

# **Discrimination Law Association**

## **Equality Bill**

**19 October 2005 - Report Stage – House of Lords**

### **Parliamentary Briefing by the Discrimination Law Association**

#### **Introduction**

1. The Discrimination Law Association (“DLA”) is a membership organisation established to promote good community relations by 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 in the United Kingdom 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 needs of 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.
2. The DLA is a national association with some 400 members including practising and academic lawyers, legal or advice workers and other person substantially engaged or interested in discrimination law and organisations engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from the perspective of the complainant,

3. We are a company limited by guarantee.
4. This is a briefing for the report stage of the Equality Bill in the House of Lords on 19 October 2005.
5. The DLA has supported the creation of a Commission for Equality and Human Rights and welcomes the government's commitment to the enactment of a single equality act during the current Parliament. The DLA welcomed provisions in the Equality Bill to prohibit discrimination on the grounds of religion and belief in the provision of goods, services and facilities and now support the amendments which have been proposed by Lord Alli to extend such protection to grounds of sexual orientation. The DLA recognises the potential positive impact of a statutory equality duty and has welcomed the proposal in the Equality Bill to make it a duty of public authorities to promote gender equality.
6. This briefing refers aspects of the Equality Bill where we believe improvements are needed; we consider the government's amendments intended to respond to matters raised during Second Reading and Committee Stage. We also consider certain amendments tabled by individual Peers which, in some cases, address, at least in principle, some of the concerns the DLA expressed previously. The measure we apply is whether the legislation would, in practice, achieve the government's stated aim of eradicating discrimination and enhancing the rights of all members of society.

## **Summary**

7. The traditional model of a non-departmental public body, accountable to a Secretary of State who makes appointments and determines level of funding is not appropriate for the CEHR. The

CEHR needs to be independent of the executive. It should be directly accountable to Parliament.

8. The CEHR should be required to establish committees for all of the grounds covered by the equality enactments: disability, race, sex, sexual orientation, religion or belief and age and human rights. This would build the perspectives of the groups that identify with each of the grounds into the governance and structure of the CEHR. Equalities Committees should be capable of developing specific policies and strategies in relation to the needs of each ground.
9. The “equalities enactments” that define the powers of the CEHR, should be expanded to include relevant EC equality legislation, where this is not already within UK legislation.
10. The CEHR’s ability to produce statutory codes of practice should not be constrained by and limited to the specific provisions of the equality acts.
11. There should be discretion to permit the CEHR to provide legal assistance in respect of proceedings outside the equality enactments if in the view of the CEHR the proceedings raise an issue of significance for equality or human rights.
12. The definition of discrimination on grounds of religion or belief should be consistent with definitions in other anti-discrimination legislation.
13. The long list of detailed and complex exceptions to the prohibition of discrimination on grounds of religion or belief should be replaced by a general exception that requires each situation to be tested against tight standards of reasonableness and proportionality.

14. The DLA supports the proposal to provide equivalent protection against discrimination on grounds of sexual orientation.
15. The duty to promote gender equality should expressly cover transsexual and transgendered people. It should also expressly cover equal pay.

## **PART 1 - The Commission for Equality and Human Rights**

### **Independence and accountability**

16. The DLA's starting point is that the legislation establishing a commission to enforce and promote equality and human rights must strike the appropriate balance between accountability and independence. The standards of the Paris Principles should be the benchmark for ensuring this balance is achieved.
17. The White paper 'Fairness for All' recognised that to be effective the CEHR will 'need to establish itself as a voice that is independent of the government of the day'. It was clear from earlier debate in the House of Lords that many Peers are concerned that the Bill fails fully to achieve this. The government recognised these concerns and has now proposed a series of amendments to Schedule 1 and Part 1. One amendment is concerned with appointment of Commissioners, but such appointments, selection of the Chair and Deputy Chair and approval of the appointment of a Chief Executive remain in the hands of a Secretary of State. A set of amendments usefully removes most of the provisions giving the Secretary of State powers to direct the CEHR's work.
18. On the crucial issue of funding, the Bill currently provides (Schedule 1, paragraph 38)
  19. The Secretary of State shall pay to the Commission such sums as

appear to

20. the Secretary of State appropriate for the purpose of enabling the Commission to perform its functions.

21. The government amendment would replace “*appropriate*” with “*reasonably sufficient*”. The distinction is slight, and the amendment makes no change to the power of the Secretary of State to determine how much money the CEHR should have, which, of course, translates to determining what, in practice, the CEHR will be able to do. The legislation would not prevent a future government uninterested in combating discrimination or in promoting equality and human rights from adjusting the budget of the CEHR to reflect such views, regardless of contrary views that may exist in Parliament.

22. This traditional model for an NDPB, in which the body is accountable to a government department, is not satisfactory or appropriate in the case of an equality and human rights body for several reasons. Firstly, unlike other NDPBs, a key role of the CEHR will be as a public watchdog over government, to ensure that the executive and other public bodies are complying with their duties in relation to equality and human rights. The Stephen Lawrence Inquiry Report highlighted the existence of institutional racism in the police service and other public services. Tackling racial and other forms of institutional discrimination in public bodies will be a key task of the CEHR. It will most likely find itself investigating executive bodies and supporting cases in politically sensitive and controversial areas. Full independence from the executive is essential to allow it to fulfil this role free from any form of pressure or interference.

23. Secondly, equality and human rights should be mainstreamed into policy-making process of all government departments and should not be the preserve of one or more designated departments only.
24. An important element of institutional independence from government is to ensure financial independence from government. As stated above the Bill, with government amendment, provides that funding is the form of an annual grant in aid provided by the Secretary of State of the sponsor department.
25. The DLA strongly supports the principles of the model proposed by the JCHR<sup>1</sup> In particular it is important to ensure that the CEHR has statutory guarantees of independence from both the executive and parliament; that its system of funding is independent of direct ministerial control and that there is direct reporting to Parliament and not to the executive.

#### **Powers of Secretary of State to direct the work of the CEHR**

26. The government proposes a number of amendments that would remove the power of the Secretary of State to carry out inquiries, investigations and assessments, which the DLA strongly welcomes. Such powers are wholly in conflict with an independent Commission. A further amendment deletes the power of the Secretary of State to direct the CEHR to provide advice about the effect of legislation or proposed legislation. Government amendments leave intact, however, certain other powers of the Secretary of State, for example the power to direct the CEHR to issue a code of practice (Clause 15), to make an order enabling the CEHR to assist a person who is or has been disabled to bring proceedings under other enactments where their disability is a relevant matter (Clause 30) and a power by order to amend the list

---

<sup>1</sup> Joint Committee on Human Rights, Eleventh Report, April 2004, paras. 126 – 137.

of “equality enactments” (Clause 35) that define the scope of the CEHR’s powers.

## **Committees**

27. The Bill gives the CEHR power to create advisory and decision making committees (Schedule 1, part 2 paras 11-15). In addition to this general power, the CEHR is required to have decision-making committees for Scotland and Wales and for Disability.

28. DLA has supported the proposal to establish a disability committee with powers delegated to it by the CEHR Board in relation to policy, strategy and monitoring. We believe that this is the most appropriate way to maintain, and to develop expertise concerning disability discrimination and to strengthen the effectiveness of the CEHR in this area.

29. There is no requirement in the Bill as drafted to have committees for any of the other equality strands, and the DLA strongly recommended that the CEHR be required to establish committees for each of the grounds covered by the equality enactments. The DLA therefore welcomes and endorses the proposals within the amendments tabled by Lord Ouseley that would achieve this.

30. The experience of the DLA informs our view that the CEHR should not function or attempt to function on the basis that ‘one size fits all’, as this is clearly not the case. Discrimination on different grounds is experienced differently, often takes different forms and can have different origins. In some instances of multiple discrimination, for example a black disabled person, the grounds for less favourable treatment will be inseparable, but in other instances the treatment will be on two distinguishable grounds - race and disability - when there will be a need to subject these characteristics to independent recognition and support. Further, until the anti-discrimination

legislation is reformed, any tribunal or court would necessarily have to consider the alleged unlawful acts separately under the Race Relations Act 1976 and the Disability Discrimination Act 1995.

31. More importantly, given the proposed duties and powers of the CEHR, it is vital that the structure of the CEHR enables it to respond to the different impact of particular areas of law and social policy on different communities. For example, policing, prisons and the criminal justice system generally are areas of law and policy that are highly relevant to race and, more recently, religion, but less relevant to disability or age, while transport policies may be more significant in relation to disability or age (young and old) than to race or religion. A single commission must be able to address the specific needs of each of the equality grounds, and listen to and learn from the experience of relevant groups. It will be appropriate for the CEHR to adopt different legal, promotional and investigatory strategies for different grounds at different times. Fundamentally, a single equality commission must continuously guard against operating on the basis of an identikit model of discrimination, which is both seriously inaccurate and dangerously misleading.

32. Thus whilst a unified structure ensures that instances of multiple discrimination can be tackled directly, a completely unified structure may leave untackled those issues that are specific to only one of the grounds. Therefore the CEHR requires a structure that will ensure that it will at all times be alert to the different ways in which different grounds interact with government and civil society and that it is capable of meeting its duties and applying its powers appropriately in respect of each of the grounds. This may involve decisions regarding allocation of resources to different issues at different times be recognised; that the Commission may need to take these strategic (and often difficult) decisions should be acknowledged.

33. The DLA submits that the decision making structures within the CEHR must incorporate the perspectives of the groups that identify with each of the equality grounds; the CEHR should be able to develop policies and strategies specific to the needs of each such group. Decision-making should involve members of the different groups, both to provide relevant experience and to meet the expectations of these groups. The DLA is, however, strongly opposed to any suggestion that the work of the CEHR should be divided into separate self-contained 'silos', which would lose the co-ordination, cross-learning and focus on equality with human rights that a single body will bring.

34. For the above reasons, the DLA supports Lord Ouseley's proposals to establish, from the outset, six Equalities Committees – for disability, race, sex, religion or belief, sexual orientation and age. These Committees would be expected to focus on policy issues and questions of strategies and priorities, rather than operational matters. We recommend that in relation to any powers delegated by the Commission, each Committee should itself have a duty to consult with all relevant stakeholders. The Equalities Committees should also have a role in developing a human rights strategy. We endorse the proposals for review of the Committees after 5 years, included in Lord Ouseley's amendments; the exclusion of Commissioners, staff and Committee members from such reviews should give stakeholders an important role and should ensure objective assessment of the Committees' performance and role.

35. The Commission needs to retain final authority in relation to all of the grounds, especially in resource allocation when there will inevitably be competing, well-argued demands. While it will be beneficial for individual commissioners to involve themselves in one or more committees, we strongly recommend against creating a Commission made up of separate champions; careful planning will

be needed to ensure maximum input from each of the committees without creating de-facto champions.

## **Equality Enactments**

36. Clause 35 defines the equality enactments entirely in terms of UK law. It is only in respect of the equality enactments that the CEHR has major powers including to conduct inquiries or investigations, provide assistance to individual litigants, issue codes of practice. UK equality legislation has been significantly shaped by EU Treaties and Directives, which in some circumstances are directly enforceable in the UK. The list in Clause 35 would not cover a case in which a person seeks to enforce their rights under EC legislation, nor would it cover a case in which it is argued that a UK non-equality statute, for example employment legislation, is in breach of one of the EC Articles or Directives. Such issues have arisen in a number of cases<sup>2</sup>.

37. EC equality rights are important as they control not merely the content of UK equality rights but the impact of UK law generally. There is no reason why the CEHR's powers should not encompass EC equality legislation, especially when there is no equivalent within UK equality law.

38. Clause 35 should be amended to include any relevant legislation of the European Union or the European Community.

---

<sup>2</sup> *R v Secretary of State for Education ex parte Schaffter* [1987] IRLR 53, *R v Secretary of State for Employment ex parte EOC* [1994] IRLR 176, *R v Secretary of State for Employment ex parte Seymour Smith* [2000] IRLR 363 and *Secretary of State for Trade and Industry v Rutherford* [2003] IRLR 858.

## **OTHER AREAS IN WHICH DLA HAS RECOMMENDED IMPROVEMENT**

### **Codes of Practice – clauses 15 and 16**

39. The ability of the Commission to produce statutory codes of practice is key to ensuring promotion of its aims and objectives. Such Codes of Practice have proved vital in providing much-needed guidance to tribunals and courts in the relevant areas of discrimination currently addressed by them.
40. The DLA has recommended that the CEHR's powers to issue statutory codes of practice should not be constrained by and limited to the specific provisions of the equality Acts, and that the list in Clause 15 should be deleted. The CEHR should be able to issue such statutory codes of practice as it believes appropriate. This could include, for example, a code of practice relating to obligations of schools under the Special Educational Needs and Disability Act 2001 or a code of practice on potential application of civil and criminal law to the reporting and portrayal of different equality groups by the media.
41. As stated above, the government's amendments do not remove the obligation on the CEHR to issue a code in compliance with a direction from the Secretary of State. This requirement is not consistent with an independent Commission and should be deleted.

### **Effective law enforcement powers**

42. The CEHR will have unique powers to probe the workings of an organisation, including summoning evidence and witnesses and publishing findings. Such powers should be stated in the enabling legislation in a way that makes it plain to all concerned when and how such powers will be applied. Regrettably, the Equality Bill defines these powers in three separate clauses or sets of clauses: *an inquiry* (clause 17), *an investigation* (clauses 22 – 24) and *an assessment* (clause 33). In practice there is likely to be significant overlap, requiring unnecessary procedural steps that will inevitably introduce delay. The DLA can see no benefit to effective enforcement by the CEHR of these distinctions, and Schedule 2, which deals in some detail with the procedures for inquiries, investigations and assessments quite appropriately lays down more or less the same requirements for all three. Therefore the DLA recommends amendment to simplify and bring within a single clause the power of the CEHR to probe the policies and practices of public and private organisations.

43. The DLA remains concerned regarding the lengthy and convoluted procedure to secure an “action plan” (Clauses 23 – 24). We recommend that the CEHR, rather than the respondent, should have the primary role in shaping the action that should be taken to bring discriminatory practices to an end.

### **Legal Assistance**

44. Legal assistance and support is a vital tool in achieving change; cases supported by the existing commissions have often had an impact well beyond their particular facts. We welcome the power of the Commission (Clause 30) to assist an individual in taking a legal case in relation to the equality acts by providing legal advice, representation, or any other assistance. We are concerned about the criteria that may be applied and the limited resources which the CEHR will devote to assisting individuals either directly or by

funding other bodies to do so; these are decision to be made by the Commission, once it is appointed, but the overall funding of the CEHR will be a significant determining factor.

45. In respect of the CEHR's statutory powers to provide legal assistance, the DLA considers that the limitations imposed under Clause 30 are unduly restrictive. For example, in respect of maternity rights it would prevent the CEHR from testing whether the UK has implemented its obligations under the Pregnant Workers Directive in employment protection legislation. In a case in which the facts relating to alleged unfair dismissal and discriminatory dismissal are inextricably, the CEHR would be able to assist only in relation to the discrimination issues. As discrimination lawyers we strongly advise against so narrow an approach. Instead the CEHR should have powers (which remain discretionary against the criteria it establishes) to assist in respect of proceedings which formally do not raise issues under an equality provision if in the view of the CEHR the proceedings do raise issues of significance for equality or human rights.

## **PART 2 - Discrimination on grounds of Religion or Belief**

### **Definition of "discrimination"**

46. The DLA had welcomed the clarification in Clause 45 of the Bill that 'religion or belief' includes a reference to lack of belief, and that this would be made clear in the existing employment discrimination provisions as well as the proposed provisions outlawing discrimination in goods, facilities and services.

47. Government amendments are proposing to redefine discrimination, replacing the simple formulation now in Clause 46 "*on grounds of religion or belief*" with "*on grounds of the religion or belief of B or of any other person except A (whether or not it is also A's religion or*

*belief*)". The DLA is not aware of any strong argument in favour of this amendment. The DLA does not support this amendment for the following reasons:

48. It is not consistent with other UK equality legislation or the EC anti-discrimination directives, which refer to discrimination "*on grounds of ...*"

Case law under the Race Relations Act has established that prohibition of discrimination "*on racial grounds*" can also cover cases where a person is dismissed when they have refused to comply with an instruction to discriminate on racial grounds, since "race" is a the, or a main, factor in the decision to dismiss. While such cases could be brought using the proposed new definition, it may be more difficult to do so.

49. The DLA welcomes the fact that the government has responded to our earlier concerns regarding the definition of indirect discrimination. We are pleased to see an amendment that would apply the same definition - referring to "*a provision, criterion or practice*" -- as in regulations prohibiting discrimination on grounds of religion or belief in employment and further and higher education and in most other equality enactments.

## **Exceptions**

50. The first reaction of any first person reading Part 2 for the first time will surely be that this legislation is so complicated, so weighed down with complex, detailed exceptions, that it will be very difficult to know what is, and what is not, lawful. Such exceptions significantly dilute the protection against religious discrimination that is heralded in the long title of the Bill.

51. From our experience in applying existing anti-discrimination laws, we are aware that it is difficult, if not impossible, to know in advance all of the situations in which it might be appropriate to permit discrimination on grounds of religion or belief. We suggest that there are a wide range of circumstances in which on some occasions it may be appropriate and reasonable to discriminate and on other occasions it would not.

52. We therefore recommend that all of the detailed exceptions in Clauses 50, 52, 53, and 59 – 63 should be replaced by a general exception, that requires each situation to be tested against tight standards, in the following terms:

*53. “(1) Sections 48, 49, 51 and 53(1) shall not apply where subsection (2) applies.*

*54. (2) This subsection applies where*

- i. being of a particular religion or belief is a genuine and determining requirement;*
- ii. it is proportionate to apply that requirement in the particular case; and*
- iii. either -*

- a. the person to whom that requirement is applied does not meet it, or*

*55. the person seeking to apply the requirement is not satisfied, and it is reasonable in all the circumstances for him not to be satisfied, that that person meets it.”*

56. A general exception in this form requires the need for any proposed discrimination to be tested on each occasion against measures of genuine and determining requirement and reasonableness. This allows for flexibility against tight standards.

57. The DLA submits that in no circumstances should there be an exception permitting harassment on grounds of religion or belief.

58. The DLA remains concerned regarding the power to be given to the Secretary of State to create new exceptions or to vary exceptions to prohibitions against discrimination.

59. The fundamental principle underlying anti-discrimination legislation is that any exceptions should be strictly justified, narrowly drawn and as limited as possible. In considering this Bill Parliament will determine which exceptions meet these criteria. What is proposed in Clause 65 is that, following careful deliberation by both houses of Parliament, the Secretary of State will be able him/herself to remove all or any part of the protection against discrimination that Parliament is being asked to approve. The Discrimination Law Association considers that any new exception, which would deny rights not to be discriminated against or harassed on grounds of religion or belief should be a matter for full consideration by Parliament and not merely a decision for the Secretary of State of the day.

60. The government's proposed amendments would restrict the power of the Secretary of State to create new exceptions to Clause 54 prohibiting discrimination by public authorities in carrying out public functions. The amendment would also delete the power to remove an exception, which the DLA regards as least worrying, as this would enhance rather than diminish protection against discrimination.

### **Immigration exception**

61. The DLA is particularly concerned that the government is continuing to seek a major exception (Clause 54) for immigration decisions based on religion or belief. The criteria in the government's amendment is "conducive to the public good" or "undesirable". In the light of current decisions regarding exclusions and deportations, we are extremely worried that persons who may be "thought to

belong or subscribe to “ a particular religion or belief (see Clause 46(2)) will be refused entry or refused or have cancelled their leave to remain purely for that reason.

62. Peers may recall the wide opposition to a similar exception in s.19D of the Race Relations Act. The operation of that exception has been the subject of formal monitoring by the Race Relations Monitor. Her annual reports describe case-hardening and reinforcement of stereotyping leading to less favourable treatment on grounds of nationality in decision regarding entry and asylum. The DLA advises caution before approving a parallel licence to discriminate on grounds of religion or belief.

### **Discrimination on grounds of sexual orientation**

63. The DLA supports in principle the set of amendments tabled by Lord Alli that would apply the same protection against discrimination in relation to goods, facilities and services, premises and functions of public authorities on grounds of sexual orientation. We are not proposing here to comment in detail on the individual new clauses.

64. There is no argument of which we are aware that supports extending the law in respect of one set of grounds and not others. The harm suffered as a consequence of discrimination and harassment in these areas by lesbians, bi-sexuals and gay men should not continue to be tolerated, and the failure to legislate to prevent such wrongs conveys an unfortunate and unacceptable message.

65. We note the long title of the Bill and are concerned that this necessary extension of anti-discrimination legislation may not be permissible within this measure.

### **PART 3 - Duty to Promote Gender Equality**

66. The Bill places a general duty on public bodies to have 'due regard to the need to eliminate unlawful discrimination and to promote equality between men and women'.

67. We welcome the government amendment that will ensure that the duty should expressly covers harassment, as is the case with the duty on public authorities in respect of disability.

68. Other matters should, however, also be included. Transsexual and transgendered people should be expressly covered by the gender duty.

69. The DLA welcome the inclusion of pay in clause 83(2) (c) defining unlawful discrimination, but would wish to see pay expressly included in the duty to promote equality of opportunity and for there to be a specific duty on public authorities to carry out pay reviews and address inequalities of pay. It would be consistent with the public duty for public authorities to make it a condition of contracts with contractors that they carry out pay reviews and take any remedial action to close the pay gap.

Discrimination Law Association  
17 October 2005