

**SUBMISSION BY THE DISCRIMINATION LAW ASSOCIATION
TO THE EUROPEAN COMMISSION
IN RELATION TO PROPOSALS FOR A NEW DIRECTIVE PROHIBITING
DISCRIMINATION OUTSIDE THE AREA OF EMPLOYMENT ON GROUNDS
OF RELIGION OR BELIEF, DISABILITY, AGE AND SEXUAL ORIENTATION**

The Discrimination Law Association ('DLA') is a national membership organisation based in Great Britain, established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. The DLA's nearly 400 members include individual lawyers, legal or advice workers and others substantially engaged or interested in discrimination law and NGOs, trade unions, law firms and barristers' chambers engaged or interested in discrimination law. 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 therefore welcomes this opportunity to make a brief submission to the European Commission on the subject of proposed new legislation.

Introduction

The DLA understands that the Commission is currently in the process of preparing a proposed Directive extending the prohibition of discrimination to areas outside employment in respect of the grounds of religion or belief, disability, age and sexual orientation. We have a number of specific recommendations regarding the text of this future Directive, which we set out below. At the outset, we strongly recommend that these changes are introduced via a single Directive covering all four grounds of discrimination, rather than separate Directives for each ground. We believe that a single Directive will aid legal clarity and transparency from the perspective of individuals, employers and service-providers. In addition, a single Directive is a better response to the situation of those who experience multiple discrimination (discussed further below). If the legal rules governing the prohibition of discrimination are as similar as possible for each of the different grounds, then this avoids gaps or undesirable inconsistencies emerging in the scope of protection at EU or national level, as well as any impression of a 'hierarchy' between the grounds.

Another overarching concern is to ensure that the introduction of a further Directive does not lead to any regression from the level of protection already guaranteed in the existing Directives. For this reason, we think that it is generally better not to introduce amendments at this time to the existing Directives. Our concern here is that re-opening earlier legislation could lead to detrimental

amendments being introduced during the Council of Ministers' negotiations, such as additional exceptions. There will, inevitably, be issues arising about consistency between the forthcoming Directive and those already on the statute book. We suggest that the best way to deal with this will be to consider a future 'recast' Directive, as has already been adopted in relation to gender equality. Notwithstanding the above, there are certain areas where we believe that the higher standards which we hope to find in the forthcoming proposal can be extended to cover the scope of the existing Directives without requiring any amendment of their text. Specifically, the provisions we propose below on multiple discrimination, equality bodies and public procurement should be applied to the existing Directives.

Exceptions

Exceptions are a critical area for the credibility of any future Directive. If the exceptions are excessively broad, this will damage the Directive's standing in two ways. First, it will be difficult to know what the Directive actually requires Member States to do, and, secondly, the value of the prohibition of discrimination is undermined if prominent examples of direct discrimination are permitted to continue.

We recognise that dealing with exceptions in the context of a Directive covering several grounds of discrimination (and applying to 27 different countries) is highly challenging. Nevertheless, we urge the Commission to avoid two possible courses of action:

- A very long list of specific exceptions applying to one or more grounds;
- An open-ended possibility to justify direct discrimination.

Instead, we suggest a limited number of exceptions covering a range of circumstances, but combined with a rigorous justification test.

1. Human rights and fundamental freedoms

Some of the concerns likely to arise in relation to the forthcoming Directive involve respect for fundamental rights. This would include issues of freedom of religion (eg a church refusing to perform same-sex partnership ceremonies) and respect for private and home life (eg a retired person renting a room in their house who would like a tenant of a similar age). A condition of the legality of all EC legislation is that it complies with the general principle of respect for fundamental rights. Whilst this will be true regardless of the text of the Directive, we think it may allay unfounded fears regarding the Directive's impact if the requirement to respect fundamental rights, expressly including freedom of religion and respect for private and home life, are stated at the outset of the preamble of the Directive. For example:

'It is important to respect fundamental rights and freedoms in all areas of life including in the context of the access to and provision of goods, housing, education, social protection (including social security and healthcare), social advantages, and other facilities and services, and to respect the protection of private and family life and transactions carried out in this context and the freedom of religion.'

2. Health, safety and security

Concerns relating to public health are also likely to stimulate demands for exceptions from the principle of non-discrimination. For example, it is common for restrictions to be placed on the access of young people to alcohol, tobacco and firearms. Alternatively, in some circumstances, it may be appropriate to target health services at particular groups, eg a clinic providing specialist healthcare for lesbians. In order to address such situations, we suggest incorporating the exception already found in Article 2(5) of Directive 2000/78:

'This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

The reference to the 'rights and freedoms of others' would also address the issues raised above relating to fundamental rights.

3. Targeted service provision

In respect of all the grounds to be included within the forthcoming Directive, it is evident that services are often limited to persons with particular characteristics, or at least targeted at such persons. Examples include residential care facilities limited to older persons; cemeteries managed by an organised religion; sporting clubs for lesbians and gay men; free parking in car parks for disabled users. Whilst Article 4(5) of the Gender Goods and Services Directive attempts to deal with such scenarios in the context of gender, we believe that its wording is too loose. In order to provide greater clarity, we suggest the following text:

This Directive shall not preclude differences of treatment, if the provision of the goods and services exclusively or primarily to persons of a particular religion or belief, disability, age or sexual orientation is justified by a legitimate aim consistent with ensuring full equality in practice and respect for human dignity. The means of achieving that aim must be appropriate and necessary.

Positive action and preferential treatment

Positive action is consistent with the goal of ensuring full equality in practice, therefore, we would not characterise this as an exception. Nonetheless, it is frequently associated with exceptions to the principle of equal treatment, so it is helpful to underline in this context the importance of including a provision permitting positive action in similar terms to the existing legislation:

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 religion or belief, disability, age or sexual orientation.

In relation to age and disability, it is obvious that many aspects of national social security, as well as general social welfare and public health programmes, draw distinctions based on these grounds. For example, benefits may be available to those unable to work due to a disability, whilst children and persons over a certain age often enjoy social advantages, such as discounted travel on public transport or free admission to museums. It is crucial to make it clear from the outset that equality does not mean the dismantling of such schemes, which reflect the special needs of such persons and are consistent with the goal of social inclusion. To this end, we suggest a further clause linked to positive action:

Preferential treatment on grounds of age or disability is permitted provided it pursues a legitimate aim consistent with the principle of equal treatment and the means of meeting that aim are appropriate and necessary.

Whilst there is some overlap between this provision and that on targeted services proposed above, this provision would have a wider material scope of application, going beyond the specific field of goods and services.

Victimisation

Article 9 of Directive 2000/43 states:

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 11 of Directive 2000/78 states:

Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

A difficulty has arisen with the interpretation of these provisions in the UK, where, as is also true in other member states, “victimisation” is treated as a form of discrimination for which victims are entitled to seek redress. Doubt surrounds whether the preceding provisions on remedies and enforcement (Articles 7 and 8 Directive 2000/43, and Articles 9 and 10 Directive 2000/78) apply in relation to a complaint of victimisation. An ongoing case specifically concerns the application of the shift in the burden of proof to a complaint of victimisation.

In order to remove such doubt, we suggest that a statement is added to the definition of victimisation in any future Directive stating:

Member States may treat victimisation as a breach of the principle of equal treatment in which case the procedures for enforcement and remedies applicable to a complaint of victimisation shall include procedures and remedies equivalent to those specified in (Articles xxx above) applying to a complaint of direct or indirect discrimination.

Multiple discrimination

Multiple discrimination is increasingly being recognised as a real, but often hidden, form of discrimination. (See, for example, recent EC Report - Tackling Multiple Discrimination: Practices, Policies and Laws). The “aggravated difficulties stemming from multiple discrimination” was noted in the Council Resolution 2007/C 308/1 on the follow-up of the European Year of Equal Opportunities for All.

Whilst it could be argued that the existing directives could encompass multiple discrimination, as is expressly recognised in preamble 14 of the Race Equality Directive, we submit that there is need for this to be explicitly stated. This appears to be necessary to ensure that the principle of multiple discrimination is transposed into national law. In order to make it clear that the new directive and the existing directives cover multiple discrimination, we would suggest a provision within the Article defining discrimination such as:

‘For the purposes of this Directive, together with the Race Equality Directive (2000/43/EC), the Employment Equality Directive (2000/78/EC), the Equal Treatment (Goods and Services) Directive (2004/113/EC) and the Recast Gender Employment Directive (2006/54/EC) the concept of discrimination shall be taken to include discrimination, harassment or instructions to discrimination which occurs on more than one of the grounds under EC Treaty Article 13 or the combination of any such grounds.

Equality Bodies

We strongly urge that the proposed Directive should include a provision requiring all Member States to have specialised equality bodies covering all the grounds to be protected under this Directive. The important role of such bodies in achieving

equality was recognised in the Council Resolution 2007/C 308, in which Member States were invited “to secure and strengthen the effectiveness of specialised equality bodies in carrying out their independent functions”. We do not consider that specialised bodies are needed only in respect of race and gender equality, which is the present position. We note that the majority of Member States already have specialised equality bodies that cover all of the Article 13 grounds. We therefore suggest a provision such as :

1. Member States shall designate and make the necessary arrangements for an independent body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of age, disability, religion or belief or sexual orientation. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals’ rights, or may form part of a body or bodies established for the promotion of equal treatment on grounds of racial or ethnic origin pursuant to Article 13 Directive 2000/43/EC or on grounds of sex pursuant to Article 12 Directive 2004/113/EC .
2. Member States shall ensure that the competences of these bodies include:
 - (a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article xxx providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;
 - (b) conducting independent surveys concerning discrimination;
 - (c) publishing independent reports and making recommendations on any issue relating to such discrimination;
 - (d) at the appropriate level exchanging available information with corresponding European bodies such as the European Fundamental Rights Agency;
 - (e) maintaining a regular dialogue with individuals affected by age, disability, religion or belief or sexual orientation discrimination and relevant non-governmental organisations;
 - (f) For the purposes of this Article, references to ‘discrimination’ shall be taken to include discrimination within the scope of this Directive and discrimination on grounds of age, disability, religion or belief or sexual orientation within the scope of Directive 2000/78/EC .

Public Procurement

One of the lessons from the existing anti-discrimination Directives is the need to complement individual litigation with other methods of stimulating compliance with the law. A concrete example is the area of public procurement. In keeping with the principle of mainstreaming, we believe that public authorities should ensure that when they purchase goods or services these should be from supplied from contractors who are running their business in conformity with the

requirements of anti-discrimination legislation. This approach should also be applied by the EU institutions when they act as purchasers of goods and services. To this end, we suggest the following clauses:

'Candidates for public contract award procedures relating to works, services and supplies, and private and public entities wishing to enter into contractual relations with State, regional or local administrations, or other bodies governed by public law, shall be required to present to the contracting authorities evidence of steps taken to comply with this Directive and Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC.

Public or private entities held, by a judicial procedure, to be in breach of the national provisions adopted pursuant to this Directive or Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC, may be deemed ineligible for grants awarded by the Member States or the EU institutions in the framework of the EU Structural Funds for a period of three years following the final judgment.'

Discrimination Law Association

30 January 2008

PO Box 49064
London N11 2UX
info@discriminationlaw.org.uk