the Gender Goods and Services Directive would cover a broader range of gender identity related discrimination (para.s 20-22). The Equal Treatment Directive protects against discrimination connected with sex (that is, not just based on membership of one sex or another) which undermines dignity. Given this broad meaning, it should protect other behaviours or manifestations which are in friction with society’s norms around gender identity.

344. Further, we consider that there would be practical problems in not protecting other forms of gender identify, including perceived gender reassignment status, particularly outside the employment sphere. The relationships between goods and services providers, and sometimes public authorities, and their customers/clients are transitory, providing little (if any) opportunity to discover whether a person is actually intending to/undergoing gender reassignment or is gender reassigned, as opposed to manifesting another form of gender identity. A service provider/public authority will be acting unlawfully in the case of the first group but not the second without, in all likelihood, knowing into which of the particular groups any particular person falls. This helps no one.



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CHAPTER 11: PREGNANCY AND MATERNITY

Q.66 Do you agree that we should make less favourable treatment of a woman on grounds of pregnancy and maternity unlawful in the exercise of public functions? [Green Paper paras 11.1 – 11.7]

The DLA's response and recommendations

345. The DLA agrees that protection against discrimination related to pregnancy and maternity should be afforded in relation to the exercise of public functions. As the Green Paper states (para 11.2), the transposition of the Gender Directive will additionally result in protection in connection with goods, facilities and services.

The DLA's response and recommendations: Important issues not adequately covered in the DLR Clarifying the law on pregnancy and maternity

346. In addition to the changes recommended in the Green Paper, the DLA suggests that the law on pregnancy and maternity needs to be clarified and amended to ensure full and proper protection in the following ways:

- The DLA The SDA needs to make it clear that it is not necessary for a woman complaining of less favourable treatment on grounds of her pregnancy or maternity leave to rely on a comparator, actual or hypothetical.
- It is also necessary to clarify the position in relation to rights during maternity. We suggest that this is done by removing the distinction between the rights during Ordinary Maternity Leave (OML) and Additional Maternity Leave (AML)

- It should be made clear that s3A SDA protects workers who are not employees.
- The Maternity and Parental Leave Regulations MPLR (in particular reg 18(2)) should be made consistent the SDA so that a woman is able to return to the same job after pregnancy.
- The Equal Pay Act should be amended to make it clear that where pregnancy/maternity leave claim is made under the EqPA there is no need for a woman to show that a man would have been treated more favourably.

The evidence and the issues

347. The SDA needs to make it clear that it is not necessary for a woman complaining of less favourable treatment on grounds of her pregnancy or maternity leave to rely on a comparator, actual or hypothetical. This is the position under European law as was accepted by the High Court in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin).
348. It is also necessary to clarify the position in relation to rights during maternity leave following the *EOC* High Court Decision, which held that the decision in *Land Brandenburg v Sass* [2005] IRLR 147 ECJ was correct. The most appropriate amendment would be to remove the distinction between rights during Ordinary Maternity Leave (OML) and rights during Additional Maternity Leave (AML). This would simplify the position for employees and employers. It would not add substantially to the costs as it would not affect pay or bonuses (following the decision in *Hoyland*). It would prevent further unnecessary and expensive legal challenges.
349. The position should be clarified in s3A SDA to make it clear that workers are protected when pregnant and during any period they have off to give birth. Section 3A does not protect workers, who are not employees, from discrimination during the period they take time off to have a baby, apart from during the compulsory maternity leave period. It is only employees who are entitled to maternity leave who are protected. The Northern Ireland Court of Appeal (NICA) in *Patefield v Belfast City Council* [2000] IRLR 664 and the EAT in *BP Chemicals Ltd v Gillick* [1995] IRLR 128 EAT have held that it is discrimination against a contract worker to replace her with a permanent employee when she left to have a baby. Thus, workers in this position would have to rely on s1 SDA.
350. The SDA provides protection from discrimination for employees who have exercised or sought to exercise a statutory right to maternity leave. Thus, under the SDA (and EC law) it is unlawful discrimination to change an employee's job on her return from leave where the reason is related to

her maternity leave. This applies where the return is from Ordinary Maternity Leave (OML) or Additional Maternity Leave (AML).

Returning to the same job after maternity leave

351. The Maternity and Parental Leave Regulations (MPLR) should be made consistent with the SDA to provide clarity and certainty. Protection under the SDA conflicts with regulation 18(2) MPLR 1999 (as amended) which provides that an employee who returns to work after AML is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances. Thus, an employer may consider that it is not reasonably practicable to allow the returning employee to return to exactly the same job if a locum has been doing the work and it would be inconvenient for that work to be reallocated.

352. The SDA provides protection from discrimination for employees who have exercised or sought to exercise a statutory right to maternity leave. Thus, under the SDA (and EC law) it is unlawful discrimination to change an employee's job on her return from leave where the reason is related to her maternity leave. This applies where the return is from OML or AML.

353. The DLA's position is supported by both the Equal Treatment Directive and the Recast Directive (Recital 25).

354. In the experience of DLA practitioners a very common example of the discrimination that occurs in this area arises where a locum is employed to cover the employee's work while she is on maternity leave and the locum continues this work while the returning employee is given other less favourable work that would be sex discrimination.

355. The problem is that the protection under the SDA conflicts with regulation 18(2) MPLR 1999 (as amended) which provides that an employee who returns to work after AML is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances. Thus, an employer may consider that it is not reasonably practicable to allow the returning employee to return to exactly the same job if a locum has been doing the work and it would be inconvenient for that work to be reallocated.

356. This definition is inconsistent with the protection under the SDA. The MPLR should be consistent with the SDA to provide clarity and certainty. Employers are aware of regulation 18 but many do not appear to be aware of the protection provided by the SDA. This leads to many women resigning on return from maternity leave which in turn often severs their connection with the labour market.

Amendment to the Equal Pay Act

357. Although the EqPA was amended following the Court of Appeal decision in *Alabaster* the amendments failed properly to implement the decision. It should be made clear that where a pregnancy/maternity leave claim is made under the EqPA, there is no need for the woman to show that a man would have been treated more favourably. This could arise, for example, where a woman is not given an appropriate pay rise because of her maternity leave. EC law provides that this would be unlawful discrimination (see *Alabaster*). Any challenge under the EqPA would require a male comparator but this is not necessary under EC law. The requirement for a comparator in such cases should be disapplied.

Q. 67 Do you agree that it is neither necessary nor appropriate to extend protection on grounds of pregnancy and maternity to school pupils and education in schools?

The DLA's response and recommendations

358. We do not agree that pupils should be denied protection against discrimination on grounds of pregnancy. Pregnancy should not be a reason for less favourable treatment in any circumstances.