

Discrimination Law Association

Equality Bill

15th June 2005 House of Lords 2nd Reading Briefing

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 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.
3. We are a company limited by guarantee.

4. This is a briefing for the second reading of the Equality Bill in the House of Lords on 15 June 2005.
5. The DLA welcomes the commitment the government has shown to the creation of a Commission for Equality and Human Rights and its commitment to a single equality Act. We welcome the proposals to prohibit discrimination on the grounds of religion and belief in the provision of goods, services and facilities. And the creation of a duty on public authorities to promote gender equality.
6. This briefing highlights some areas in the Equality Bill where we believe further improvements can be made to ensure that the CEHR and the new areas of equality law are fully able to achieve the government's aim of eradicating discrimination and enhancing the rights of all members of society.

Summary

7. The traditional model of a non-departmental public body is not appropriate for the CEHR. The CEHR needs to be independent of the executive. It should be directly accountable to Parliament.
8. The governance and structural arrangements for the CEHR must be open to the perspectives of the groups that identify with each of the grounds and should be capable of developing specific policies and strategies in relation to the needs of each ground. 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.

9. The Commission's ability to produce statutory codes of practice should not be constrained by and limited to the specific provisions of the equality acts.
10. The Bill currently makes distinctions between investigations, inquiries and assessments. The distinctions between them are complex and unnecessary. It would be better to have a single clause setting out the power of the CEHR to probe the policies and practices of public and private organisations.
11. We recommend a more streamlined and effective approach to action plans following an investigation.
12. There should be discretion to permit assistance in respect of proceedings that formally do not raise issues under an equality provision if in the view of the CEHR the matters raise an issue of significance for equality or human rights.
13. The definition of indirect discrimination in relation to religion and belief should be consistent with the definition in race equality legislation on goods, services and facilities.
14. The duty to promote gender equality should expressly cover transsexual and transgendered people. It should also expressly cover harassment and pay.

Independence and accountability

15. It is important to ensure that the legislation establishing a commission to enforce and promote equality and human rights strikes the appropriate balance between accountability and independence. The standards of the Paris Principles should be the benchmark for ensuring this balance is achieved.

16. 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'. We do not believe that the current fully Bill achieves this. The provisions in schedule 1 of the Bill make it clear that the CEHR will operate within the standard framework for the relationship between government departments and an NDPB. Funding of the CEHR will be determined by the Government (sch. 1. para. 38). The Commission is required to report to the government (sch. 1. para 32). The Government appoints the Commissioners, including selecting the chair and Deputy Chair of the Commission and must approve the appointment of a chief executive by the Commission (sch. 1, para 4).
17. The ability of the CEHR to work independently of government is further constrained by the powers given to the Secretary of State to direct the Commission to carry out inquiries (clause 17(1)(a)) and investigations (clause 22(2)). The Bill requires the Commission to seek the permission of the Lord Chancellor to continue to support a case involving an equality enactment and a Human Rights Act (s.7) issue once the equality aspect of the case cease to be in issue (clause 30(4)). The Commission would also require the approval of the Secretary of State to support legal proceedings where a person who is, or has been disabled relies or proposes to rely on a matter relating to their disability.
18. This traditional model for an NDPB, in which the body is accountable to a government department, is not satisfactory 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.

19. 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.

20. An important element of institutional independence from government is to ensure financial independence from government. Under the draft Bill funding is the form of a grant in aid provided by the Secretary of State of the sponsor department.

21. The DLA strongly supports the principles of the model proposed by the JCHR¹ 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.

22. Basic to the credibility of the CEHR and the confidence of the public which it attracts will be its independence from the executive. The DLA strongly recommends that the provisions giving the Secretary of State power to direct the CEHR to conduct an inquiry, investigation or assessment should be deleted. There are sufficient powers within the executive to inquire into matters that are of concern to the government without imposing such concerns on a body that is expected under EU legislation to act independently. All decisions to initiate inquiries/investigations/assessments should be made by the CEHR and that the government, through any one of its ministers, should have no role in such decisions.

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

Committees

23. 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. There is no requirement to have committees for any of the other equality strands.
24. It is essential that the CEHR does not function or attempt to function on the basis that 'one size fits all', since 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 will necessarily have to consider the alleged unlawful acts separately under the Race Relations Act 1976 and the Disability Discrimination Act 1995.
25. More importantly, given the proposed fundamental duty of the CEHR under clause 3 and its wide remit under clauses 8 to 13, it is vital that the structure of the CEHR as well as its internal organisation enables it to respond to the different impact on different communities of particular areas of law and social policy. For example, policing, prisons and the criminal justice system generally is highly relevant to race and, more recently, religion, but less relevant to disability or age, while transport policies may affect disabled people more than people within other groups. 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, that is both seriously inaccurate and dangerously misleading.

26. Thus whilst a unified structure ensures that instances of multiple discrimination can be tackled directly, the DLA is concerned that 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 is alert to the different ways in which different grounds interact with government and civil society and capable of applying its powers appropriately in respect of each of the grounds.

27. The DLA believes that the governance and structural arrangements for the CEHR must be open to the perspectives of the groups that identify with each of the grounds and should be capable of developing specific policies and strategies in relation to the needs of each ground. There needs to be a way in which decision-making can involve members of the different groups, both to provide relevant experience and to meet the expectations of these groups. We are 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.

28. However, we can see the benefit to the CEHR of standing committees. It is also important that the need for different resources to be allocated to different issues at different times be recognised, and that the role of the Board in taking these strategic (and often difficult) decisions is well established.

29. DLA welcomes 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. The disability committee should also have a role in developing a human rights strategy. In respect of any decision-making powers delegated to the committee, we submit that these should be accompanied by a duty to consult with all relevant stakeholders.

30. The DLA believes that there are equally cogent arguments for the establishment of standing committees for the other five equality grounds and human rights. **The DLA therefore strongly recommends that Part 5 of Schedule 1 is amended to require the new Commission 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.**

31. The DLA has some reservations regarding the powers listed in paragraph 52 of Schedule 1 that are to be delegated to the Disability Committee. We are concerned in particular about delegating powers that appear to relate to operational matters of the CEHR, rather than matters of policy or shaping of strategies and priorities and monitoring performance of the CEHR in relation to their areas of expertise in which the disability committee and the other committees we recommend should have a major role.

32. 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.

Codes of Practice – clauses 15 and 16

33. 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.

34. Given the broad nature of the Commission's functions, however – including its fundamental duty (contained in clauses 8 and 3 respectively) – DLA believes that the Commission's ability to produce statutory codes of practice should not be constrained by and limited to the specific provisions of the equality Acts, as laid out in Clause 15(1). DLA would advocate deleting the list in clause 15(1) to enable the Commission to produce such statutory codes of practice as it believes appropriate.

35. Clause 15(3) requires the Commission 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 removed.

Effective law enforcement powers

36. A Commission established to eliminate discrimination and promote equality of opportunity and human rights must be, and must be seen to be, an effective law enforcement agency. This was the aim when the EOC and CRE were established in the 1970's; it was the aim when the DRC was established in 1999, and, in relation to sexual orientation, religion or belief and age discrimination, is the main impetus for the establishment of the CEHR.

37. It was recognised in the 1970's, and it is even clearer today, that to expose and eradicate discriminatory practices cannot depend on

individual victims seeking redress for particular unlawful acts. It was therefore the intention of Parliament that the main enforcement tool of the CRE and EOC would be their power to conduct formal investigations. It is regrettable that both bodies have been less robust in using this power than had been envisaged, deterred, unnecessarily in our view, by decisions in the House of Lords giving a cautious interpretation to the statutory provisions.

38. The Equality Bill offers fresh opportunity to create robust enforcement powers for the new body. In our view the power to investigate the policies and practices of public and private sector organisations - with sufficient resources to do so to achieve maximum impact - is critically important for the effectiveness of the CEHR and its ability to secure change. It is this power in particular that will set the CEHR apart from other bodies also concerned to eliminate discrimination and promote equality.

39. The powers of the CEHR to probe the workings of an organisation, including summoning evidence and witnesses and publishing findings should be stated in the 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). An inquiry under clause 17 may be into any matter relating to the duties of the CEHR set out in clauses 8 – 11 except if the CEHR suspects that an unlawful act of discrimination or harassment, when the process can only be an investigation under clause 22. An inquiry could be concerned with a public authority's practices including compliance with its statutory equality duties but such compliance could also be the subject of an assessment under clause 33. If such assessment uncovered acts of discrimination then further consideration of such acts would need to be as an investigation under clause 22. There appears to be no benefit to the CEHR to enact such 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.

40. 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.

Investigations (clauses 22-24)

41. Looking specifically at proposed investigation powers (clauses 22 – 24), these powers should apply when the CEHR suspects that unlawful acts are *being committed* as well as having been committed in the past. We agree that if the CEHR finds evidence of unlawful discrimination or harassment, it should formally notify the respondent. What is omitted from the Bill is provision for the notice to require the unlawful conduct to cease.

42. The DLA do not agree, however, that the notice should require the respondent to prepare an action plan (clause 23(4) and 24). These provisions establish a procedure of draft action plans moving back and forth between the respondent and the CEHR and, if necessary, the county court (sheriff court in Scotland) that extending over many months, during which time the respondent would have no obligation to take any action to change their policies or practices.

43. We recommend instead that the CEHR notice should prescribe a timetabled draft action plan that the respondent would be expected to carry out. The DLA is satisfied that by the time the CEHR has completed an investigation and is in a position to serve a notice specifying unlawful acts, the CEHR will have a very good understanding of the way the respondent conducts its affairs and what changes are required to secure non-discrimination in the future. In

many cases the CEHR is likely to have a far clearer idea of what needs to be done than the respondent who may have chosen to remain in denial throughout the investigation. This is consistent with the power of the CEHR to make recommendations, whether or not the CEHR makes a finding of unlawful discrimination.

44. We recommend that the respondent should be allowed a fixed period to make representations regarding the draft action plan; the CEHR would be required to take account of those representations in drawing up a final action plan that would then be binding on the respondent. As in Clause 23(5), the respondent would have a right of appeal, within a fixed period, to the employment tribunal or county/sheriff court on all aspects, the finding of unlawful discrimination, the requirement to stop discriminating and the requirements of the action plan. The notice including the action plan would be final and binding either after the expiry of the time to appeal or, if there was such an appeal, on the date of the order by the court confirming and/or modifying the requirements of the action plan (or any later date specified in such order).

Legal Assistance (clause 30)

45. 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 to assist an individual in taking a legal case in relation to the equality acts by providing legal advice, representation, or any other assistance.

46. However, under clause 30(5) and 30(6) where a case involves both an discrimination enactment and some other issue, the CEHR cannot provide legal assistance for the case once the anti-discrimination enactment issue is no longer being pursued This is unduly restrictive. For example, in respect of maternity rights it will be important for the Commission to test whether the UK has implemented its obligations

under the Pregnant Workers Directive in employment protection legislation and associated regulations. Such provisions should be included in the definition of Equality Regulations. More broadly we consider there should be discretion to permit assistance in respect of proceedings which formally do not raise issues under an equality provision if in the view of the CEHR the matters raise an issue of significance for equality or human rights.

Existing powers not transferred

47. Section 55 SDA, which allows the EOC to review discriminatory provisions in health and safety legislation and section 73 SDA, which allows the EOC to tackle persistent discrimination, have not been re-enacted despite assurances that there would be no diminution in the powers of existing commissions.

Part 2: Discrimination on grounds of Religion or Belief

48. DLA welcomes the clarification that 'religion or belief' includes a reference to lack of belief both in relation to the current employment provisions and the proposed goods, facilities and services provisions.

49. The criteria for indirect discrimination in this clause apply when a '*requirement, condition or practice*' would put someone at a disadvantage. This wording is different from that applying to race which refers to a '*provision, criterion or practice*'. The DLA considers that differential wording is likely to lead to undesirable confusion in the law as the courts attempt to distinguish between them. A common definition should be used across all the discrimination enactments unless differential provision can be justified. This could result in the ridiculous position of a court attempting to distinguish between the

indirect discrimination provisions in relation to Jews and Sikh and those relating to Muslims and Hindus.

50. 'Requirement or condition' has been ruled to be an absolute bar, so that in the case of a person seeking entrance to a place of public entertainment who does not possess the particular 'requirement or condition' will not be allowed in. So for example, a 'requirement or condition' that no one will be allowed entrance if they are wearing a Jewish *kippah* will amount to indirect discrimination if it cannot be justified. By contrast a 'provision or criterion' is a more flexible term that will encompass not only requirements and conditions but also preferences and desirable characteristics.

Duty to Promote Gender Equality

51. 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'.

52. Transsexual and transgendered people should be expressly covered by the gender duty.

53. We consider that the duty should expressly cover harassment, as is the case with the duty on public authorities in respect of disability.

54. We welcome the inclusion of pay in clause .82(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.