



The Equality Bill –

Government response to the Consultation

Presented to Parliament by The Lord Privy Seal, Leader of the House
of Commons and Minister for Women and Equality by command of
Her Majesty

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THE EQUALITY BILL – GOVERNMENT RESPONSE TO THE CONSULTATION

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EXECUTIVE SUMMARY

1. Promoting equality is essential for individuals to fulfil their potential, for the creation of a cohesive society and for a strong economy. A substantial body of equality legislation has been introduced over the last four decades, protecting millions of people from discrimination and promoting greater equality. But the legislation has become complex and hard to understand. The Equality Bill will simplify and strengthen the law. The following paragraphs summarise the main measures covered in this document.

A new Equality Duty on public bodies

2. The three existing public sector equality duties have required public authorities to give due regard to the need to tackle discrimination and promote equality for race, disability and gender. To help make progress on our public policy objectives, we will place a new Equality Duty on public bodies, which will bring together the three existing duties and extend to gender reassignment, age, sexual orientation and religion or belief.

Ending age discrimination

3. The Bill will contain powers to outlaw unjustifiable age discrimination by those providing goods, facilities and services and carrying out public functions in the future. To allow businesses and public authorities to prepare, and to make sure the law does not prevent justified differences in treatment for different age groups, there will be further consultation on the design of the legislation and a transition period before the new legal protections from age discrimination are implemented.

Requiring transparency

4. We cannot tackle inequality if it is hidden. Transparency is essential to tackling discrimination. We want public bodies to comply with the Equality Duty in their role as employers by reporting on important inequalities:

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- gender pay
- ethnic minority employment; and
- disability employment.

5. £160 billion is spent by the public sector on private sector contracts every year. The Equality Duty will require public bodies to give due regard to the need to tackle discrimination and promote equality through their purchasing functions. We will use this purchasing power to help us deliver our public policy objectives of greater equality.

6. We will ban secrecy clauses which prevent people discussing their own pay.

7. The Equality and Human Rights Commission will conduct inquiries into particular sectors, including the financial services sector and the construction industry.

8. We will work with business to improve transparency in the private sector, in particular through the introduction of a new “kite-mark”, and gather and publish evidence on the effectiveness of equal pay audits in closing the gender pay gap.

9. We expect business will increasingly regard reporting on their progress on equality as an important part of explaining to investors and others the prospects for the company. We will review progress on transparency and its contribution to the achievement of equality outcomes and in the light of this consider, over the next five years, using existing legislation for greater transparency in company reporting on equality.

Extending positive action

10. We will extend positive action so that employers can take into account, where they feel it is appropriate, when selecting between two equally qualified candidates, under-representation of disadvantaged groups, for example women and people from ethnic minority communities.

11. We will also extend the permission to use women-only shortlists in selecting parliamentary candidates to 2030. Whilst we will not legislate to allow for ethnic minority shortlists at this stage,

we will pursue non-legislative measures to increase the number of ethnic minority elected representatives in both Parliament and local councils.

Strengthening enforcement

12. We will allow tribunals to make wider recommendations in discrimination cases, which will benefit the employer's wider workforce and help to prevent similar types of discrimination occurring in the future.

13. We will explore further whether to allow discrimination claims to be brought on combined multiple grounds, such as where someone is discriminated against because she is a black woman.

14. We will consider whether there is a case for introducing representative actions in discrimination law, to allow trade unions, the Commission for Equality and Human Rights and other bodies (with the permission of the Court) to take cases to court on behalf of a group of people who have been discriminated against. We will not make provision for representative actions in the Equality Bill but will consider the arguments further over the coming months in the light of the Civil Justice Council's recommendations in its review of collective redress mechanisms, and further research to be commissioned by the Government Equalities Office.

15. We will support trade union equality representatives in their roles by building on current initiatives including the 15 pilot projects we are sponsoring through the Union Modernisation Fund. We will review and report on what the pilot projects have delivered by next year, with a view to next steps.

16. We will ensure that appropriate training is made available to judges hearing discrimination cases and make provision for the use of expert assessors to advise judges who hear county court cases involving discrimination across all the protected grounds.

Simplifying the law

17. We will abolish the existing "two-tier" levels of definition and tests in the Race Relations Act and standardise the definition of

indirect discrimination. We will align the approach to victimisation with the approach taken in employment law and extend protection to children in schools whose parents or siblings complain about discrimination, so that children are protected under all relevant protected grounds (e.g. race, gender, sexual orientation, religion or belief). We will bring equal pay law within the Equality Bill.

Simplifying exceptions

18. We will devise a model for exceptions which includes a genuine occupational requirement for all grounds of discrimination at work except for disability. We do not intend to introduce a genuine service requirement for discrimination outside work. We will consider further the extent to which we need to retain specific exceptions in particular cases.

Streamlining and strengthening the law for:

- transsexual people

19. We will provide protection against discrimination for people who associate with transsexual people and protect transsexual people against indirect discrimination and discrimination in the exercise of public functions. We will clarify the definition of gender reassignment to recognise that not all transsexual people undergo medical supervision.

- pregnant women and new mothers

20. We will extend protection against discrimination in the exercise of public functions to cover pregnancy and maternity. We will make clear that breastfeeding mothers are protected against discrimination in the provision of goods, facilities and services.

- disabled people

21. We will simplify the definitions of disability discrimination and the different justification tests allowing disability discrimination as well as the threshold for making reasonable adjustments. We will also repeal the list of capacities which forms part of the definition of whether a person is disabled. We will remove barriers for disabled

people by creating a duty on landlords and managers of premises to make disability-related alterations to the common parts of residential premises.

- members of private clubs

22. We will make it unlawful for mixed-sex private clubs to discriminate between men and women members so that people are not treated as second class simply because of their gender. We will also outlaw discrimination by private clubs based on religion or belief, pregnancy or maternity, gender reassignment and age. We will also outlaw discrimination by private clubs against guests on any of these grounds.

23. But we will not extend these changes to single-sex clubs (e.g. for sport) and there will be no change in the position that private clubs can limit themselves, e.g. to members of a particular religion or belief, pregnant women and new mothers, transsexual people and people of particular ages.

Harassment

24. We do not think people at work should be subject to harassment, from whatever quarter, simply because of who they are. So we are now giving further consideration to extending the protection that already exists for employees who are harassed by a customer or client because of their sex, so that they are also protected from such harassment on all other grounds.

25. We will also extend protection against harassment outside work – in the provision of goods, facilities and services and public functions – because of a person's age where we see real evidence of need, for example in care homes, and we are considering further whether to extend protection in respect of disability. But we do not propose to extend protection against harassment outside work, on grounds of sexual orientation or religion or belief, because we do not see evidence of a real problem.

Retaining our approach

26. We do not intend to:

- include a purpose clause in the Equality Bill;
- introduce protection against discrimination for carers as such. However, we are considering what the implications of the *Coleman* case might be for protection against discrimination based on association;
- introduce statutory protection against discrimination on grounds of genetic predisposition, but to continue with the present system of monitoring by the Human Genetics Commission, in the light of the insurance industry's extended moratorium on the use of such information;
- introduce specific protection against caste discrimination or discrimination for Welsh speakers.

Implementing the Gender Directive

27. We have implemented the Gender Directive, which extended protection on grounds of sex in the access to and supply of goods and services. The Sex Discrimination (Amendment of Legislation) Regulations 2008 came into force on 6 April 2008.

Next steps towards the Equality Bill

28. Over the next few months there will be a continuous and determined programme of further action to prepare for the introduction of the Equality Bill in the next parliamentary session. We are establishing a senior level stakeholder advisory group to work with us across the full range of measures to be included in the Bill. This will help us ensure that we are communicating effectively with key interests.

Public sector Equality Duty

- We will be discussing with relevant organisations how the new Equality Duty will work in practice, especially in relation to religion or belief. A cross-government working group will

develop the detail of our public sector Equality Duty proposals for secondary legislation. This group will be supported by an expert reference group involving a full range of public bodies and other key stakeholders.

Age discrimination

- A financial services working group, including age equality organisations, will assess the likely impact on customers and service providers of a number of legislative options. It will submit a final report by the end of September 2008.
- We will also establish a working group to inform the development of the legislation to prohibit age discrimination in all sectors other than financial services and health and social care. A key consideration will be how we can ensure that justifiable age-based practices (for example, concessionary travel for older and younger people) can continue.
- Subject to the progress of the two working groups, further work to inform an impact assessment, and in the light of European developments on the draft goods and services discrimination Directive, we will seek to consult in 2009 on more detailed proposals for bringing the new law into force in those sectors covered by the two working groups.
- We will make a separate statement after the parliamentary recess setting out a defined programme of work to tackle age discrimination in the health and social care sectors and to help service providers prepare for legislation.
- We will continue to take a range of other steps to ensure that older people are treated fairly, have fulfilling lives and are able to play a full part in society. For example, we are refreshing our Age Strategy and this will be published early next year. It will consider the ways society needs to adapt to demographic changes, as well as the role for Government, employers, voluntary groups, service providers, retailers and individuals.

Transparency and procurement

- We will work with the Office for Government Commerce and others to develop ways of improving how public bodies use their purchasing power to support the delivery of equality outcomes. Government will examine a range of options for taking forward this work and will consult with stakeholders in developing these options.
- We will work with business, the Equality and Human Rights Commission and others to develop a kite-mark scheme for employers who are transparent about reporting their progress on equality. The kite-mark will show which organisations have demonstrated acceptable equality outcomes.
- We will work with the CBI, unions and others to gather evidence on the effectiveness of equal pay job evaluation audits in narrowing the pay gap and spreading best practice.
- The Equality and Human Rights Commission will launch a series of inquiries into inequality in the financial services and construction sectors, beginning this year.

Enforcement

- We will explore with stakeholders whether it is practical to give redress to people who suffer discrimination on multiple grounds.
- We will work with the trades unions to strengthen the excellent and pioneering work of trade union equality representatives in the workplace.
- The Civil Justice Council will publish its interim findings on collective redress mechanisms across the legal system for further consultation shortly, followed by formal advice to the Lord Chancellor later this year. We have set up a cross-Government working group, which will consider the Civil Justice Council's interim report and respond to its final recommendations. Alongside this work, the Government Equalities Office will be undertaking more detailed analysis to consider whether there is a case for representative actions

in the discrimination context, including by commissioning some desk research over the summer.

- We are consulting on the practicalities of allowing employment tribunals to make wider recommendations through the Dispute Resolution Secondary Legislation Consultation¹, which closes on 26 September 2008.
- We will also be working with the Tribunals Service, Employment Judges and other relevant stakeholders, to identify other ways of ensuring that we learn the lessons from tribunal judgments.

Related issues

- We will look at areas where decisions may be influenced by the outcome of the ECJ judgment on *Coleman*.
- We will engage in discussions with the EU Commission on the development of a new Anti-Discrimination Directive prohibiting discrimination and harassment on grounds of age, disability, sexual orientation and religion or belief in various fields outside the workplace.

¹ <http://www.berr.gov.uk/consultations/page46889.html>

Chapter 1: Overview of the consultation

Introduction

1.1 We made a commitment in our 2005 General Election manifesto to introduce an Equality Act in this Parliament to modernise and simplify equality legislation. The Discrimination Law Review was launched in February 2005 to fulfil this commitment by considering “the opportunities for creating a clearer and more streamlined equality legislation framework which produces better outcomes for those who experience disadvantage while reflecting better regulation principles.”

1.2 The Discrimination Law Review’s findings resulted in a consultation paper on proposals for the Equality Bill, entitled “A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain”, which was published in June 2007.

1.3 Work has since been carried forward by the Government Equalities Office² with the close involvement of other key departments, including the Department for Work and Pensions; the Department for Children, Schools and Families; the Department for Business, Enterprise and Regulatory Reform; Communities and Local Government; the Ministry of Justice; the Department of Health and the devolved administrations. This work has taken account of the findings of the independent Equalities Review, chaired by Trevor Phillips, which carried out an investigation into the causes of persistent discrimination and inequality in British society, and whose final report was published in February 2007.

1.4 This document sets out our analysis of the responses received to consultation proposals, in which we attempt to bring out the weight of the arguments for and against a particular approach as well as indicating the number of those putting forward particular views, and our decisions on the measures we will include in the Equality Bill.

1.5 Copies of all the responses we received from organisations are available on the Government Equalities Office website³.

² The Discrimination Law Review was launched by the Department of Trade and Industry before moving to the Department of Communities and Local Government in May 2006 and then to the Government Equalities Office in October 2007.

³ <http://www.equalities.gov.uk>

Overall responses: feedback

1.6 The consultation ran from 12 June to 4 September 2007. It was supplemented by five regional consultation events for general audiences in Bristol, Cardiff, Edinburgh, Manchester, and London. We also held a further event in London for business stakeholders and specialist events on age discrimination and public sector duties. In all, nearly 500 people attended these events. The Discrimination Law Review team also held nearly forty bilateral meetings during the consultation period with a wide range of stakeholders and interest groups.

1.7 In total, 4,226 responses to the consultation were received: 597 of these were from organisations; and 3,629 were from private individuals.

Responses from organisations

1.8 A wide range of organisations responded, including the three former equality commissions (Equal Opportunities Commission, Commission for Racial Equality and Disability Rights Commission), the new Equality and Human Rights Commission, the Equality and Diversity Forum, Stonewall, Press for Change; disability groups, age groups, carers' groups, religious bodies and belief groups, trades unions, local government, lawyers and legal bodies, police and private sector businesses/interest groups. A full list of the organisations which responded is at Annex A.

Responses from individuals

1.9 Most individual responses focused on one of three specific issues:

- Around 2,500 responses came from individuals expressing views about matters of religion or belief, often from a specifically Christian perspective. Their main focus was on the proposals to provide additional protection against discrimination and harassment for transsexual people; and on harassment on grounds of religion or belief or on grounds of sexual orientation, outside the

workplace. Most of these responses opposed extending such protection.

- Around 500 responses came from individuals who favoured extending protection against age discrimination beyond the employment field to cover the provision of goods, facilities and services, the disposal and management of premises and the exercise of public functions.
- Around 500 responses came from individuals supporting increased rights for women to breastfeed in public places.

Overall responses: assessment

1.10 There was a range of reactions to the package of proposals. The Equality and Human Rights Commission, former equality commissions, organisations representing interests such as age and sexual orientation and trades unions in general considered that, overall, the consultation proposals lacked ambition. On the other hand, private sector firms and their representative organisations generally considered that the proposals struck a sensible balance between the need to modernise discrimination law and the need to avoid disproportionate burdens.

1.11 Nearly all respondents agreed with the objective of streamlining the law, replacing with a new single Equality Act the current nine major pieces of discrimination legislation and around 100 statutory instruments setting out connected rules and regulations, which have given rise to more than 2,500 pages of guidance and statutory codes of practice.

1.12 The following consultation proposals also attracted a broad level of consensus.

- **positive action:** extending the scope of voluntary positive action measures to the limit permitted by European law. Many respondents on this issue agreed that this is an area where clear and authoritative guidance is essential, and confirmed that the lack of such guidance was acting as a deterrent for fear of falling foul of the law. The

Equality and Human Rights Commission will publish clear user-friendly guidance on the new measures.

- **single public sector Equality Duty:** combining the three existing public sector duties on race, gender and disability, as long as there is no loss of existing protection.
- **public sector procurement:** the potential for public sector procurement to drive change in the private sector. The Confederation of British Industry, for instance, commented that “procurement can be an effective lever to improve equality”. Equality stakeholders and various public and local authorities took a similar view.

1.13 Other measures drew a more mixed response:

- the proposal to remodel a new single public sector Equality Duty by focusing on priority objectives, which was strongly criticised by many equality stakeholders;
- the need to extend protection against age discrimination in the provision of goods, facilities and services, the disposal of premises and the exercise of public functions;
- protection against harassment outside the workplace on the basis of sexual orientation and religion/belief;
- additional requirements on the private sector.

Conclusion

1.14 We are pleased that such a large number of organisations and individuals responded to the consultation, and are grateful for the care and attention which all stakeholders took in responding to our proposals. We have reflected very carefully on all the responses received.

1.15 In the light of these responses, we announced on 26 June a package of legislative and non-legislative measures designed to

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strengthen protection as well as streamline the law⁴. We will continue to refine these proposals over the next few months, and engage in wide consultation. As signalled in our consultation on the Draft Legislative Programme for 2008-09⁵, we propose to introduce the Equality Bill in the next parliamentary session.

⁴ Framework for a Fairer Future – The Equality Bill <http://www.equalities.gov.uk/publications/FRAMEWORK%20FAIRER%20FUTURE.pdf>

⁵ Preparing Britain for the Future - <http://www.official-documents.gov.uk/document/cm73/7372/7372.pdf>

Chapter 2: A new Equality Duty on public bodies

2.1 We have decided:

- **to introduce a new streamlined public sector Equality Duty to replace the race, disability and gender equality duties;**
- **to frame the new Equality Duty in a way which makes clearer the outcomes it is designed to achieve;**
- **to retain the existing structure of general and specific duties (leaving open the possibility of application of different duties to different authorities, as now);**
- **not to proceed with other elements of the proposed restructuring of the duties (identification of priority objectives);**
- **to extend the new Equality Duty to age, sexual orientation and religion or belief and to make explicit that it covers gender reassignment.**

2.2 The chapter on public sector equality duties in the consultation contained around a dozen questions on various aspects of the proposed single Equality Duty. It attracted many responses, with strong views expressed in many cases.

2.3 We have decided to establish a cross-government working group to develop the detail of our public sector Equality Duty proposals for secondary legislation. This group will be supported by an expert reference group involving a full range of public bodies and other key stakeholders.

Bringing together the existing three public sector equality duties

Feedback from the consultation

2.4 The consultation paper asked whether consultees agreed that the existing three equality duties (on race, disability and gender) should be brought together into a single duty.

2.5 We received more than 350 responses on this issue. More than 80 per cent supported the proposal to bring the three existing duties together. The Equality and Human Rights Commission and the three former equality Commissions favoured integration, but signalled the need for caution to ensure that existing protection

was not watered down. The Disability Rights Commission made clear that it would be important to ensure that the strengths of the existing duties were retained – a point that was also made by various other respondents, particularly from the disability lobby. The Association of Disabled Professionals was opposed to incorporating the disability equality duty into a single duty, which it considered would allow public authorities to cherry-pick which activities they needed to undertake and could leave disabled people at the bottom of the political agenda.

2.6 Concerns about possible dilution were not confined to disability groups – many other equality stakeholders, argued that unification should only happen provided there was no dilution in the strength of the current provisions. The Greater London Authority also took a similar line .

2.7 Various religious bodies (the Evangelical Alliance, Muslim Council of Britain, the Board of Deputies of British Jews) favoured bringing together the three existing duties, and Trades unions warmly welcomed the proposal for integration to provide a more effective means of dealing with multiple discrimination. UNISON wanted the duties to be extended to the private sector as well.

2.8 The Scottish Executive and the Welsh Assembly Government supported the replacement of the three duties with a single duty, with the latter also requesting that the UK Government allow Welsh Ministers to place specific duties on public authorities in Wales (similar to the power that already exists for Scottish Ministers).

2.9 Probably the strongest support for integrating the existing three duties was expressed by local authorities, largely because a number of them have already adopted single equality schemes as part of the Local Government Equality Standard. The Local Government Association, in its joint response with the Improvement and Development Agency and Local Government Employers, supported the proposal, as did many individual councils.

2.10 Some local authorities, while favouring integration, also expressed concerns about potential weakening of the existing duties and the need to ensure that a single duty did not remove the need to tailor specific actions for specific equality groups. They

also said that the definition of “public authorities” would need to be considered carefully, because the increasing emphasis on delivery through partnership meant that equality and diversity matters needed to be tackled within the context of sharing responsibilities across public agencies.

2.11 Other practitioners welcomed the proposal: a number of NHS bodies pointed out that they were already operating a single equality scheme. The Metropolitan Police Authority saw a single duty as an integral part of harmonisation and simplification that would be more understandable and easier to put into practice. The Police Federation of England and Wales considered that a single duty would simplify the administration and compliance of public bodies with their duties, with significant benefits in communicating with and training staff.

2.12 There were few responses from business on this issue: the CBI considered that a single duty could help authorities respond to the requirements more efficiently, but made clear that lessons should first be learned from the existing duties (some of which were too targeted on processes rather than outcomes) and said there was currently little evidence that the race duty had been effective in improving outcomes. The Recruitment and Employment Confederation saw separate duties as potentially confusing for employers in what was already a complicated procurement process.

Assessment

2.13 We believe it is right to bring together the existing three equality duties. We expect that this will provide significant rationalisation benefits, promote the development of more personalised public services which better meet people’s diverse needs, and place the achievement of equality outcomes at the heart of our public services. It is noticeable that a number of public authorities are already adopting an integrated approach, not just for the existing three duties but also in relation to gender reassignment, age, sexual orientation and religion or belief. Continuing with three separate but slightly different duties, with different requirements and reporting cycles, would result in inefficiencies and fail to encourage public authorities to consider the needs of their communities as a whole, when designing and delivering public services.

2.14 It will be important to ensure that the requirements placed on public bodies through the specific duties underpinning the general duty are light-touch, flexible and proportionate. The detail of the specific duties is being considered further, and we will consult on our proposals later.

A statement of purpose for the Equality Duty

2.15 It will be important to ensure that the new single Equality Duty is framed in a way which makes clear what equality outcomes public authorities should be trying to achieve. The consultation paper proposed that there should be a statement of purpose for the single duty, based on four “dimensions of equality”: addressing disadvantage; promoting respect and fostering good relations; meeting different needs while promoting shared values; promoting equal participation.

Feedback from the consultation

2.16 Overall there was strong support for a statement of purpose, and a variety of suggestions about its content. Nearly 250 responses were received on the issue, with 90 per cent agreeing that there should be a statement of purpose. Of the nearly 200 responses concerning the four dimensions of equality, 75 per cent agreed. Seventy per cent of nearly 150 respondents agreed that the proposed statement of purpose would adequately capture the need for work to build good relations and promote positive attitudes.

2.17 Many respondents linked the idea of a statement of purpose with having a general “purpose clause” for the Equality Bill; and some (including the Greater London Authority, the former Disability Rights Commission, Justice, and the Bar Council) preferred the latter idea. A general purpose clause is discussed in chapter 8. A number of equality stakeholders (such as Help the Aged, the Women’s National Commission and Liberty) said they would be content with a statement of purpose for the duty, as well as a general purpose clause. They saw such provisions as potentially providing useful guidance for interpretation and understanding of the provisions.

2.18 Local government opinion was mixed. Some local authorities supported the idea of a statement, seeing it as a helpful foundation for taking action, and providing welcome guidance for authorities. But others disagreed. For example, Lancashire County Council considered that the current purpose of the existing statutory duties is clear enough, and the London Borough of Waltham Forest thought the proposed statement was weaker than current requirements (amongst other things, it did not specifically mention eliminating discrimination or harassment).

2.19 On the content of the statement, a good number of respondents, including equality stakeholders and local authorities, agreed with the four areas outlined. However, a number feared that, on their own, the four “dimensions of equality” would only serve as a statement of good intentions – and that what was really needed was for public bodies to assess the equality impact of everything they do.

2.20 While agreeing with the need for a statement, some suggested new or different content: for example, EAVES were not satisfied that the proposed statement adequately covered violence as a cause and consequence of systematic inequality and discrimination and the Royal College of Nursing considered that the proposed statement did not go far enough in capturing the need for work to build good relations and promote positive attitudes within and between groups.

2.21 The Scottish Executive supported the provision of a clear statement of purpose to set out the intention of the Equality Duty and provide guidance on the need to deliver meaningful outcomes.

Assessment

2.22 We believe there is a good case for clarifying what the new Equality Duty is intended to achieve. This will help us move from what has in the past been perceived as a rather process-based approach to one which focuses on the achievement of outcomes. We are aware of criticism that the design of the race duty, for example, led some public bodies to focus their efforts on processes such as the production of a Race Equality Scheme, losing sight of the overall objectives to be achieved in practice.

2.23 We recognise the concern of some stakeholders, particularly

groups representing disabled people, that the new Equality Duty should not be weaker than the existing requirements. We agree that the strengths of the existing general duties should be retained and built upon. In order to ensure that the new Equality Duty is proportionate, we propose to retain the requirement that public bodies should have “due regard” to the need to take action to achieve the identified outcomes.

2.24 We plan to retain the three broad “limbs” of the existing duties:

- eliminating unlawful discrimination and harassment;
- advancing equality of opportunity; and
- advancing good relations between different groups.

2.25 But to make the aim of the Equality Duty clearer, we have decided to unpack on the face of the legislation what we mean by “advancing equality of opportunity”. In particular, we believe advancing equality of opportunity involves addressing disadvantage where it exists; encouraging a culture which ensures that individuals’ differences are accepted and do not hold them back; meeting different needs; and encouraging participation and inclusion. We consider that this, together with supporting statutory codes of practice and guidance from the Equality and Human Rights Commission and others, should provide the greater clarity that public bodies need.

Structure and coverage of the duties

2.26 The consultation paper proposed a possible new approach to the structure of the Equality Duty. A package of proposals included the possibility of dropping the existing split between the general duties (in the primary legislation) and the specific duties (set by secondary legislation), so that everything would appear on the face of the primary legislation; making sure that the duty applied in a proportionate way; enabling public bodies to set priority equality objectives, potentially with a role also for national governments in setting strategic objectives; and providing four key principles to underpin performance of the duties - consultation/involvement; use of evidence; transparency; and capability. The consultation paper also asked whether the duties should apply to all public authorities or only to some.

Feedback from the consultation

2.27 Around 60 per cent of nearly 300 responses agreed with prioritising objectives. Ninety per cent of nearly 200 respondents agreed that public authorities should be required to review their objectives at least every three years. Around 75 per cent of nearly 150 respondents agreed it would be helpful for the appropriate national governments to set strategic equality objectives.

2.28 Of all the issues raised in the consultation paper, the restructuring proposals attracted the strongest criticism, particularly from equality stakeholders (though in purely numerical terms, there was a small majority in favour of the proposals). The two key criticisms made most strongly were that the focus on priorities would weaken the existing duties because prioritisation would result in a loss of mainstreaming of equality considerations; and that restructuring would be a regressive measure. In addition, many respondents viewed the reliance on a “principles-based” approach as worrying since it would remove the current prescriptive requirements (such as the need to produce equality schemes), thus making implementation and enforcement difficult.

2.29 The former Disability Rights Commission said that the present duties legally mandate mainstreaming by requiring ‘due regard’ to be given to all public authority decisions and activities, and send the clear message that equality is ‘core business’ for the public sector. It opposed the consultation paper proposals as a break with the mainstreaming principle which, were it removed, would represent an enormous setback. It saw principles as being far harder to enforce than equality schemes and a recipe for confusion and weaker activity. In its view, the existing requirements of the disability equality duty already allowed flexibility and were less prescriptive than the race duty in certain respects. Thus, it was open to a public body with a small number of staff and few service users to adopt a different approach from a large Government Department. The Disability Rights Commission was, however, in favour of national governments setting strategic equality outcomes.

2.30 In many ways this response was reflected in those from other equality stakeholders. The Equality and Human Rights Commission did not believe that the integration of the three

existing duties and their extension to other strands would require the wholesale re-writing of the content and structure of the duties as proposed. In its view, the adoption of “key principles” had the potential to shunt the concept of equality from the core business of public authorities to the margins.

2.31 Similar objections to restructuring, prioritisation and the principles-based approach as well as, in some cases, proportionality were raised by other respondents including: the former equalities Commissions, equality groups, the Citizens’ Advice Bureau, trades unions, a number of NHS bodies and local authorities (including the Local Government Association). The Greater London Authority did not agree with the proposal, which it saw as explicitly to narrow the current requirement for public authorities to consider equality in all their work. It made clear that equality must be “mainstreamed” in that work. It opposed the replacement of specific duties with principles.

2.32 Against these strongly expressed objections, there were relatively few respondents who explicitly favoured prioritisation, proportionality or a principles-based approach, even in addition to rather than instead of mainstreaming. These were generally individual local authorities. The Church of England emphasised the need for the duty to impose explicitly proportionate duties on authorities of different sizes/kinds.

2.33 The Scottish Executive and Welsh Assembly Government favoured retaining the existing structure of general and specific duties. In particular, the Scottish Executive wished to retain the existing power of Scottish Ministers to make orders on specific duties in relation to public authorities in Scotland (and also in relation to public authorities that operate both in Scotland and in England); and the Welsh Assembly Government wished to have similar powers to those already available to Scottish Ministers, in relation to public authorities in Wales.

2.34 Besides the main proposals on restructuring, the consultation paper asked whether strategic equality outcomes should be set by the appropriate national Government; and whether the equality duty should apply to all public authorities. The great majority of respondents on these issues favoured a role for national Governments in setting strategic equality outcomes. The Scottish Executive saw such a role as crucial because it provides clear

leadership for the public sector; and provides clear priorities for consistent and co-ordinated action. Age Concern England thought it would be helpful for Government to have such a role, provided it did not reduce local authorities' discretion to direct resources at areas of inequality at local level, and the Access Association supported the development of some key strategic outcomes, so long as they were set in consultation with key under-represented groups. The Equal Opportunities Commission agreed with a national equality strategy. The Local Government Association, in its joint response with the Improvement and Development Agency and local government employers, made clear that it would find it helpful for Government to set the framework within which local authorities set their own priority equality objectives and pointed to the relevance of tools used by local government to support their work on equalities, e.g. the Equality Standard for Local Government.

2.35 Not all were enthusiastic about strategic equality outcomes. The Equality and Diversity Forum found no clear agreement among its members. Devon NHS Trust considered that Government intervention could result in rapidly changing emphases based more on political requirements than on sectoral need. The Trades Union Congress was also cautious about potential politicisation and the risk that less popular causes might be omitted, such as equality for travellers and the transgender community.

2.36 Most respondents also supported applying the duties to all public authorities. The Scottish Executive saw it as essential for the general duty to apply to all public authorities, since restricting it to only some authorities would send a negative message. However, the Executive considered that the specific duties should apply to listed bodies. The Welsh Assembly Government and Liberty took a similar line, provided public authorities are only required to do what is proportionate in relation to their function and size. The Implementation Review Unit were clear that all schools, whatever their size, should come within the scope of equality legislation. And Lancashire County Council pointed out that some of the "smaller" public authorities had a huge impact on people's lives – schools, for example, which were key socialising influences and where bullying could often have an equality undertone. The BBC (which described itself as a "hybrid" body - a public authority only in relation to some of its functions) noted that the consultation

paper suggested that the Equality Bill might take a different approach to the definition of public authority than that taken in the Human Rights Act; and made clear that the BBC's journalistic, programme and broadcasting activities must not be compromised by the equality duty.

2.37 Some suggested that the duties should apply more widely. The Equal Opportunities Commission recommended that the Equality Duty should apply to all public authorities and others carrying out public functions or providing services on behalf of public authorities, including the private functions of "hybrid" public authorities. The Equality and Diversity Forum, the Law Society and the Bar Council considered that the definition of "public authority" in the Bill should not be the same as for the purposes of the Human Rights Act 1998; and that it should cover all organisations that provide public services, referring to section 75 of the Northern Ireland Act 1998 which covers any organisation regulated by a statutory authority. For the specific duties, the Forum supported a listing approach but with the same duties for all, if it was made clear that the duties were proportionate. The Law Society considered that private bodies carrying out public functions on behalf of a public authority ought in principle to be covered. Liberty saw a case for extending the equality duty to large bodies in the private sector and to private contractors carrying out functions for a public authority. The Trades Union Congress was firmly of the view that the single duty should apply directly to all public authorities and to all private and voluntary sector organisations that are performing public functions (as well as to the private functions of any organisation carrying out a public function).

Assessment

2.38 We have reflected further on the structure of the equality duty, in the light of the concerns expressed by a large proportion of respondents. We conclude that it is preferable to retain the overall structure of the existing duties, that is to say a general duty as described above underpinned by specific duties designed to support performance of the general duty, for the following reasons:

The Equality Bill – Government Response To The Consultation

- to avoid any implication that the existing duties are being weakened, or that equality considerations are being pushed out of the mainstream of public authority activities;
- to avoid a radical change in structure, so soon after the introduction of the disability and gender duties;
- to retain the level of flexibility offered by the two-level structure. Being able to make specific duties through secondary legislation means that the relevant provisions can be specific, detailed and applicable in different circumstances to different authorities as appropriate;
- the specific duties are an important guide to public authorities on how they should meet the requirements of the general duty;
- the specific duties can ensure that the Equality Duty delivers transparency and accountability on equality issues and can help enforcement of the Duty; and
- to provide time for further consideration of the detail in what is recognised as a highly complex area. The specific duties under the new Equality Duty will be subject to further consideration and consultation.

2.39 The specific duties need to be able to be used flexibly and effectively by all the different kinds of public bodies, in proportion to their size, their resources and the challenges they face. We are establishing a cross-government working group to develop the detail of our public sector Equality Duty proposals for secondary legislation for English and cross-border public bodies. This group will be supported by an expert reference group involving a full range of public bodies and other key stakeholders. The Scottish Executive will decide on the specific duties for Scottish authorities operating only in Scotland, and for the purely Scottish functions of cross-border authorities, as they do at present for the existing duties. We intend to include in the Equality Bill a similar power to allow Welsh Ministers to decide specific duties for Welsh authorities operating only in Wales, and for the purely Welsh functions of cross-border authorities.

2.40 We note the general support for the setting of strategic priorities by national Governments. We have already started this process through developing the first Equality Public Service Agreement (PSA) target and we will keep the operation of and outcomes achieved by this new PSA under review. We expect that public bodies will take account of this and similar national targets, as well as local circumstances, when planning how they will respond to the new Equality Duty.

2.41 Finally, we note the majority of views in favour of universal coverage of the new Equality Duty. We intend to apply the general duty to all public authorities; and to list the bodies subject to the specific duties.

Extension of the duties

2.42 The consultation paper asked for views on extending the single Equality Duty to also cover one or more of: age, sexual orientation, or religion/belief. It made clear our intention not to extend any age duty to include services specifically provided for children.

Feedback from the consultation

2.43 Nearly 350 responses were received on the issue of extending the Equality Duty, of which 90 per cent agreed with extension.

2.44 There was a strong overall response in favour of extending the Equality Duty to the three new equality strands, and also to gender reassignment. However, there were also strong objections, particularly from Christian religious organisations, to extending the duty to cover sexual orientation or gender reassignment; as well as to its extension to include religion or belief – though some of these respondents made clear that they would nevertheless argue for extension to include religion or belief, if the decision was made to extend the duty to include sexual orientation. More individuals (around 2,000) responded on this than on almost any other issue. There were a substantial number of responses from individuals (around 500) who supported extension of the duty to include age.

2.45 Many equality stakeholders wholeheartedly supported extension of the duty to all the equality strands. The Equality and

Human Rights Commission fully endorsed extension to all the protected grounds. The Disability Rights Commission considered the existing model could be applied with equal benefit to the new areas of equality. The Age Employment Network favoured an extension to all equality strands – otherwise, equalities legislation would continue to be piecemeal and complex. The Policy Research Centre on Ageing and Ethnicity agreed it was time to include age, sexual orientation and religion/belief in a single duty, which could address concerns about treatment of older people in health and social care; and ensure that specialised and appropriate sexual health services would be built into planning of public authority services. The Association of Women Barristers emphasised that the single duty must cover all strands, otherwise public bodies would continue to be faced with a complex two-tier system in which equality on some grounds was given priority over others. The Fawcett Society and Equal Opportunities Commission supported extension to all three new strands, as did the Women's National Commission and Stonewall. A number of NHS bodies supported extension to all three new strands, including Lewisham PCT and Velindre NHS Trust, who saw benefits in improved access for older people to health promotion initiatives, improved medical treatment for gay men, lesbians and bisexual people, and in countering Islamophobia. The Greater London Authority emphasised that the duty should cover all the strands because public services should be delivered on the basis of equality for all – it would be illogical to offer protection to some groups and not others.

2.46 There was strong support for extension to all three new strands from trades unions (the Trades Union Congress, UNISON, ASLEF, USDAW) and some higher education institutions (the University of Edinburgh and legal experts from Clare College Cambridge, who pointed out that privacy issues relating to the monitoring and accuracy of information about sexuality or religion or belief would need to be dealt with sensitively, relying on guidance produced by the Equality and Human Rights Commission). In the education sector, the Learning and Skills Network, Implementation Review Unit (IRU), and the Higher Education and Funding Council for England were clear that the duty should be extended to cover all three new strands, though the IRU suggested phasing in the duties over a period of years; and the Higher Education Funding Council for England identified potential challenges in acquiring the evidence base for prioritising

and assessing the impact of policy. The National Association of Schoolmasters/Union of Women Teachers and the National Union of Teachers supported extension.

2.47 The Police Superintendents' Association of England and Wales, the Police Federation of England and Wales and the Metropolitan Police Authority all supported extending the duty. The Association of Police Authorities considered such a development to be a sensible progression and suggested further work on extension to other areas such as transgender. It saw Muslim groups as likely to be disadvantaged by the lack of a duty in relation to religion/belief; drew attention to research in Wales on inappropriate housing provision for young gay men and lesbians; and saw links between coverage of age and disability.

2.48 Age Concern England and Help the Aged supported extension to age, sexual orientation and religion or belief on the grounds that an integrated duty would be simpler for public authorities to implement and enable multiple discrimination to be addressed more easily, and that it would help local authorities plan properly for demographic change.

2.49 There were a number of objections to the Government's stated intention not to include children's services in any extension of the age duty. The Children's Commissioner for England thought this approach discriminatory and inequitable in itself and was totally opposed to the exclusion of children from such protection. The Children's Rights Alliance for England felt the extension to cover age should particularly apply to children, on the basis that society was becoming less tolerant of children who were suffering various forms of discrimination in, for example, accessing leisure services, mental health and child protection services. Save the Children very much welcomed extending the duty to cover age, so long as it covered children and young people, because they had no real political or social power, were economically dependent on adults, subject to rules that did not apply to other social groups and were vulnerable to ill-treatment by others more powerful than them.

2.50 Other stakeholders wanted wider explicit extension: Justice considered that the duties should also explicitly cover, transgender, pregnancy and maternity, as well as the three new strands. Carers UK argued that a single duty could be neither inclusive nor effective without addressing the discrimination,

harassment and inequalities faced by the significant and growing proportion of the population who are carers. The Vale of Glamorgan Council said there was a need to consider how Welsh Language legislation would fit in with the duty, a point also made by the Welsh Language Board and Rhwydiaith – the Welsh Language Officers Network. Press for Change, the Scottish Transgender Alliance, a:gender as well as other respondents (such as UNISON) wanted the duty explicitly to cover gender reassignment.

2.51 The Scottish Executive was, in general, very supportive of a single public sector equality duty and considered it would be beneficial to introduce legislation that is harmonised and streamlined across equality categories including sexual orientation, age and religion/belief. The Welsh Assembly Government also favoured such an extension and indicated that it was working towards production of a single equality scheme for its own policy development.

2.52 The legal profession was broadly in favour of extension to the three new strands. The Bar Council considered that the advantages of bringing in the new groups far outweighed the disadvantages and noted that there was already, in many areas of the country, a perception that certain religious groups were either overtly favoured or discriminated against – if authorities had data as to the impact of their policies on these groups it would help dispel much existing misinformation and enable proportionate action to be taken to address their needs. The Discrimination Law Association and the Employment Lawyers Association also supported extension to the new strands, though the latter argued for delayed introduction until the three-year review point of the gender duty had been reached. The Law Society also agreed but struck a note of caution (also picked up by some other respondents) in relation to religion or belief, pointing out that it considered it less than ideal that groups defined by religion or its absence should be allowed a role in policy making.

2.53 Local government respondents were generally strongly in favour of extension to all three new strands. However, the Local Government Association in its joint response with the Improvement and Development Agency and Local Government Employers, was concerned that any extension to include an age duty should be properly costed, introduced in a phased way, funded and cross-

referenced to any relevant changes in regulation or guidance on the provision of social care services.

2.54 However, there were a number of notes of caution (in addition to the one or two mentioned above) about extension to sexual orientation and/or religion or belief. A number of respondents (including Strathclyde Fire and Rescue Service), although generally supportive, considered that sexuality and religion or belief were essentially private matters. The Confederation of British Industry considered that lessons should be learned from the existing duties before a single duty was introduced. The City of York Council said that extension to religion or belief should not take positive arrangements away from others e.g. Christmas, bank holidays based on the Christian calendar, etc. Nottinghamshire Police envisaged huge difficulties in data collection about religion and sexual orientation.

2.55 As indicated above, there was a generally negative response from Christian organisations, belief groups and a large number of individuals to any extension of the duty to cover sexual orientation or religion or belief. The Church of England did not believe that the duty should extend to those two strands (or to age), considering that it could result in an unbalancing of the status quo in relation to sexual orientation and religious conscience. The Church was also concerned about promoting respect for the equal worth of different groups in the context of faith schools, and that such an approach could more generally undermine the Church's established position. The Catholic Bishops Conference of England and Wales was concerned that such a measure could require a public authority to promote civil partnerships as equal to marriage; and wanted to have reassurance that faith schools could continue to teach in line with the tenets of their faith. The Catholic Parliamentary Office and the Christian Institute considered that extension of the duty to sexual orientation would establish a framework which could lead to the promotion of homosexuality.

2.56 The Evangelical Alliance considered it would be best to avoid potential tensions by not requiring public authorities to actively promote equality across all six strands, but that if the duty were to be extended, it should be extended to all. King's Church International opposed what they saw as the promotion of "minority" religions at the expense of Christianity. The Lawyers Christian

Fellowship said that empirical evidence was clear that not all sexual orientations or behaviour were of equal value; and believed it wrong in principle to promote the equality of different religions or beliefs which in its view were not of equal value and benefit to society. The British Humanist Association considered that extending the duty to religion or belief would be problematic.

2.57 Few religious organisations supported extension to religion or belief, except the Muslim Council of Britain and, to an extent, the Board of Deputies of British Jews. Faithworks considered that local authorities have a responsibility to ensure greater understanding of religion and belief in order to increase community cohesion and prevent potential tensions.

Assessment

2.58 We note the strong overall response in favour of extending the Equality Duty to fully cover gender reassignment and to cover the three new strands: age, sexual orientation and religion or belief. We believe the Equality Duty is a key means of tackling systemic discrimination and, led by the public sector, achieving cultural and social change towards greater tolerance and cohesion. This is not a matter of special treatment for minority groups, but of considering the needs of everyone - men and women; people of all ethnic groups; people of any age or sexual orientation and any religion or belief, or none.

2.59 We have therefore decided that, as well as race, disability and gender, the new Equality Duty will cover age, sexual orientation and religion or belief, and also to clarify that the duty will fully cover gender reassignment. We note that a number of public authorities are already adopting an integrated approach which looks at how public functions, policies and services affect all the equality groups including age, sexual orientation and religion or belief.

2.60 A significant number of those opposed to the extension of the public sector duty believed that this would result in schools being required to “promote” homosexuality; or local authorities being required to treat all religions or beliefs equally. This is not true. The point of the Equality Duty is to ensure that public authorities take account of the different needs of all their constituents or customers, whatever their sexual orientation, age,

religion or belief, race, disability or gender. It is intended to ensure that certain groups are not overlooked or disadvantaged. For example, it could encourage schools to adopt explicit anti-homophobic bullying strategies. Or it could mean a local authority making available a halal or kosher option as part of its meals on wheels service to ensure that older Muslim or Jewish residents are able to benefit from the service. But it would not mean that the authority would have to provide a traditional festive meal to cater for every religious festival; it could just provide a traditional Christmas dinner on 25 December. However, to fully understand the possible risk of unintended consequences we will have further discussions with stakeholders, and with religious groups in particular, as to whether the ‘advancing equality of opportunity’ part of the duty should be extended to the religion or belief strand and if so how best to apply it.

2.61 In relation to age, experience in Northern Ireland shows that such a positive duty can deliver positive results: for example, a more proactive approach to consulting and involving older people in policy and service development and improved awareness of stereotyping and older people’s diverse needs.

2.62 However, despite the arguments put forward in favour of including children’s services in the age duty, we do not consider that this would be appropriate. Of course, we do not condone the abuse, bullying or maltreatment of children. However, the use of discrimination law, and particularly an age equality duty, does not seem an appropriate mechanism to combat poor treatment of children in children’s services; and could become impractical and even counter-productive. As indicated in the consultation paper, it is almost always appropriate to treat children of different ages differently and to provide particular functions and services especially for children. An age duty which in effect required public authorities to distinguish between the needs of and services delivered to nine-year-olds as distinct from ten-year-olds would be unworkable.

Implementation and enforcement of the duties

2.63 The consultation paper asked for views on the role of the Equality and Human Rights Commission as the primary agency for enforcement of the Equality Duty. Some respondents were concerned that the consultation paper appeared to rule out the

possibility of a private individual or organisation bringing a case for judicial review in the event of a public body failing to implement the general duty. There was no such intention – the option of judicial review proceedings will remain open to anyone who wishes to challenge a public body’s implementation of the general duty. The consultation paper also asked for views on the role of the public service inspectorates (such as the Audit Commission, Healthcare Commission, Office for Standards in Education) in assessing compliance with the public sector duty; and on timing of when the new Equality Duty should come into force.

Feedback from the consultation

2. 64 The majority of the nearly 200 responses on the role of public sector inspectorates agreed they should be involved with assessing compliance with the public sector duties.

2.65 The Equality and Human Rights Commission agreed that it should retain its statutory enforcement role. On enforcement by inspectorates, it commented that the existing equality duties had been underpinned by the expectation that the key players in enforcing the duties would be the various public service inspectorates which, for the organisations they audit or inspect, carry far greater clout than the former equality Commissions. The Commission understood that some inspectorates had embraced their equality obligations under the Race Relations Act while others had not, or only in limited ways. The Commission considered that it ought not to be necessary to introduce further legislation to ensure that inspectorates check for compliance with statutory equality duties in the same way as for other statutory duties. However, it accepted that some mandatory requirement on inspectorates may in fact now be necessary.

2.66 Among the inspectorates which responded, there were divergent views on whether and how they should have a role in enforcing the public sector duty. The Office for Standards in Education (OFSTED) made clear their firm belief that quality and equality are inseparable and pointed out that consideration of issues relating to equality was an integral part of their inspection. However, they did not agree with “compliance checking” as such. They preferred the existing approach in the education sector, of self-evaluation by schools backed by dissemination of best practice and occasional “health checks” by inspectors with a view

to promoting improvement through evaluating the impact of service provision on outcomes. A similar line was taken by Her Majesty's Inspectorates of Probation, of Constabulary, and of Constabulary for Scotland Her Majesty's Inspectorate of Probation and the Commission for Social Care Inspection both welcomed the opportunity to work closely with the Equality and Human Rights Commission. Her Majesty's Crown Prosecution Service Inspectorate made clear that it had always seen it as part of its general duty to ensure equality issues are properly integrated within its inspection framework, and that it expected to specifically focus on equality issues from time to time, in the form of thematic reviews; however, it considered it inappropriate to rely on inspectorates for wide-ranging and comprehensive monitoring of compliance and enforcement.

2.67 The most favourable responses from inspectorates were from the Audit Commission, which welcomed close working relationships between the inspectorates and the Equality and Human Rights Commission and pointed out its own earlier successful arrangement with the Commission for Racial Equality; and the Mental Health Act Commission which considered that inspectorates should have a statutory role in checking compliance. By contrast, Her Majesty's Inspectorate of Court Administration considered that public service inspectorates should not have any formal role in assessing compliance with the duties; it pointed out that it had no power to report to and/or influence bodies other than the relevant Minister and the body under inspection and was not convinced that memoranda of understanding would be particularly helpful. It said that if inspectorates were to take on this role then they would need to be provided with the skills and resources to discharge the duty.

2.68 The majority of others who commented on the role of public service inspectorates agreed that they should indeed have a role in enforcing the public sector duty alongside the Equality and Human Rights Commission. Some (including the Greater London Authority, the Disability Rights Commission, the Equal Opportunities Commission, the Women's National Commission and the Bar Council) thought this should be an explicit legal duty to ensure consistency.

2.69 Others argued for close links between the public service inspectorates and the Equality and Human Rights Commission.

The Scottish Executive made clear its belief that audit and inspection bodies have a crucial role to play in pushing forward the equality agenda across the public sector. The Welsh Assembly Government agreed that the consultation document set realistic expectations of how inspectorates could contribute to equality outcomes, consistent with their primary functions and a risk-based approach.. The Police Federation of England and Wales saw merit in enabling Her Majesty’s Inspectorate of Constabulary to assess compliance but pointed out that its ability to do so would be enhanced by guidance from the Equality and Human Rights Commission (a point also made by a number of inspectorates themselves). A number of county councils favoured the inspectorates monitoring relevant aspects of equality.. The National Union of Teachers suggested that inspectorates and the Equality and Human Rights Commission should have a joint role whereby the inspectorate would notify the Commission whenever it found evidence of non-compliance (as had previously been the arrangement between the Healthcare Commission and the Commission for Racial Equality).. UNISON considered that inspectorates should take a pivotal role and that bodies such as the Higher Education Funding Council for England and the Learning and Skills Council should not fund providers which were failing to meet the duties. The Higher Education Funding Council for England pointed out that there was no existing statutory body which inspects the higher education sector, with the Quality Assurance Agency’s role being to monitor academic standards, not legal compliance, due to the nature of higher education.

2.70 On timing of implementation of a new Equality Duty, suggestions ranged from an upper limit of “indefinite” (Equality 2025 considered that the disability equality duty should continue until such time as it was no longer needed) or eight to ten years (Council for Disabled Children) to “immediately”, subject to consultation on the specific duties (Association of Women Barristers, Liberty). The majority view was around three years from introduction of the gender duty (which came into force in April 2007), to link with the natural milestone of the duty’s three-year review.

Assessment

2.71 We are impressed with the evidence which emerged from the consultation response of a number of inspectorates having

established good working links with the former equality Commissions; and already covering equality issues in their work with the bodies which they inspect. We note that the inspectorates are themselves, as public bodies, already subject to the existing duties and they will of course be subject to the new Equality Duty. As part of the work we are taking forward on developing proposals for the specific duties, we will consider whether inspectorates have a role to play in monitoring or assessing the performance of public authorities in complying with the duties.

2.72 On timing of implementation, we consider that it would make sense not to implement the new single duty before the reviews of the gender and disability duties have been completed after their first three years. It will also be necessary to carry out a consultation on the specific duties, and that process, combined with drafting the relevant regulations, can be expected to take perhaps twelve months in itself. This all suggests implementation around 2010/2011 at the earliest.

Chapter 3: Age discrimination outside the workplace

3.1 We have decided that:

- **the Equality Bill will enable us to make it unlawful to discriminate against adults aged 18 and over because of their age when providing goods, facilities and services and carrying out public functions in the future;**
- **the specifics of the new law will be set out in secondary legislation made under the Equality Bill;**
- **the legislation will not prevent the differential provision of products or services for people of different ages where this is justified.**

Preparing for the new law

Implementation challenges

3.2 We recognise that tackling harmful age discrimination is likely to be a long-term challenge and we will give service providers time to address the practical and organisational issues that are likely to arise. Work is under way to improve our understanding of the impact on different sectors, and we will make provision to be able to bring the new law into force more quickly in those sectors which will be ready to comply with the law earlier than others. The Equality and Human Rights Commission will help those service providers affected to prepare for the introduction of the new law.

3.3 Recent research⁶ suggests that implementation challenges will be greatest in the health and social care sectors, so we anticipate that this sector will require the longest transition period.

Non legislative initiatives to promote age equality

3.4 The Department of Health is taking a number of steps to tackle age discrimination. These include the work the Care Services Improvement Partnership is doing on older people's mental health services, and the development of a vision for services to succeed

⁶ The Department of Health commissioned two literature reviews and two research studies on the costs and benefits of eliminating age discrimination in the provision of health and social care. Links to each of these can be found on the Department of Health website at: www.dh.gov.uk/en/publicationsandstatistics/DH_085763

the National Service Framework for Mental Health, which covered adults of working age only but expires in 2009. All new policy initiatives are now subject to age equality impact assessments. This process has led, for example, to pilot programmes examining how we can make sure that older people benefit from improved access to psychological therapies. The Individual Budgets pilots have sought to ensure that the budgets offered to individuals to fund social care are not differentiated by age.

3.5 A cross-Government project to consider the key long-term questions about how we should adapt to an ageing society is also under way, to inform the development of a new Age Strategy to be published early next year. Led by the Department for Work and Pensions with input from the Prime Minister's Strategy Unit, the Department of Health and the Department for Communities and Local Government, the project will consider the various ways Government will need to adapt how it serves people as they age, as well as the role for other players including employers, voluntary groups, service providers, retailers and individuals.

The path to legislation

3.6 We want to continue to make progress on work to develop the new law and make it effective:

- a financial services working group, including age equality organisations will assess the likely impact on customers and service providers of a number of legislative options. The group will submit a final report by the end of September.
- we will also establish a working group to inform the development of the legislation to prohibit age discrimination in all sectors others than financial services and health and social care. A key consideration will be how we can ensure that justifiable age-based practices (for example, concessionary travel for older and younger people) can continue.
- subject to the progress of the two working groups, further work to inform an impact assessment, and in light of European developments on the draft goods and services discrimination Directive, we will seek to consult in 2009 on more detailed

proposals for bringing the new law into force in those sectors covered by the two working groups.

- we will make a separate statement after the Parliamentary recess setting out a defined programme of work to tackle age discrimination in the health and social care sectors and to help service providers prepare for legislation.

Feedback from the consultation

3.7 The consultation document did not make a specific proposal to ban age discrimination in the provision of goods, facilities and services and the exercise of public functions. Rather, we asked for evidence of unfair age discrimination, sought views on whether legislation would be the best way of tackling such discrimination and on how legislation could be targeted, and invited general comments. We indicated that we would exclude children under 18 from any proposed legislation.

3.8 The majority (around 80 per cent) of the nearly 750 responses on this issue were in favour of legislation to tackle harmful age discrimination in these fields. The responses included around 500 individual responses forwarded by Help the Aged, the vast majority of which supported legislation.

3.9 There was strong support for legislation from age and equality organisations. However, there were significant concerns from business and some public sector service providers over the possible impact legislation might have on beneficial and justifiable age-based differences, and the potential burdens of complying with legislation.

3.10 Many of those who favoured legislation considered it was needed to plug a major gap in the existing matrix of anti-discrimination legislation, a view strongly supported by the Equality and Human Rights Commission. Help the Aged and the Equality and Diversity Forum suggested that legislation was necessary to send a clear signal that all discrimination is unacceptable, and argued that the Equality and Human Rights Commission's work would be hampered if the Equality Bill maintained the existing 'hierarchy of rights'.

3.11 The Equality Challenge Unit pointed out that voluntary initiatives had failed to tackle age discrimination in employment. However, it also warned that the Employment Equality (Age) Regulations 2006 had created uncertainty among service providers as to whether certain age-based concessions (notably reductions in fees for older people undertaking further education courses) were still lawful. The Bar Council also argued that legislation was needed since voluntary measures had failed, adding that the costs of introducing and maintaining such a law would be low and that unintended consequences and disproportionate burdens would be avoided through the provision of clear guidance and appropriate exceptions.

3.12 A number of private sector organisations, including ASDA, B&Q and the British Retail Consortium, saw legislation as potentially problematic and complicated, with a risk of unintended consequences if the correct exceptions were not made to ensure that discounts could still be offered to pensioners, or products and services marketed to particular age groups. Freshfields Bruckhaus Deringer anticipated that legislation could cause problems for the provision of pension products and services, while the Employers Forum on Age, the Confederation of British Industry and the British Bankers Association thought the large number of exceptions required would make the law unworkable.

3.13 The examples of age discrimination received largely reflected the areas of concern which the consultation paper had outlined, with health and social care and financial services the most frequently mentioned. Age equality groups also cited a recent survey which found that almost 30 per cent of adults surveyed report experiencing age discrimination - more than any other form of prejudice. The Trades Union Congress quoted a Social Exclusion Unit finding that 29 per cent of people over 80 are excluded from important basic services.

3.14 Those respondents raising concerns about age discrimination in the provision of health and social care services included Age Concern, Help the Aged, Justice, the Mental Health Act Commission, a number of local authorities and primary health care trusts, and medical bodies including the Royal College of Psychiatry, the British Psychological Society, the Royal College of Nursing and others. Concerns raised included women over 70 not receiving routine invites for breast cancer screening, that none of

the additional £1 billion invested in services after the publication of the National Service Framework for Mental Health was directed to services for older people, a lack of dignity and respect shown to older people and a lack of staff training to help implement the NHS National Service Framework for Older People. Numerous respondents pointed out the difference in mental health services available to over-65s and many argued that only legislation would ensure adherence to existing guidance that treatment should be provided on the basis of clinical need, not age.

3.15 Age Concern argued that any additional costs incurred in improving the service to older people in mental health and social care, for example, would be offset by the potential benefits of earlier preventative work. The British Medical Association recognised that older people often experience inequities in health and social care provision, but thought further targeted non-legislative measures should be deployed to tackle the problem with the possibility of legislation kept under constant review.

3.16 Justice objected to age limits imposed on certain state benefits and funds – a concern raised by other respondents.

3.17 A number of respondents, including equality organisations and a large number of individual respondents, raised concerns about age discrimination in the private sector. Most commonly, the examples given related to insurance and other financial services. For example, Age Concern cited surveys suggesting that those aged 75 and over are nearly ten times more likely to be refused a quote for motor or travel insurance than people aged 30 to 49, and noted that premiums can rise sharply with age. Age Concern argued that both of these factors can lead to older people being unable to access ‘bundled’ products such as bank accounts which offer free travel insurance. It was also noted that age limits on motor insurance can lead to older people being unable to hire cars.

3.18 The London Older People’s Strategy Group echoed these concerns, and also pointed out that some older people have to give up volunteering activities due to problems in getting insured and that older people may be turned down for mortgages or other financial products solely on the basis of age.

3.19 The Association of British Insurers and a number of insurance companies opposed legislation. Many of these

respondents either disputed that there was any evidence of harmful age discrimination in the insurance sector or argued that legislation would not be the best way to tackle concerns about older people's access to insurance. It was felt that legislation would not meet the Government's aim of a proportionate response to a real problem and that there was a significant risk of legislation having unintended consequences.

3.20 The Association of British Insurers and other insurance respondents pointed out that the use of age in the assessment of risk allows insurers to make accurate decisions about pricing and cover which ensure fairness, competition and choice for customers of all ages. It was suggested that if age legislation were considered necessary in this area, there would need to be a watertight exemption for insurers, to ensure that insurers could continue to use age in the assessment of risk.

3.21 A number of local authorities identified issues which they felt amounted to age discrimination against older people, including differential access to medical treatment and a general lack of respect shown to older people in the delivery of services, whether in individuals' homes, care homes, day centres or the wider community. However, the Local Government Association, the Association of Directors of Adult Social Services and a number of local authorities also warned that achieving equal provision of social care for people all ages would lead to either a reduction in services provided to younger adults or a cost of billions added to the social care bill.

3.22 The Scottish Executive and Welsh Assembly were concerned that the age discrimination legislation might have significant resource consequences for local authorities and health bodies in Scotland and Wales.

However, both the devolved Governments were supportive of the principle of extending anti-discrimination legislation across all strands. The Scottish Executive felt there could be significant complications and difficulties in terms of legislating effectively for age discrimination in goods and services, and felt that there may be other means of effectively tackling age discrimination. The Scottish Executive emphasised that if legislation were not brought forward, then concrete alternative non-legislative measures to tackle age discrimination should be identified.

3.23 The Age and Employment Network argued that age limits for group holidays were discriminatory, whilst Saga holidays opposed legislation on the grounds that private sector service providers, including holiday operators, should be able to target their products or services at particular niche markets defined by age.

3.24 The National Caravan Council and the British Holiday and Home Parks Association both questioned how legislation would affect the qualifying ages used in residential home parks, which they considered a justifiable means of enabling older people to enjoy their preferred lifestyle amongst others of a similar age. An individual respondent cited the same age restrictions, along with age limits imposed by holiday letting agencies covering hotels, guest houses, self catering accommodation and even campsites.

3.25 A number of respondents argued against the consultation paper's proposal to exclude children from protection against age discrimination. These included children's rights organisations such as the Children's Commissioner for England and the Children's Rights Alliance for England, a number of legal and consumer bodies, and the Equality and Human Rights Commission. It was stated that 43 per cent of under 18 year olds considered that they had been treated unfairly because of their age. The specific examples of unfair treatment cited by these respondents included signs on shop doors saying 'no school children' or 'only two children at a time', difficulties experienced by teenagers in accessing mental health and child protection services, discriminatory treatment in leisure services such as cinemas and swimming pools, a lack of appropriate provision in public settings (family toilets, family changing rooms in swimming pools etc), a lack of appropriate and safe seating in public transport for babies and younger children, the use of mosquito electronic devices, ASBOs, stop and search, curfews, dispersal zones and restrictions on use of public space. A number of local authorities also cited concerns about restricted access to services for young people with learning disabilities as they leave children's services and move into adult services.

Assessment

3.26 We were presented with a significant amount of evidence that older people are being treated in a discriminatory way by those providing goods and services, including health and social

care. There were also strong concerns about restricted access to some financial services, such as insurance.

3.27 It is wrong that people are treated in a discriminatory way because of their age. With the number of people aged over 85 set to double over the next two decades, we need to ensure that older people are treated fairly, lead fulfilling lives and are able to play a full part in society.

3.28 Many respondents also voiced concerns about the potential impact of legislation.

3.29 We agree that it will be vital to ensure that legislation does not prevent service providers from offering age-specific goods and services where this can be justified and recognise that tackling harmful age discrimination is likely to be a long-term challenge.

3.30 We have therefore decided that the Equality Bill will include powers to outlaw unjustifiable age discrimination by those providing goods, facilities and services and carrying out public functions in the future. There will be a transition period before these powers are brought into force. The specifics of the new law will be set out in secondary legislation made under these powers. This will give service providers time to address the practical and organisational issues that are likely to arise, and enable us to consult interested parties on how to make the new law effective, including how we can ensure that we only outlaw unjustified discrimination without unintentionally stopping things that are beneficial to particular age groups.

3.31 When the secondary legislation comes into force, it will ban unjustifiable age discrimination against those aged 18 years and over. For example, a doctor failing to investigate a health complaint raised by an older person or not providing treatment simply because of their age; or retailers assuming that older people are incapable of signing a contract – for example for a mobile phone or loan – without a younger person present to explain the details.

3.32 The legislation will not prevent the differential provision of products or services for people of different ages where this is justified – for example, free bus passes for the over-60s and discounted rail travel for young people, priority flu vaccinations for

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over-60s, holidays for particular age groups, or different treatment on grounds of age in the provision of financial services, where this is based on actuarial evidence.

3.33 We have considered the arguments which were put forward for prohibiting age discrimination against children as well as adults. However, we continue to believe that age discrimination legislation is not an appropriate way to ensure that children's needs are met.

Chapter 4: Transparency

4.1 We have decided that we want:

- **the new expanded single public sector Equality Duty to make our public bodies more transparent without putting an undue administrative burden on them;**
- **public bodies to report on important equality areas;**
- **to develop ways to help public bodies comply with the new equality duty when they are purchasing goods and services. We are exploring how public procurement can be used to further equality outcomes, and will examine a range of both legislative and non-legislative options. We will also be looking at how we can encourage greater transparency on equality issues among private sector contractors, to contribute to the delivery of our equality targets;**
- **to outlaw pay secrecy clauses, which make it unlawful to stop employees discussing their pay;**
- **to develop non-legislative mechanisms for improving transparency amongst employers through a series of inquiries by the Equality and Human Rights Commission and development of a kite-mark scheme for employers who are transparent about reporting their progress on equality;**
- **but we do not want to make equal pay job evaluation audits mandatory or to allow a moratorium on claims.**

Transparency in the public sector

Feedback from the consultation

4.2 We have set out information about the consultation feedback on the new public sector Equality Duty in chapter 2.

Assessment

4.3 The new expanded single public sector Equality Duty (see chapter 2) will make our public bodies more transparent without putting an undue administrative burden on them.

4.4 The Government has national targets to reduce the gender pay gap and the ethnic minority and disability employment gaps. But to tackle inequality, we must be able to see it.

4.5 We know that across the country as a whole, there is a full-time pay gap between men and women of 12.6 per cent; if you are from an ethnic minority you are a fifth less likely to find work than if you are white; and if you are disabled you are two and a half times more likely to be out of work. But we do not know what the picture is by workplace. Transparency will highlight areas where we need to make progress

4.6 Public authorities are under legal equality duties on race, disability and gender but there is no clear mechanism for identifying progress on these duties. That means the public cannot hold public authorities to account for their performance on addressing discrimination and promoting equality. We want to make progress in areas such as closing the gender pay gap, so we need more transparency on how the public sector is performing.

4.7 We want public bodies to report on important equality areas. We are doing further work before putting forward proposals for exactly what information public bodies should be required to publish, and we will consult on this later. These could include, for example

- gender pay;
- ethnic minority employment; and
- disability employment.

This transparency will enable us to see progress year by year within a public authority and to:

- see which authorities are making progress and learn lessons from them;
- identify which authorities are falling behind; and

- allow comparisons between similar authorities.

4.8 We shall also be consulting on which public bodies should be listed in the legislation as subject to these requirements. The Equality and Human Rights Commission will produce statutory codes of practice and non-statutory guidance on the application of the Equality Duty to help public bodies implement the new duty effectively in all their functions.

Transparency through public sector procurement

Feedback from the consultation

4.9 We received more than two hundred responses on this issue from a wide range of respondents including local authorities, equality stakeholders, trade unions, business representatives, public service providers and business stakeholders.

4.10 Many respondents argued that more needed to be done than simply improving the guidance on procurement: these included the Equality and Human Rights Commission, who suggested that the new Bill should require public authorities to incorporate equality considerations into all aspects of their procurement processes. The Greater London Authority called for a new statutory obligation placing anti-discrimination measures at the heart of public sector procurement. Others favouring going beyond the provision of guidance alone included the Bar Council, the Discrimination Law Association, Justice, and a number of Trades Unions, equality and diversity bodies.

4.11 The Confederation of British Industry, in accepting proposals to extend positive action measures so long as they remained voluntary, agreed that public sector procurement could be an effective lever to improve equality and support an outcome-focussed public sector duty. They went on to suggest that the Government must commit to developing procurement practice which promotes environmental and social objectives by making clear the requirements placed on contractors. They made a number of recommendations for improving procurement practices, including making human resources professionals part of procurement teams for a better understanding of equality requirements.

4.12 Other respondents were concerned about possible fairness issues. The EEF argued, for example, that there should not be mandatory disqualification from public sector contracts for employers with an employment tribunal finding of discrimination against them, because this would encourage employers to “pay off” claimants and would unfairly exclude employers who had changed their practices as a result of a particular case at Tribunal. The EEF were also concerned that introduction of onerous requirements could deter small and medium-sized enterprises which, though well disposed to equality issues, lack the resources to meet the requirements.

Assessment

4.13 We are looking at how to help public bodies comply with the new equality duty when they are purchasing goods and services. We are exploring how public procurement can be used to further equality outcomes, and will examine a range of both legislative and non-legislative options. We will also look at how we can encourage greater transparency on equality issues among private sector contractors, to contribute to the delivery of our equality targets.

4.14 The Equality Duty will help us deliver our equality targets by improving transparency in the public sector, but 80 per cent of people are employed in the private sector and the gender pay gap is double what it is in the public sector. We can drive progress in the private sector in a number of ways, including using the spending power of the public sector to deliver greater transparency in the private sector and working with business to improve practice on equality issues. Below, we set out the measures we will take to encourage greater transparency in the private sector.

4.15 The public sector spends £160 billion every year on purchasing goods and services from the private sector. Thirty per cent of British companies are contracted by the public sector. The Government recently set out how social outcomes can be delivered through public sector purchasing⁷.

⁷ Buy and Make a Difference – How to address Social Issues in Public Procurement (Office of Government Commerce) (http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf)

4.16 Under the existing public sector equality duties, public bodies are already required, in carrying out procurement, to have due regard to the need to eliminate unlawful discrimination and to promote race, disability and gender equality. Some public bodies are already choosing, for example, to ask potential contractors what percentage of their staff are from ethnic minority communities.

4.17 The consultation feedback on this issue was noticeable for the relatively large number of positive responses from public authorities.

4.18 The stages at which authorities might consider taking account of social factors, such as equality, are as indicated in the recent Office of Government Commerce publication, “Buy and make a difference”, which sets out an approach to reflecting wider social issues through procurement - at the specification stage; at the pre-qualification/selection stage; at the award stage; in the performance of the contract; and through relationship management. The Office of Government Commerce will be publishing a similar guide specifically on addressing equality issues in procurement, including clarification of what the existing public sector equality duties mean for public procurement.

4.19 The Government Equality Office will work with the Office of Government Commerce and others to develop ways of improving how public bodies use their purchasing power to support the delivery of equality outcomes. Government will examine a range of options for taking forward this work and will consult with stakeholders in developing these options.

Transparency through banning pay secrecy clauses

Feedback from the consultation

4.20 We did not specifically consult on this issue but a number of respondents made proposals in response to the question asking for suggestions about improvements to equal pay legislation. In particular, the Equal Opportunities Commission cited research carried out for it in 2004 which found that 22 per cent of employers did not allow employees to share information about their pay with their colleagues. It also found that women on lower wages were more likely to be unaware of the pay of their peers than higher

earners; and that women were also more likely to be unaware of the pay of their colleagues than men were. In some cases, the research found that non-disclosure conditions were written into the employee's employment contract.

Assessment

4.21 The Equality Bill will outlaw pay secrecy clauses, making it unlawful to stop employees discussing their pay. This does not mean that people will be compelled to disclose their pay details. But in situations where colleagues work closely together, on similar work, but are paid different rates or have different packages, it is right that they should be able to compare if they want.

4.22 We are committed to closing the gender pay gap and for the first time we have a Government target to reduce it. Without transparency, it is difficult to see where unequal pay exists. It means that firms and employees are less likely to discuss pay and tackle any pay inequality. That means that women find it more difficult to challenge employers who unfairly and unlawfully pay them less.

4.23 One of the obstacles to transparency is pay secrecy. We consider that ensuring that employees can discuss their pay with each other, like requiring public authorities to publish their gender pay gap, is a simple and effective means of achieving a significant increase in transparency.

4.24 Businesses increasingly recognise the advantages they can gain from improving their performance on equality, so that they can attract and retain talent from the widest possible pool and tap into new markets. We therefore expect that performance on equality will increasingly be a matter which companies choose to report to their shareholders and stakeholders.

4.25 We will review progress on transparency and its contribution to the achievement of equality outcomes and, in the light of this, consider, over the next five years, using existing legislation for greater transparency in company reporting on equality.

Equal pay job evaluation audits and a moratorium on claims

4.26 The measures we will take to improve pay transparency respond to concerns, from a range of respondents, that more needs to be done to narrow the gender pay gap. The most prominent expression of that concern came in the form of calls from various stakeholders to introduce mandatory equal pay job evaluation audits. Such an audit is a systematic examination of how women and men are rewarded as employees in an organisation, to expose any gender pay gap.

4.27 The Civil Service has been conducting equal pay job evaluation audits since 2003 and some private sector companies have voluntarily carried them out, with mixed results. We want to examine in more detail the impact equal pay job evaluation audits have had. We will work with the CBI, unions and others to gather evidence on the effectiveness of equal pay job evaluation audits in narrowing the pay gap and spreading best practice.

4.28 We are not persuaded that it would be right to allow a moratorium on claims, due to the strong concerns that this would deny access to justice and risk infringing European rules.

Feedback from the consultation

4.29 Those who proposed that there should be a form of mandatory pay audit included the Citizens Advice Bureau, the Association of Women Barristers, the Fawcett Society, a number of local authorities and a number of trades unions. The Women's National Commission wanted to see an obligation on employers to identify any gender pay gap within their workforce and the ability to make transitional arrangements (i.e. a moratorium on claims) to enable employers to carry out a rigorous equal pay review. The Equal Opportunities Commission, which argued in detail for an obligation on employers to examine their equal pay gap, followed by a full pay review only where there were signs of pay discrimination, also proposed a "period of grace" for employers who are undertaking pay reviews, to remove any disincentive to conducting a review which could highlight any pay discrimination. The Fawcett Society thought the "period of grace" worth considering in some circumstances.

4.30 Some trade unions such as the National Association of Schoolmasters Union of Women Teachers, and the National Union of Teachers were strongly opposed to a moratorium as potentially

denying many women the right to a claim. Members of the legal profession such as the Association of Women Barristers and the Employment Lawyers' Association made points suggesting that the concept of a moratorium was fraught with practical difficulties, unfair and would potentially infringe European law.

4.31 Various private sector organisations opposed mandatory equal pay job evaluation audits. For example, the EEF reported that its member companies were strongly against such audits, as being expensive and burdensome.

Assessment

4.32 We believe that, in tackling the gender pay gap, the key issue is to determine what works. As noted above, the Civil Service has been conducting equal pay job evaluation audits for some years and some private sector companies have voluntarily carried them out. We want to examine in more detail the impact that equal pay job evaluation audits have.

4.33 We are not persuaded that it would be right to allow a moratorium on claims. We are persuaded by the arguments of some respondents that such a moratorium would deny access to justice and run the risk of infringing EU rules.

Transparency through sector inquiries by the Equality and Human Rights Commission

4.34 The Equality and Human Rights Commission will launch a series of inquiries into inequality in the financial and professional services and construction sectors, beginning this year.

4.35 The consultation document focused on legislative rather than non-legislative mechanisms, and did not address this possibility. However, it is important not to lose sight of the potential for non-legislative measures, especially in helping to identify where problems may exist and what action needs to be taken.

4.36 The level of inequality varies between different sectors of our economy. For example:

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- In the financial sector, which employs over 1 million people, the gender pay gap is 41.5 per cent compared to the national figure of 12.6 per cent⁸.
- In the construction industry, 2.5 per cent of workers are from ethnic minorities, whereas the average for the workforce as a whole is around 8 per cent.

The Equality and Human Rights Commission has an important role to play in highlighting these persistent inequalities in different sectors of our economy and ensuring the private sector tackles discrimination and promotes equality.

An equality kite-mark

Feedback from the consultation

4.37 We consulted on two options for a voluntary equality standard scheme:

- an independently assessed voluntary accredited standard; or
- a non-accredited voluntary standard based on self-assessment.

There were more than 200 responses on this issue. There was not a great deal of support for a voluntary accredited standard. A number of equality stakeholders were unconvinced by or opposed to the proposal as it did not go far enough to add value: for example, the former Disability Rights Commission were concerned that such a scheme might undermine current, robust strand specific initiatives; the Runnymede Trust preferred mandatory employment equity plans; and the Equality and Diversity Forum preferred mandatory publication of equality indicators.

4.38 Some businesses and advisory and legal bodies were also not convinced. Freshfields Bruckhaus Deringer considered that good equality practice was evolving without the need for government intervention. The Law Society doubted that a “one-size fits all” approach would be appropriate. ASDA had concerns that the introduction of an equality standard could distract

⁸ The extent of the gender pay gap is driven principally by two factors (a) the structural difference in pay between the sexes for work of equal value and (b) the disproportionate representation of women in lower paid jobs. The importance of each of these factors may vary in different sectors.

employers from actually delivering equality outcomes. B&Q were concerned that an independently assessed accredited standard could give rise to significant costs. The EEF considered that an equality standard in addition to existing standards such as Investors in People would not be helpful, preferring to see development of a checklist-style tool not involving accreditation.

4.39 A number of stakeholders favoured a non-accredited standard or equality check tool, including the Confederation of British Industry. The British Bankers Association supported the idea of a kite mark if it would obviate the need to complete forms on diversity issues during a tendering process, but were wary of setting up a bureaucracy to administer it, and Zurich Financial Services preferred a non-accredited tool to enable organisations to tailor the initiatives to their particular business.

Assessment

4.40 We will work with key partners including business, the Equality and Human Rights Commission, the Trades Unions and others to develop a kite-mark scheme for employers who are transparent about reporting their progress on equality.

4.41 We consider that an equality standard could potentially deliver benefits. Many businesses, of all sizes, want to be able to demonstrate their equality credentials because they recognise that this information is of interest to shareholders, potential investors, customers, the media, their existing workforce and prospective employees. Therefore we do see a case for development of a voluntary kite-mark scheme for employers who are transparent about reporting progress on equality. The Business Commission on Race Equality in the Workplace⁹ has already recommended that Government should explore this approach.

4.42 Businesses increasingly recognise the advantages they can gain from improving their performance on equality, so that they can attract and retain talent from the widest possible pool and tap into new markets. We therefore expect that performance on equality will increasingly be a matter which companies choose to report to their shareholders and stakeholders.

⁹ The Business Commission on Race Equality in the Workplace: a report by the National Employment Panel, October 2007 (<http://www.dwp.gov.uk/ndpb/nep-pdfs/BusCommissionReport.pdf>)

4.43 We will review progress on transparency and its contribution to the achievement of equality outcomes and, in the light of this, consider, over the next five years, using existing legislation for greater transparency in company reporting on equality.

Chapter 5: Positive action

5.1 We have decided:

- **to broaden the range of voluntary positive action measures which can be taken by employers or service providers to the full extent allowed by European law. This will be backed by comprehensive and authoritative guidance from the Equality and Human Rights Commission;**
- **that employers, where they feel it is appropriate, will be able to take under-representation into account when selecting for appointment or promotion between two equally qualified candidates. However, making decisions irrespective of merit (i.e. quotas) or having an automatic policy of favouring those from under-represented groups will remain unlawful;**
- **that all protected groups¹⁰ will benefit from measures to meet particular needs in relation to education, training, welfare or other benefits;**
- **that we will build on progress already made in improving democratic representation by extending the expiry date for all-women election shortlists from 2015 to 2030, and take forward non-legislative measures to increase black and ethnic minority representation.**
- **that we will not extend the concept of “reasonable adjustments” to other protected groups besides disabled people.**

What is ‘positive action’?

5.2 Positive action was addressed in the consultation paper under the heading of “balancing measures”. “Positive action does not permit under-represented groups to be given favourable treatment regardless of merit. What it does is to allow targeted measures to prevent or compensate for disadvantage or to meet special needs,

¹⁰ Except disability, where positive action provisions are not needed because the law does not prevent more favourable treatment of disabled people.

so that people from disadvantaged groups can compete on equal terms. This is distinct from “positive discrimination”, which disregards merit and is generally unlawful.

5.3 The consultation paper proposed extending the general scope for positive action beyond the current limits in domestic legislation – which refers mainly to training and encouragement to take up certain types of work - and also addressing some specific areas such as political representation.

Extending the scope of positive action provisions (including measures to meet special needs); reasonable adjustments

Feedback from the consultation

5.5 More than 150 responses were received to the question asking to what extent current positive action provisions were being used. There were over 250 responses to the question asking whether it would be helpful for organisations to be able to use a wider range of voluntary positive action measures, of which more than 90 per cent agreed.

5.6 The responses indicated that positive action mechanisms are being used more frequently in the public sector than the private sector. However, there is widespread uncertainty about whether, and to what extent, such measures are lawful; and an almost unanimous wish for further and accurate guidance. While some respondents argued for positive action measures to be mandatory, the majority favoured the proposed voluntary approach. Very few respondents wanted to go as far as positive discrimination and some, including police representatives, argued against such an approach. A number of respondents pointed to concern about the impact on the remainder of the workforce of what might appear to be special treatment for some employees.

5.7 On the whole, equality stakeholders regarded the existing positive action measures as being under-used. The Equality and Human Rights Commission considered there to be an even greater reluctance to take positive action outside the employment area, and thought that it would be unlikely to be enough merely to permit additional positive action. The Commission identified a need to encourage such measures and for it to produce a statutory code of practice with examples on what would and would not be permitted.

The Age Employment Network was not aware of examples of positive action measures in the field of employment but welcomed the proposed wider scope. Age Concern and Help the Aged also agreed with widening the scope for such measures, with the latter seeing this as necessary to compensate for historical disadvantage in relation to age. The former Equal Opportunities Commission and Disability Rights Commission favoured the proposed widening of scope. The National Disabled Staff Network saw little evidence of employers taking positive action and referred to the statistics showing under-employment of disabled people – it was also one of the relatively few respondents which argued for a mandatory approach, because it felt that there was no convincing evidence that voluntarism works.

5.8 The Scottish Executive accepted that there should be a broader framework for positive action measures, so that it and other public bodies could attract a more diverse workforce, but emphasised the need for greater clarity. The Welsh Assembly Government drew attention to a range of initiatives which it uses to address the under-representation of minority groups in its own workforce, as did a number of other authorities, including: Strathclyde Fire & Rescue Service and the London Fire and Emergency Planning Authority. The Merseyside Fire and Rescue Service pointed out that all such services were the subject of challenging employment diversity targets which have to be achieved by 2009, and that it had achieved its target for employment of ethnic minority fire fighters and was above the national average for employment of female fire fighters. However, this body did not agree with a target-driven approach and, while agreeing with the proposal to widen the range of positive action, was opposed to any form of positive discrimination.

5.9 A number of Councils drew attention to actions that they had been taking, including Lancashire County Council, which also argued for mandatory positive action. East Dunbartonshire Council responded that it actively undertook positive action measures but found that the current provisions created a level of uncertainty. On the other hand, some Councils had identified little evidence of positive action measures being used, including Coventry City Council, Glasgow City Council, Vale of Glamorgan Council and the London Borough of Walthamstow. All these Councils favoured widening the range of permitted measures.

5.10 The Citizens Advice Bureau agreed there should be a broader framework for positive action to redress chronic problems of under-representation and systemic discrimination. It wanted greater clarity about the practical application of such measures and suggested that the Equality and Human Rights Commission could have the power to initiate positive action where appropriate, following an investigation and in the context of agreeing action plans.

5.11 The Bar Council supported the proposal in principle but considered that the range of balancing measures should be specified. The Law Society noted that the usual targeting measures, such as selected advertisements, were not very effective in correcting gender imbalance but stressed that it would never wish to recruit anyone other than the best candidate for the job.

5.12 NHS Employers found evidence that the current positive action provisions are being used within the NHS but that there was some confusion about how to use them. It would support further legitimate measures to help redress imbalances and agreed that there should not be positive discrimination or quotas; and that the actual process of selection must be fairly applied.

5.13 Northumbria Police agreed that relaxing existing limitations would improve recruitment of minority groups but was concerned about possible public perception of this. The Association of Chief Police Officers pointed to past and ongoing activity to encourage sustained positive action and broadly welcomed the consultation paper's proposals for a wider range of positive action measures. The Police Federation of England and Wales agreed that positive action is the correct vehicle to improve recruitment and address under-representation. It supported the consultation paper's proposals but made clear that it was opposed to positive discrimination, because it was vitally important to retain popular support. The Association of Police Authorities pointed to a range of positive action measures and supported the proposals in principle. However, it made clear that the proposals would need to be developed with care and noted that about one-third of its membership was opposed to the idea of going beyond the existing positive action measures.

5.14 The Confederation of British Industry thought that, according to its 2007 employment trends survey, a significant proportion of employers were using the existing positive action provisions: around one-third of employers were, for example, providing training and encouraging applications from under-represented groups, including 53 per cent of firms with more than 5,000 employees. It also thought that the main reasons for not taking positive action were confusion and a lack of awareness, as well as uncertainty about what is and is not permitted. It agreed that a wider range of permissible positive action could help improve equality in specific workplaces, but made clear that such measures should remain voluntary and backed by adequate support and guidance.

5.15 The Chartered Institute of Personnel and Development believed there was confusion about what is meant by positive action and positive discrimination. It made clear that measures should remain voluntary and that the merit principle should be sacrosanct. The Recruitment and Employment Confederation agreed that there should be more clarity about what employers could and could not do; but was wary about extending the current provisions which it saw as under-used. The EEF found that there was a degree of confusion and uncertainty among its members and suspected that take-up of existing options was limited. B&Q stressed that any programmes adopted by employers must remain voluntary. ASDA pointed to areas where it was already taking positive action and did not believe further measures would be helpful, citing the concern that positive action measures for one group could raise a claim from another, a concern shared by the British Retail Consortium.

5.16 The Trades Union Congress and UNISON supported a broader range of positive action measures, though the Public and Commercial Services Union expressed concern that some posts might be perceived as being filled by people who were not up to the job.

5.17 The possible use of positive action measures outside the workplace also attracted a high rate of responses from religion and belief bodies. The Muslim Council of Britain favoured a wider range of options as did the Church of England. On the other hand, the National Secular Society and British Humanist Association expressed concern about extending the potential for positive action

on grounds of religion or belief, seeing a risk that new and unjustifiable inequalities or disadvantages could be introduced.

5.18 On the more specific questions (should “reasonable adjustments” be extended to other equality strands beyond disability; should all protected groups be able to benefit from measures to meet special needs in relation to education, training, welfare or other benefits?), the great majority of respondents on these points were against extending “reasonable adjustments” (concern about adding confusion; adding burdens; diluting existing protections); and in favour of extending measures to meet special needs, though the Equal Opportunities Commission expressed some detailed concerns about the way in which the current provisions are framed, from a gender equality perspective.

Assessment

5.19 We welcome the evidence of positive action measures that the consultation has revealed, particularly in the public sector. However, we would like to be able to make faster progress in tackling the disadvantage and under-representation which persists despite the progress we have made. It is clear that domestic legislation, as it stands, does not offer the same range of potential measures to help disadvantaged groups as are available under European legislation.

5.20 We have therefore decided to widen the scope of positive action measures for all the grounds protected by discrimination law¹¹. This will allow all protected groups to benefit from measures to meet their special needs. It will also enable employers, where they feel it is appropriate, and where there is a choice between two or more equally qualified candidates, to take under-representation into account when making recruitment or promotion decisions, provided there is not an automatic rule favouring those with any particular protected characteristic. Positive action measures will remain strictly voluntary and the principle of selection on merit will be retained.

5.21 It will be essential for the new provisions to be supported by clear, user-friendly guidance produced by the Equality and Human

¹¹ Except disability, where positive action provisions are not needed because the law does not prevent more favourable treatment of disabled people.

Rights Commission, which illustrates the types of measures that can and cannot be taken.

Political candidates

5.22 It is important that Parliament and our other democratic institutions properly reflect the make-up of our society, including women as well as men and people from ethnic minorities. Of course, all our MPs represent the whole community in their constituencies, but having more representative elected bodies ensures that our political institutions better understand and reflect the society they serve. Only 19 per cent of MPs are women, and only 2.3 per cent of MPs are from non-white backgrounds, compared with 8 per cent of the population.

5.23 The Sex Discrimination Act allows political parties to take positive measures towards increasing the participation of women in our democratic institutions. Such measures include allowing women-only shortlists for election candidates in national and European parliamentary elections and local government elections. The consultation paper asked whether this provision, due to expire in 2015, should be extended.

5.24 The consultation paper also asked for views on whether or not to widen the scope of voluntary positive action measures for political parties to target the selection of candidates beyond gender. Following the consultation, the Government commissioned a report by Operation Black Vote to look further at the case for Black and Minority Ethnic-only shortlists. The report¹², published on 19 May, recommends the adoption of Black and Minority Ethnic-only shortlists as a means of helping to increase the representation of ethnic minorities in Parliament and elsewhere. It also provides examples of various other positive action measures that could be taken by political parties to encourage more ethnic minority candidates to come forward.

Feedback from the consultation

5.25 The great majority (more than 90 per cent) of the nearly 150 respondents on the issue of women-only shortlists agreed that the existing provision should be extended. There was a general

¹² *How to Achieve Better BME Political Representation* (May 2008)

sentiment that the provisions should continue for as long as it was considered necessary and proportionate to retain them i.e. until a gender balance is achieved in Parliament. A number of respondents wanted similar provisions for all equality groups.

5.26 The Scottish Executive noted that there was still some way to go before our electoral processes reflect the diversity of the people living and working in our communities; and that the latest elections in Scotland saw a reduction in the number of women in the Scottish Parliament and no meaningful increase in women representatives in Scottish local authorities.

5.27 Trades unions which responded all supported extending the expiry date for women-only shortlists. The Association of Women Barristers pointed to research by the Equal Opportunities Commission, indicating that, at the current rate of progress, the gender gap in Parliament would take almost 200 years to close. The Equal Opportunities Commission, the Fawcett Society, Liberty and a variety of other respondents including the former Commission for Racial Equality strongly supported the proposal. The main argument was one of fairness and practicality – to date, the measures had not been fully successful, and needed to be kept in place until a fair gender balance had been achieved.

5.28 Local authorities generally supported extension but on the whole were more cautious. The Greater London Authority and London Councils agreed unreservedly with continuing women-only shortlists. Some other authorities considered that the existing provisions for women-only shortlists should continue beyond 2015 only if the need is clear and the measure proportionate. Additional conditions suggested included the idea of a published review and evaluation of an extended provision every three years after 2015.

5.29 The great majority (more than 90 per cent) of the nearly 150 respondents on the issue of widening existing voluntary measures to increase representation of other under-represented groups in Parliament, agreed with it. This was particularly the case in the responses from groups representing disabled people, but also from others including the Equal Opportunities Commission, the Bar Council (suggested targeting for other strands for a time-limited period), Stonewall (which noted that women-only shortlists have not resulted in a single openly declared lesbian being elected to

the House of Commons), the Policy Research Centre on Ageing and Ethnicity and a number of local authorities.

5.30 A number of respondents agreed specifically with the introduction of measures aimed at increasing ethnic minority representation, including Black and Minority Ethnic-only shortlists. They included the National Assembly Against Racism, the Ethnic Minority Advisory Group, and London Councils. The Trades Union Congress, UNISON and Unite the Union all saw a case for further consideration of such measures, without offering further detail. .

5.31 The Commission for Racial Equality pointed out that the low representation of people from minority ethnic groups as councillors or MPs was a more complex issue than might be presumed. It noted (as did Justice) that the activities of political parties generally should be brought within the scope of discrimination law; pointing out that various measures were already available to political parties to encourage increased representation, such as mentoring or shadowing, and that these did not require new or additional measures, just commitment and leadership. It questioned how a Black and Minority Ethnic group would be defined, for the purpose of a shortlist. It therefore did not consider that legislation permitting Black and Minority Ethnic-only shortlists should be introduced, but a full programme of positive action should be adopted. The Discrimination Law Association considered that selection criteria on anything other than gender grounds would be problematic, raising the question of which minority ethnic groups, religions or beliefs or age groups would be eligible for a shortlist.

5.32 Others could envisage some extension but only to certain groups. The Law Society agreed with extension but only to gender, race and disability. It did not think it appropriate to have selection targets for religion or belief (too many forms of religion/belief) or sexual orientation (essentially a private matter). The British Humanist Association did not believe that positive action for candidate selection should be extended beyond gender.

Assessment

5.33 The provisions which we introduced in 2002 to allow women-only shortlists for election candidates have been extremely successful: the number of women MPs rose from 60 in 1992 to 128

in 2005. But this still only amounts to just over 19% of MPs despite women making up 51% of the population.

5.34 We have therefore decided to extend these provisions beyond 2015, to 2030. This is on the basis that this will cover a further five national elections and, if current progress is maintained, enable a critical mass of approximately 200 women MPs to be achieved by then. The existing legislation contains a power to extend the expiry date should that prove necessary in the future – that power will also be replicated in the Equality Bill.

5.35 We have decided not to legislate at this stage to allow for Black and Minority Ethnic-only shortlists, or to provide similar measures for other groups beyond gender, as there is no consensus on this issue. However, we will introduce in the Equality Bill specific positive action provisions for political parties to use across all protected grounds, similar to those contained in the Sex Discrimination Act but excluding the shortlists provisions. This will allow parties to take a wider range of positive action measures in relation to matters regarding their constitution, organisation and administration, such as those suggested in Operation Black Vote's report, including:

- carrying out an audit of political party membership to identify the proportion of members from under-represented groups and identify where gaps are present;
- setting targets for recruitment drives;
- carrying out general and specific or targeted recruitment drives;
- running mentoring and leadership programmes;
- setting targets for increasing the proportion of politicians and staff from under-represented groups;
- establishing and supporting in-house forums for under-represented groups;
- reaching out to community and faith organisations;
- supporting local young Mayors and youth parliament;

- supporting non-partisan voter registration initiatives and democracy week.

Chapter 6: Enforcement

6.1 We have decided that:

- **the Bill will allow employment tribunals to make wider recommendations in discrimination cases, which will benefit the wider workforce and help to prevent similar types of discrimination occurring in the future;**
- **we will be working with the Employment Tribunal Service, employment judges and other relevant stakeholders to identify other means of ensuring that we learn the lessons from tribunal judgments and are able to take a more strategic approach to tackling discrimination;**
- **if practical, we want to allow discrimination claims to be brought on combined multiple grounds. This is a very complex area and we are exploring it further, including whether the legislation could be made to work in practice and what the costs and benefits would be;**
- **we will support trade union equality representatives in their roles by building on ongoing initiatives**
- **we will not make any provision for representative actions in the Equality Bill. In the light of the Civil Justice Council's recommendations in its review of collective redress mechanisms, we will consider whether there is a case for introducing representative actions in discrimination cases. We will consult on any proposals for reform;**
- **we will continue to promote Alternative Dispute Resolution mechanisms as an effective means of resolving many disputes fairly and speedily outside the legal system, whilst recognising that the courts and**

tribunals will remain the most appropriate means of redress for some cases;

- **we consider that there is scope to explore further the potential role of Ombudsmen in relation to equality issues. The Equality and Human Rights Commission will work with Ombudsmen to ensure that they are equipped to deal effectively with discrimination complaints which they receive, in cooperation with the relevant bodies;**
- **we are not persuaded of the need to introduce equality tribunals;**
- **we will not designate specific courts to hear discrimination cases but we will ensure that appropriate training is made available to judges hearing discrimination cases, as well as making provision for the use of expert assessors to advise judges in court cases involving discrimination across all the protected grounds;**
- **transfer disability discrimination school education cases in Scotland (including education cases relating to admissions and exclusions) to the Additional Support Needs Tribunals for Scotland.**

Extended recommendation powers for employment tribunals

6.2 Currently tribunals can only make recommendations where an employer has been found to have discriminated, but only if they directly benefit the person who has been discriminated against. However, as around 70 per cent of employees involved in discrimination cases leave the organisation, this ties the hands of tribunals.

6.3 Allowing a tribunal to make wider recommendations will mean, for example, that where a female employee leaves her employer because of discrimination and has subsequently won the case, the tribunal could recommend that the employer should introduce an equal opportunities policy.

6.4 This would not benefit the woman who had left, but it would benefit women still in the workforce. And it would also benefit the employer, who would be less vulnerable to future claims. If the employer did not comply and a further claim was made, the tribunal would be able to take the earlier recommendation into account when considering the case. This power will encourage better employment practice and should help reduce the number of race, sex, disability and other types of discrimination claims at employment tribunals.

6.5 Recommendations will form part of the tribunal's judgment, which will in due course be made available on the Employment Tribunal Service's website. Claimants and/or their representatives will therefore be able to search for previous recommendations. They could also ask the respondent about any previous recommendations through the questionnaire procedure.

6.6 Training and guidance will be provided to Employment Tribunal judges to assist them in exercising their new powers effectively.

6.7 On 1 July, the Department for Business, Enterprise and Regulatory Reform published a consultation on a number of proposals designed to complement the measures set out in the Employment Bill and other changes arising from the Dispute Resolution Review. This package of measures will provide a framework for a more efficient system for dispute resolution which is easier to use and enables disputes to be resolved earlier, with less lost time, expense and stress for all parties. The Dispute Resolution secondary legislation consultation also asks a number of practical questions about how the extended recommendations power should be implemented. The closing date for this consultation is 26 September 2008. Responses should be sent to Dispute Resolution Secondary Legislation Consultation, Bay 4100, BERR, 1 Victoria Street, London SW1E 0ET.

6.8 We will also be working with the Employment Tribunal Service, employment judges and other relevant stakeholders, to identify other means of ensuring that we learn the lessons from tribunal judgments. We wish to explore the scope for establishing a more effective mechanism for sharing knowledge about the cases which arise in tribunals across the country. This

would enable us to identify whether similar cases are arising repeatedly in a particular sector, for example. Such a mechanism would enable Government, the EHRC, employers and trade unions to take a more strategic approach to tackling discrimination, to spread learning from individual cases in a systematic way, and help to achieve a shift in corporate culture.

Feedback from the consultation

6.9 There were a fair number of responses on the issue of an extended recommendations power from a wide range of stakeholders, despite it not having been explicitly addressed in the Equality Bill consultation.

6.10 The response from employer organisations was mixed. The Confederation of British Industry was not in favour of extending tribunals' powers to allow them to make recommendations for the benefit of the wider workforce. They argued that a tribunal would not understand the workings of a firm on the strength of an individual case, that a scenario where different tribunals make contradictory recommendations would lead to confusion, and that it would be inappropriate for a tribunal to "recycle" a recommendation related to a similar case for another different organisation.

6.11 However, some other business organisations were in favour. The Employers' Forum on Disability reported that its members were in favour of tribunals being able to make recommendations even when the employee is no longer employed, so as to effect systemic change and enhance the legal case for action on equality. The Federation of Small Businesses also recognised that recommendations could help firms to comply with the law in the future, although it also felt tribunal judges should take into account the fact that small businesses very rarely have a Human Resources department and the case may have arisen because the small business owner was not aware of, or had not understood, discrimination legislation.

6.12 A number of local government organisations responded in favour of stronger recommendation powers, which it was felt would make the aims of anti-discrimination law easier to meet by strengthening the remedies available to Employment Tribunals,

and result in a more efficient use of resources by extending the benefit of any ruling more widely.

6.13 The Trades Union Congress and the five trades unions which raised the issue of the operation of tribunals were in favour of extending the power to make recommendations, as were a large number of equality and legal organisations. The most common argument made in favour of such an extension was that recommendations would significantly improve the tribunal's impact on the poor practice of employers who lose tribunal cases, by enabling the employment tribunal to address underlying discriminatory practices and help employers to dismantle structural or institutional discrimination which may exist in an organisation. It was argued that such a power would complement other provisions which can be used to address systemic disadvantage and discrimination.

Assessment

6.14 The power of tribunals to make recommendations already exists in respect of the individual claimant and recommendations made under the existing power may already benefit the wider workforce indirectly. For example, a recommendation that managers are trained in fair and transparent promotion procedures, following a finding that the respondent had discriminated against the claimant in a promotion exercise, would benefit not only the claimant but also the wider workforce.

6.15 A stronger recommendation power already exists in Northern Ireland, under the Fair Employment and Treatment Order 1998 (Article 39). Recommendations are confined to the facts of the individual case but are not restricted to remedying the claimant's present situation and there is a financial sanction for failure to comply. There is no evidence that this power has had adverse effects on business.

6.16 We do not think it likely that a wider recommendation power would result in an increase in claims. There is no evidence that this has happened in Northern Ireland. On the contrary, we consider that recommendations will encourage better employment practice and should help to reduce the number of claims at employment tribunal.

6.17 In discussions with the Government Equalities Office, the Employment Tribunal Presidents have made a commitment to providing training on the changes we are making to recommendation powers. This will help ensure that recommendations deal only with the facts heard in the case and are a proportionate means of ensuring compliance with the law. Employment Judges are assisted by two lay members from the union and management sides, both of whom will have expertise in human resources issues. As already noted, the Government issued a public consultation on 1 July, as part of the Dispute Resolution Review, on the practical implementation of the power. The response to this will inform the training and guidance given to Employment Judges.

6.18 Any recommendation could be overturned on appeal if it was clear that there was no evidence for it, or on grounds of lack of reasonableness.

6.19 In addition, we consider that well-founded recommendations for the benefit of the wider workforce could add real value in tackling the structural causes of discrimination.

Multiple discrimination

6.20. Currently, people can only bring a claim that someone has treated them unfairly because of one particular characteristic, for example their race, sexual orientation or gender. However, there are situations where people are discriminated against because of a particular combination of characteristics. For example, a black woman may suffer prejudice or harassment which a black man or a white woman would not experience.

6.21 The consultation document noted earlier calls for people to be able to bring claims on a combination of grounds and asked for evidence of difficulties in gaining legal redress in such cases under the present system.

Feedback from the consultation

6.22 There were nearly one hundred responses on this issue. Examples were provided of discriminatory incidents which, it was argued, could have been brought to tribunal or court only if there were provision to bring combined multiple claims. In addition,

examples were given of cases which had come to tribunal or court and which, it was argued, could only have succeeded had there been provision for combined multiple claims. A number of respondents made the point that, since the law did not currently permit cases to be brought on combined grounds, it was hard to provide evidence of difficulties in gaining legal redress, since no one would seek to bring such a case.

6.23 Generally speaking, equality stakeholders supported additional protection against multiple discrimination, along with a number of trades unions, voluntary bodies and legal organisations. It was argued that the law must be changed to reflect the fact that people's identities are multi-layered and complex. The Equality and Human Rights Commission did not believe that it would be difficult to amend the law to allow combined multiple discrimination claims, and stressed that such a change should not be problematic or onerous for employers because they would need to respond to only one combined complaint rather than two or more based on separate grounds. The Bar Council, along with a number of equality organisations, argued that courts and tribunals should be able to award higher levels of compensation in multiple discrimination cases.

6.24 A number of equality organisations argued that the consideration of multiple combined claims would be more straightforward if the law were amended to allow courts and tribunals to take a less strict approach to the use of a comparator when determining whether discrimination has taken place. The British Institute of Human Rights, along with a number of other respondents, saw potential in adopting a holistic human rights approach which would not be dependent on specific grounds or comparators at all. They noted that one of the benefits of this approach would be to overcome the problem of identifying the correct comparator in cases of multiple discrimination.

6.25 On the whole, public authorities were less convinced of the need to allow individuals to bring combined multiple discrimination claims. The Local Government Association considered there was no need to introduce specific legislation on multiple discrimination but indicated that it would welcome some reassurance on how the existing system would best serve multiple claimants.

6.26 Most of the business respondents on this issue opposed any change to the law to allow individuals to bring multiple discrimination claims. The Chartered Institute of Personnel and Development considered such a change would increase the risk of increasingly time-consuming and multi-faceted cases being brought, which could leave employers open to significant stress and inconvenience. PricewaterhouseCoopers saw the ability to bring multiple discrimination claims as being unnecessarily complex. The EEF considered there was no clear evidence of a problem and that combined cases would overcomplicate the law and make it significantly harder for employers to understand.

Assessment

6.27 We are considering in the light of the consultation responses whether there may be a gap of some kind in the way in which the law is currently framed. The most commonly cited example of multiple discrimination is that of black women who have been treated less favourably not solely because they are either black or female but because they combine these characteristics. Under current legislation, a person against whom a claim of discrimination is brought may be able to evade liability by demonstrating that he or she treated a black woman no differently from how he treated other women and no differently from how he treated black men.

6.28 We are taking forward further work before reaching a final decision on whether and if so how to allow discrimination claims to be brought on combined multiple grounds.

Trade Union Equality Representatives

6.29 The consultation did not propose statutory recognition of trade union equality representatives, but a number of stakeholders suggested it. Workplace equality representatives play a supportive role for individuals in the workforce. They look at a range of issues which are of concern to employees, including flexible working, equal pay discrimination and harassment. They do not currently have statutory status, unlike Union Learning Representatives and Shop Stewards whose functions, rights and responsibilities are set out in legislation.

Feedback from the consultation

6.30 The Trades Union Congress stressed the valuable role equality representatives can play in promoting equality and diversity and made clear that it believes that statutory union equality representatives would be an extremely effective and collaborative route to promoting good equality practice and ensuring widespread compliance with the law.

6.31 The Equal Opportunities Commission saw the issue in the context of giving statutory recognition to the role played by trade unions in negotiating equal pay. It acknowledged the Government's adoption of the Women and Work Commission's recommendation to prioritise capacity building, through the Union Modernisation Fund, for trade union and workplace equality representatives, but considered that more could be done if there was a specific role of equality representative, legally recognised, with proper facilities time, protection from victimisation and a place at the bargaining table.

6.32 These views were shared by a number of other stakeholders including the Discrimination Law Association, UNISON, the National Union of Teachers and UNITE.

Assessment

6.33 We recognise the valuable contribution that trade union equality representatives can make. Equality representatives contribute to the delivery of key public policy objectives, including tackling child poverty where one of the ways to do this is to ensure that parents of children with a disability or lone parents can be supported to remain in work and be better off.

6.34 This is why we are supporting the development of the trade union equality representative's role in various ways:

- we have sponsored fifteen pilot projects through the Union Modernisation Fund, providing about £1.5m to develop a union infrastructure to support the workplace activities of equality representatives – for example through training and development;

- we held an event on 24 June 2008 with equality representatives and the unions to highlight the good work they already do and to identify learning points for other equality representatives.

6.35 The main actions arising from the 24 June event were:

- the Trades Union Congress will set up an informal or semi-formal network of equality representatives to share best practice and identify key themes;
- the Trades Union Congress will help to build an evidence base on the effectiveness and value of equality representatives.

Representative actions

6.36 Currently, employees who believe they have been the subject of unlawful discrimination and wish to bring a tribunal claim must do so as individuals. This carries financial and emotional costs, as well as a risk to their reputation. However, some discrimination is systemic and a number of employees may face the same kind of unfair treatment.

6.37 Representative actions would enable bodies such as trade unions or the Equality and Human Rights Commission to take cases to court or tribunal on behalf of a group of individuals as a single claim.

Feedback from the consultation

6.38 The consultation document addressed the issue of representative actions in relation to goods, facilities and services cases heard by courts. The Department for Trade and Industry's (now the Department for Business, Enterprise and Regulatory Reform) consultation on the Dispute Resolution Review addressed the issue of representative actions in relation to employment cases. Both documents indicated that the Government was not persuaded that there was a good case for establishing this mechanism. The Equality Bill consultation received responses addressing the case for representative actions in both the courts and the tribunals.

6.39 The Confederation of British Industry's response made it clear that they are strongly opposed to any move to introduce representative or class actions. They stressed that introducing representative actions would risk destabilising relationships between employers and trade unions and could pose a threat to employee relations in the long-term. They also considered that introducing representative actions was likely to undermine the partnership between employers and the Equality and Human Rights Commission, which it saw as crucial to the promotion of equality and diversity.

6.40 However, the Equality and Human Rights Commission itself supported the introduction of representative actions for certain types of cases, and noted that the Government was already considering introducing representative actions in some areas. The Commission referred to an earlier Law Commission consultation on representative claims in civil actions, which concluded that representative actions should be introduced only where there is a clear need for them, and to proposals in 2007 by the then Department for Trade and Industry to introduce representative actions for consumer protection legislation where breaches of consumer protection legislation affect a number of consumers in a similar way.

6.41 The majority of respondents to the Equality Bill consultation who raised this issue were in favour of introducing representative actions, and did not think it likely that representative actions would lead to a more litigious claims culture. These respondents included equality organisations (including the equality commissions), trade unions, voluntary, consumer and legal organisations and some local authorities.

6.42 Many of the arguments advanced in support of representative actions related to the need to improve access to justice and reduce the burden on individual claimants. It was argued that at present, the potential of the law to tackle 'group discrimination' and dismantle systemic discrimination is blunted by the individual focus of the litigation process and remedies, and that representative actions would avoid the entire weight of litigation falling on often vulnerable individuals. It was noted that many individuals are unwilling to bring a case because they fear they will suffer retaliation or victimisation as a result, and that representative actions would minimise this fear, thus improving access to justice.

The need to improve access to justice was particularly emphasised with respect to disability discrimination in the non-employment field, where evidence suggested that there was a high incidence of discrimination but a very low volume of cases being heard in the courts.

6.43 It was argued by many respondents that the grouping of similar claims together as a representative action would enable more efficient use of both the tribunal's and the parties' resources. One reason given for this was that representative bodies such as trade unions have significant resources and expertise at their disposal, which would enable more efficient running of cases in comparison with numerous cases brought separately by litigants-in-person.

Assessment

6.44 Looking at the responses on this issue in the round, both to the Equality Bill consultation and the Dispute Resolution Review, the views divide between those of business and those of equality bodies, trade unions and others. Businesses were generally opposed to the introduction of representative actions, class actions or the like, on grounds that they would expose business to spurious or vexatious claims and create a compensation culture, as well as significantly increasing the number of claims. In comparison equality bodies, trade unions and others regarded representative actions as a way to open up access to justice, empower individuals, tackle systemic discrimination and make the handling of cases more efficient.

6.45 The Civil Justice Council - an advisory body on civil justice issues - is in the process of gathering evidence on the case for introducing representative actions across the legal system. The Civil Justice Council is aware of the strong response to the Discrimination Law Review calling for representative actions to be introduced for discrimination cases. The Civil Justice Council expects to publish its interim findings on collective redress mechanisms across the legal system for further consultation shortly, followed by formal advice to the Lord Chancellor later this year.

6.46 The Ministry of Justice is leading a cross-Government working group, which will bring together the different Departments

with an interest in collective redress in different areas of law and will coordinate engagement with interested stakeholders. The group will consider the Civil Justice Council's interim report and respond to its final recommendations, including considering whether there is a case for introducing representative actions in discrimination cases.

6.47 Alongside this work, the Government Equalities Office will be undertaking more detailed analysis of the case for representative actions in the discrimination context. We will commission some desk research over the summer to look more in-depth at the applicability of the Civil Justice Council recommendations to discrimination cases and what the impact of making provisions for collective redress would be in relation to discrimination.

6.48 We would consult on any proposals for collective redress procedures in the discrimination context which emerge from the work set out above.

Measures to improve the handling of discrimination cases in the courts

Alternative Dispute Resolution

6.49 Alternative Dispute Resolution mechanisms are a means of enabling disputes to be resolved fairly and speedily without burdening the courts, although they do not replace the need for access to redress in the courts.

Feedback from the consultation

6.51 The consultation asked for suggestions about ways in which Alternative Dispute Resolution could be used more effectively or widely to resolve discrimination disputes in the non-employment field. Nearly 150 responses were received on this issue.

6.52 A wide range of respondents including equality and legal bodies and private and public sector organisations agreed that Alternative Dispute Resolution mechanisms, for example in the form of mediation and conciliation services, offered potential benefits to all parties, through avoiding possibly lengthy and costly court cases and facilitating earlier and more speedy resolution of

disputes. No-one opposed such mechanisms, though opinions differed as to their usefulness and appropriateness.

6.53 A number of respondents noted that Alternative Dispute Resolution could provide a remedy for individuals who would not be eligible for public funding and for whom legal action would be financially prohibitive, or where issues raised are sensitive or the claims complex but of low value.

6.54 Others pointed out that the Disability Discrimination Act conciliation process had proved helpful and that conciliation or mediation may achieve the desired result in a more effective and less stressful way than a court hearing. It was also suggested that the mechanism for Alternative Dispute Resolution in the first stage of the current National Health Service Complaints Procedure could also cover cases of discrimination.

6.55 However, some respondents also made clear that Alternative Dispute Resolution procedures were not suited to resolving the more fundamental question of access to justice. A number of equality and legal organisations and trade unions pointed out that the nature of Alternative Dispute Resolution meant that outcomes would be geared to the individual and would not therefore be appropriate for resolving wider problems such as structural patterns of discrimination. Alternative Dispute Resolution would not therefore provide a substantive solution to the majority of discrimination matters.

6.56 The Bar Council made the similar point that many county court cases are of low financial value but are of importance to the people involved. The Bar Council went on to propose a form of national mediation assistance where mediators would be trained to deal with particular equality strands and be made available throughout the court system to mediate in their particular strand. They suggested that cases falling below a particular financial value should be compulsorily referred for mediation. They also suggested an inquisitorial approach as used by the Irish Equality Authority might be useful.

6.57 The Council of Her Majesty's Circuit Judges and Association of District Judges fully supported current Alternative Dispute Resolution initiatives to encourage mediation in small claims, fast-track and multi-track cases through the National Mediation

Helpline. Like other respondents, the Council and Association also pointed out that there was also a need for the courts to interpret discrimination laws and the resultant publicity from such cases can serve as a force for changing the culture in society as a whole.

6.58 Whilst supporting Alternative Dispute Resolution, a number of respondents made clear that there should be no compulsion on parties to participate in Alternative Dispute Resolution procedures and that a system must be in place to allow claimants to return to the court process if Alternative Dispute Resolution failed. A number of legal bodies felt that in order for Alternative Dispute Resolution to be just and effective, parties must be placed on an equal footing and that currently, service providers would often have legal representation whereas the individual would not.

Assessment

6.59 It is encouraging to note the positive responses to the use of Alternative Dispute Resolution mechanisms. We regard such mechanisms as a means of enabling disputes to be resolved fairly and speedily without burdening the courts. The Ministry of Justice is taking forward work to enhance the information provided to users and potential users of civil courts, with particular emphasis on individuals with small claims, and to direct people to appropriate sources of advice and other dispute resolution methods, including a new civil disputes website. This will include information on discrimination claims.

Role played by Ombudsmen in ensuring compliance with discrimination law

Feedback from the consultation

6.60 About 80 responses were received to this question which asked for suggestions for ways in which the role of Ombudsmen might be used more effectively to resolve discrimination disputes.

6.61 The Parliamentary and Health Service Ombudsman did not at present see any scope for using existing Ombudsmen to determine discrimination disputes conclusively as Ombudsmen do not ordinarily make findings of law or seek to determine legal cases. However, she considered that the introduction of the positive equality duties was beginning to bring to Ombudsmen's

attention the fact that users of public services can reasonably expect public bodies to comply with those duties as well as with the conventional anti-discrimination legislation. Failure to do so might justify or contribute to a finding of maladministration.

6.62 The Citizens' Advice Bureau wanted to make greater use of Ombudsmen which it saw as independent, non-adversarial and more cost-effective than the courts. It also considered that Ombudsmen were becoming increasingly aware of equality and human rights issues and that they may be able to deal with discrimination issues if, for example, equality standards that a public body was expected to meet were clearly set out and fell under the remit of an Ombudsman. It envisaged Ombudsmen providing a mechanism whereby the Equality and Human Rights Commission could expect that market regulators (for example the Financial Services Ombudsman) would ensure that the markets and firms they authorise and oversee are not discriminating unfairly. The Disability Rights Commission and the Equal Opportunities Commission noted, however, that it was unlikely to be feasible to extend the role of Ombudsmen to additional sectors such as pubs, shops and businesses.

6.63 A number of local authorities saw potential in developing the role of Ombudsmen, as a mediator, in a training capacity, or in the resolution of discrimination disputes - as a final port of call if the local authority's own complaints procedure was not sufficient.

6.64 A number of respondents felt that although Ombudsmen could have a useful role to play, because their decisions were not binding cases might still have to be pursued in the courts. A number of respondents considered in more detail how an enhanced role for the Ombudsmen might interplay with the court process. The Bar Council suggested that an Ombudsman's recommendation should be admissible as evidence when discrimination cases proceed to mediation, arbitration or a formal court hearing, whilst the Council on Tribunals noted that consideration would need to be given to the operation of time limits for bringing cases in the event of a complaint to an Ombudsman.

Assessment

6.65 We agree that there is scope to explore further the potential role of the Ombudsmen in relation to equalities issues. The Equality and Human Rights Commission will work with Ombudsmen to ensure that they are equipped to deal effectively with discrimination complaints which they do receive, in cooperation with the relevant bodies.

Equality Tribunals

6.66 As indicated in the Equality Bill consultation paper, we are not persuaded of the need to introduce “equality tribunals”. We consider that such a change would divert specialist resources from the employment tribunals and create jurisdictional problems.

Feedback from the consultation

6.67 The consultation document therefore did not ask any specific questions about “equality tribunals”. Despite this, a number of stakeholders indicated in their responses that they were in favour of equality tribunals and some linked this issue with, as they saw it, the need for stronger sanctions and for improving access to justice generally. Those arguing in favour of equality tribunals included a number of equality organisations, trade unions and voluntary bodies.

6.68 Disability organisations, including the former Disability Rights Commission, tended to argue in favour of “equality tribunals”. The Disability Rights Commission stated that individuals who experienced disability discrimination were deterred from bringing claims in the courts by the complexity and costs associated with the court process, compounded by the relatively low level of compensation awards. It felt that these factors were restricting access to justice and that the paucity of cases and low levels of compensation had led to a culture of complacency amongst service providers. For these reasons the Commission favoured starting all discrimination cases in the employment tribunals and felt that the legislative and administrative changes would be reasonably straightforward. In addition, the Commission argued for stronger sanctions and increased levels of compensation, especially for disability cases where compliance with some provisions might incur significant expense for service providers and

employers, as well as broader sanctions such as removal of licences for pubs that have discriminated.

6.69 The idea of creating “equality tribunals” was supported by some members of the Employment Tribunal judiciary, who noted that, over the past 35 years of adjudicating discrimination complaints in the field of employment and employment-related areas, tribunals had built up considerable expertise in these types of complaint which could be utilised in non-employment discrimination claims.

6.70 While acknowledging that there were problems with access to justice for some discrimination cases, the former Commission for Racial Equality did not support the establishment of “equality tribunals”. The Commission considered that “equality tribunals” would not be sustainable in the longer term as the only forum for equalities expertise, envisaging that they would be less effective in dealing with complex cases involving services or the exercise of public functions. The Commission for Racial Equality also considered that “equality tribunals” were inconsistent with the policy on mainstreaming in the public sector and that all courts and tribunals needed to become skilled and equipped to hear discrimination cases.

6.71 The Equality and Human Rights Commission noted that there was not universal support for this proposal and recommended further discussion and consultation.

6.72 The Council of Her Majesty’s Circuit Judges and Association of District Judges did not support the notion of “equality tribunals”. They made clear that they were strongly of the opinion that discrimination claims arising outside the workplace should continue to be dealt with in the county courts. They refuted any suggestion that there had been unpredictable outcomes or that judges sitting in such cases had been unfamiliar with the law.

6.73 The Law Society agreed that goods, facilities and services cases should not be transferred to the tribunal system.

Assessment

6.74 We do not consider that a structural solution – the creation of “equality tribunals” – is the appropriate way forward. As indicated

in the consultation document, it might appear to solve some problems but at the expense of creating others (for example, discrimination cases involving housing would still have to be heard in the courts). While equality stakeholders, particularly the disability lobby, were strongly in favour of “equality tribunals” it was also clear that significant elements of the legal profession were against such a measure.

6.75 It is difficult to state with any certainty how many discrimination cases reach the courts. This is because, unlike in employment tribunals, there is no centralised record of court cases. However, we accept that relatively few discrimination cases involving the provision of goods, facilities or services appear to come before the courts. We also accept that, as reported in consultation responses, there are people who complain that they have been deterred from bringing a case, for example because of the complexity, costs and risks of doing so.

6.76 One reason why there are relatively few discrimination cases outside the employment area may be because customers, rather than challenging discrimination by a particular establishment, choose to buy goods or services from a competitor. The nature of the discriminatory experience can be transitory in a service environment, as distinct from discrimination experienced in a work environment, where there is an ongoing relationship.

6.77 We continue to believe that the civil courts remain the most appropriate venue for hearing non-employment discrimination cases but that there is scope to improve the handling of these cases. Our proposals for achieving this are set out below.

Enhancing discrimination expertise in the courts

6.78 The consultation document proposed a number of options for enhancing discrimination expertise in the courts:

- designating certain courts to hear all non-employment discrimination cases and within those courts, providing a small number of judges with specialised training and assigning them to all such cases;
- increasing the use of expert assessors in discrimination cases.

Feedback from the consultation

6.79 Nearly 150 responses were received giving views on proposals for enhancing discrimination expertise in the county and sheriff courts.

6.80 There was a generally negative response to the proposal to designate certain courts to hear all non-employment discrimination cases and to provide specialised training to a small number of judges. It was thought that this would limit access to justice, especially for disabled people or those with caring responsibilities, who might find it more difficult or expensive to travel long distances to attend a hearing. But there was a positive response to the provision of additional training overall, and to making greater use of expert assessors.

6.81 Those opposing the designation of courts and ‘ticketing’ of judges included the Council of Her Majesty’s Circuit Judges and Association of District Judges, who saw no reason why all judges sitting in county courts should not deal with discrimination claims, as well as a number of legal organisations, trade unions, disability and other equality bodies. All those opposed were concerned about the negative impact these proposals might have on access to justice.

6.82 The Law Society supported the proposal for designated judges and, possibly, courts on the grounds that it is necessary to have specially trained judiciary in discrimination cases, but felt that in order to facilitate access to justice, it may be necessary for designated judges to sit away from their home court.

6.83 There was strong support for the provision of additional training to judges hearing discrimination cases. The Council of Her Majesty’s Circuit Judges and Association of District Judges recognised the need for and the value of proper training to ensure consistency in decision-making and were confident that what is needed will continue to be provided by the Judicial Studies Board either by means of dedicated training exercises or as part of its continuing programme of education for judges.

6.84 The Bar Council agreed that it is essential that judges should be trained in discrimination law properly and that it should be

possible for all judges to have a proper working understanding of this area of law.

6.85 A wide variety of respondents, including equality organisations, trade unions, legal bodies and local authorities, supported an extension of the use of expert assessors to all strands. The Bar Council considered that for the foreseeable future it would remain necessary to supplement the insight of judges into these issues with the experience and skill of trained assessors relating to the strand(s) involved in the case that comes before the court and that the use of assessors in race discrimination cases had been key in ensuring a better judicial understanding of the area. They felt that the use of assessors should be compulsory.

6.86 The former Commission for Racial Equality and the Equality and Human Rights Commission also supported the use of assessors across all strands. They argued that the role of assessors should be clarified and that assessors should be enabled to take an equal part in the decision-making process.

Assessment

6.87 We accept, on further consideration, the concerns that a system of designating certain courts or formally ticketing judges to hear non-employment discrimination cases would limit access to justice. We have therefore decided not to proceed with this proposal.

6.88 We have invited the Judicial Studies Board to make special training in discrimination law available to all judges. The Judicial Studies Board will develop a discrimination law module for inclusion in its core civil continuation course. As only one-third of civil judges are invited to these courses each year, the Judicial Studies Board will, in addition, develop a distance learning module which will be accessible electronically to all judges. This will provide supplementary guidance to the civil continuation module and also serve as a training resource for any judge faced with a discrimination case for the first time who had not yet attended a continuation seminar module. We will discuss further with the senior judiciary the appropriateness of asking them to ensure that cases are heard by judges with the relevant discrimination law training

6.89 There was strong support from a number of stakeholders for the use of assessors to be made mandatory for all discrimination cases. We have decided that provision should be made for one lay assessor (to be drawn from the body of employment tribunal side members) to assist the judge in all discrimination cases. There will be a strong presumption that judges will sit with an assessor, unless it is unnecessary to do so. Judges will use their discretion to decide whether an assessor is necessary in each individual case, taking into account matters such as the nature of the case, their own experience of dealing with discrimination cases and the wishes of the claimant, for example.

6.90 Currently, assessors in Race Relations Act cases are appointed by the Secretary of State. We have decided to use employment tribunal side members as assessors for non-employment discrimination cases because they already have experience and expertise in hearing discrimination cases. A range of criteria will be used to select those most qualified to act as assessors in the courts. We consider that one assessor will be sufficient to ensure that the appropriate level of expertise is available in civil court cases, because levels of awareness of diversity and discrimination issues amongst the judiciary are significantly higher than in the 1970s (when the Race Relations Act and Sex Discrimination Act were introduced with provisions for two assessors), and judges will have access to appropriate training.

Additional Support Needs Tribunals for Scotland: disability discrimination in education

6.91 The consultation document asked whether the powers of the Additional Support Needs Tribunals for Scotland should be extended to include consideration of disability discrimination cases in education.

Feedback from the consultation

6.92 Well over 90 per cent of the more than 50 responses on this issue were in favour of the proposal.

6.93 The President of the Additional Support Needs Tribunals for Scotland (ASNTS) considered there were strong arguments for extending the jurisdiction of the Tribunals in this manner, including:

- bringing remedies in Scotland into line with the broadly equivalent systems in England and Wales;
- it is more appropriate for disability discrimination cases relating to education to be heard by Additional Support Needs Tribunals, which know and understand the school context and are experienced in dealing sensitively with cases concerning children and young people with additional support needs.
- the Additional Support Needs Tribunals are very new but have established sufficient credibility and experience to warrant an extension of jurisdiction;
- the Additional Support Needs Tribunals would be more accessible, more user-friendly, cheaper and able to act more responsively to the needs of the users;

6.94 The Scottish Executive also strongly favoured this proposal and drew attention to its own specific consultation exercise on this issue which attracted general agreement from all stakeholders. It saw key benefits of the tribunals as:

- being a less confrontational system;
- providing a more holistic approach;
- providing more opportunity for workable remedies;
- being cheaper, quicker and more user friendly.

6.95 Those opposing the proposal included the Sheriffs' Association, which considered that it was not necessary to change a system that appeared to be working and that aligning the jurisdictions was not a sufficient reason of itself to justify the measure. The Faculty of Advocates also raised a number of operational and jurisdictional issues, including the need, if disability discrimination were moved to the tribunal, for the tribunal also to deal with exclusion of disabled pupils (this point, as well as the need for the tribunal also to consider admissions, was also raised by the Scottish Executive).

Assessment

6.96 Despite the concerns of a relatively small number of respondents, we do not believe that any operational and jurisdictional difficulties associated with this transfer of responsibilities will be insuperable. The system works in England and Wales. We are persuaded by the strong arguments put

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forward in favour of the measure, particularly the benefits of a cheaper and more user-friendly system.

Chapter 7: Simplification measures

7.1 We have decided:

- **to retain the requirement for a comparator in direct discrimination claims;**
- **to keep the existing approach to discrimination on the basis of perception and association¹³, except for an extension to protect against discrimination on the grounds of association with transsexual people;**
- **to extend protection from indirect discrimination to transsexual people;**
- **to harmonise the definition of indirect discrimination by adopting the test of particular disadvantage arising from application of a ‘provision, criterion or practice’;**
- **to align the approach to victimisation in discrimination law with that of employment law, by removing the requirement for a comparator for all cases of victimisation in discrimination law;**
- **to harmonise protection for children from victimisation in the education field, where their parent or sibling does a protected act (for example makes a complaint or supports someone else’s complaint) under the legislation. Currently such protection only applies to a protected act done under the Disability Discrimination Act;**
- **to adopt a harmonised approach to the way the law treats the exercise of public functions and the provision of goods, facilities and services, across all protected grounds;**
- **to bring equal pay provisions within the Equality Bill (and harmonise and clarify some aspects);**
- **to retain separate approaches to contractual and non-contractual pay matters;**

¹³ We are considering the implications of the ECJ judgement in *Coleman v Attridge Law* published on 17 July 2008.

- **not to introduce hypothetical comparators into equal pay claims.**

Overall approach to simplification

7.2 The consultation document set out a range of proposals to simplify and harmonise the various definitions and exceptions currently contained in nine major pieces of discrimination legislation and around a hundred ancillary instruments. These proposals are designed to simplify the law and help employers and service providers understand and comply with their responsibilities.

7.3 Our intention is to standardise existing definitions and concepts used in different pieces of discrimination law covering different protected groups unless there is an overriding reason not to. Our proposals are based on the following principles:

- Existing protections should not be eroded;
- Common approaches should be adopted wherever practicable;
- Definitions, tests and exceptions should be practical and reflect the realities of people's experience of discrimination and the way business operates; and
- British discrimination law should comply with the requirements of European law.

The requirement for a comparator

7.4 The consultation document asked for comments on whether we should retain the requirement for a comparator in direct discrimination claims.

Feedback from the consultation

7.5 More than 200 responses were received to this question. Feedback was mixed, with around 75 per cent in favour of retaining the comparator. It was felt that the system was imperfect and any achievable simplification would be welcome.

7.6 Legal groups had varied views on the issue. The Law Society argued that it is unnecessary to retain a comparator and

that claimants should merely have to show that they had been unfairly treated or subjected to a detriment. The Employment Lawyers Association favoured the retention of a comparative approach to discrimination, based on establishing that there had been less favourable treatment, but did not see that a specific comparator at the outset was needed. The Discrimination Law Association agreed. They emphasised the need 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. They recommended amending the current definition of direct discrimination so that it takes place where a person, on the relevant grounds, treats another less favourably than they would treat “other persons”.

7.7 Nearly all of the responses from business organisations were in favour of retaining the comparator. Organisations such as the British Retail Consortium and the Confederation of British Industry, emphasised the importance of comparators, whether hypothetical or real, in establishing a claim, as without that element an individual could ascribe any act or omission to discrimination without needing to show that it would not have happened had they not possessed the protected characteristic. EEF welcomed the proposal to retain a comparator and suggested that problems with the selection of the right comparator may have been overemphasised. During the litigation process, employment tribunals would, EEF argued, step in where it was adjudged that the claimant had initially selected the wrong comparator.

7.8 The vast majority of local authorities and equality stakeholders including disability, gender, race and religion or belief groups were supportive of retaining a comparative element in claims, as without it they felt tribunals would struggle to decide whether there had been less favourable treatment on the basis of a protected characteristic. However, this did not in all cases equate to support for the retention of real or hypothetical comparators.

Assessment

7.9 Currently, for a discrimination case to succeed at tribunal or in court, the person must show that because they possess a protected characteristic (e.g. they are black, or gay, or a woman) they were treated less favourably than someone who does not share that particular protected characteristic. This is the comparator. In respect of pregnancy and maternity leave in employment (as a result of a recent judicial review judgment), and for pregnancy and maternity in the field of goods, facilities and services (following our implementation of the Gender Directive), no comparator is needed and it is enough to show that less favourable treatment is because of pregnancy or maternity.

7.10 The consultation document discussed the case for removing the comparator since it is sometimes difficult to define or identify in a given case. On balance, however, we propose to retain the requirement for a comparator (except for pregnancy and maternity, and pregnancy and maternity leave) since this reflects that discrimination is principally about equal rather than fair treatment and courts and tribunals have flexibility on how to define comparators in each case. Removing the comparator would make it harder to ascribe actions to inequitable treatment based on a protected characteristic, which is a key and long-standing principle governing discrimination law. Organisations would find it more difficult to address actual rather than hypothesised discrimination in the absence of a comparator. A comparator remains one of the best ways to measure “different” treatment.

Perception and association

Feedback from the consultation

7.11 Nearly 250 responses were received on the issue of perception and association. The vast majority were in favour of extending protection to cover discrimination on the grounds of association with transsexual people; our response on this issue, and on the question of providing protection on the grounds of perceived gender reassignment, is in Chapter 9. However, a large number of responses called for protection on the grounds of association and perception in other areas.

7.12 Age Concern England and the Disability Rights Council, for example, argued that discrimination by association should be

extended on the grounds of disability and age. This would provide protection to carers. Similarly The Princess Royal Trust for Carers called for protection for people who associate with disabled people, as families are often affected by discrimination related to their caring responsibilities.

7.13 The London Fire and Emergency Planning Authority were supportive, noting that some fire fighters have experienced discrimination because they were thought to be gay or belong to a distinct religious group.

7.14 Liberty considered that adverse treatment connected to gender, disability status, gender reassignment status and age should be outlawed; and that the definition of direct discrimination should therefore reflect the definition that is already provided in other enactments, including the Race Relations Act and European Directives. This was a view shared by the majority of trades unions, who argued for the proposals to go further than providing protection on the grounds of association with a person going through gender reassignment, to cover association with people of different ages, disabled people and to cover people who were perceived to be undergoing gender reassignment.

Assessment

7.15 In certain fields and protected grounds, the standard protection from discrimination extends so that it is also unlawful to discriminate against someone because they are perceived to possess a protected characteristic or because they associate with someone who possesses a protected characteristic. For example, in the employment field it is unlawful to discriminate against someone because they are perceived to be a certain age or because they associate with someone of Asian origin.

7.16 We propose to retain and strengthen current arrangements so that, broadly, protection explicitly exists on the grounds of race, religion or belief and sexual orientation for both association and perception, in all the areas protected by discrimination law. In Chapter 9 we set out our decision to extend protection to people who associate with transsexual people. In relation to association more generally, we recognise the referral of the Coleman case to the European Court of Justice, which has considered the current exclusion of disability from associative discrimination. We will need

to consider the terms of the judgment published on 17 July 2008 carefully before determining the implications for the Equality Bill.

Harmonising the definition of indirect discrimination

Feedback from the consultation

7.17 More than 200 consultation responses were received to the question of whether to harmonise the definition of indirect discrimination where it applies across the protected grounds, and around 95 per cent were in favour.

7.18 The Equality and Human Rights Commission said they “supported proposals for a simpler definition making the law more accessible to those who believe their rights in relation to equality have been breached”. The vast majority of race groups supported this measure as a means of bringing greater consistency and clarity across discrimination law. The former Commission for Racial Equality welcomed the harmonised definition of indirect discrimination across all strands, recommending that anticipatory actions in respect of indirect discrimination be allowed by adopting the definition of indirect discrimination in Article 2 of the Race Directive.

7.19 Most disability groups were also supportive of the harmonisation proposal, similarly on the basis that this would bring clarity and serve to extend protection.

7.20 All gender groups were in favour of the proposal including the former Equal Opportunities Commission.

7.21 Sexual orientation, age and trades union stakeholder groups were also unanimous in their support of the proposals, which it was hoped would bring consistency, clarity and simplicity to the law.

7.22 All 11 business groups that responded were also in favour of this proposal. The British Bankers’ Association and the Chartered Institute of Personnel and Development thought that it would bring harmonisation and enable better understanding. All local authorities were in favour, for example Dorset Fire Service observed that it should bring more flexibility in considering whether compliance had been demonstrated.

7.23 Some religious organisations and individuals were opposed to aspects of these proposals however, with the Christian Institute and Christian Action Research and Education arguing that including gender reassignment in any definition would restrict religious freedoms.

7.24 The consultation responses were overwhelmingly (94 per cent) in favour of the proposal to adopt the same objective justification provisions. A small number of respondents of various interests agreed that there should be harmonisation but argued that the definition should also include the stipulation that in order to be justified, indirect discrimination should be “appropriate and necessary” rather than “proportionate”.

Assessment

7.25 We welcome the strong support for these proposals. We believe that it is right to harmonise the definition of indirect discrimination to refer to an apparently neutral “provision, criterion or practice” which puts or would put people of the claimant’s group at a particular disadvantage. We believe the concept of “a particular disadvantage” entails a more flexible test than hitherto. It opens up the possibility of expert evidence or witness evidence being used rather than detailed statistical analysis to show particular disadvantage to a particular group of people. This is important for strands such as sexual orientation and religion or belief, where reliable statistics are not available, and where there are issues of privacy involved in gathering data which might provide statistics.

7.26 We consider that the wording “appropriate and necessary” is problematic in domestic discrimination legislation because of the extreme exigency associated with “necessity” in domestic law. If this wording were to be used there might be a risk that that this would be interpreted by the courts as an overly-strict requirement (for example, in order to satisfy the test the provision, criterion or practice would have to be the only possible means of achieving the legitimate aim). We therefore believe it is better to require that the justification be a “proportionate means of achieving a legitimate aim”, and we propose to harmonise the test on this basis.

Victimisation

7.27 In our consultation paper we sought views on whether or not to have the same approach to victimisation in discrimination law as in employment law, by removing the requirement for a comparator. We felt that this would make the law more effective, though it would be unlikely to result in significantly more claims.

7.28 We did not consult on the protection of children from victimisation in schools where their parent or sibling does a protected act, but we have subsequently identified this as an important addition to our proposals since the consultation, in the interest of having a harmonised approach to protection for children in the education in schools field.

Feedback from the consultation

7.29 We received more than 180 consultation responses on the issue of removing the comparator of which around 95 per cent were in favour of aligning the approaches.

7.30 The three former Equality Commissions all welcomed the proposed alignment with the employment law approach to make the law more consistent and easier to understand. The Commission for Racial Equality recommended “a definition of victimisation that combines the current breadth of “protected acts” under section 2(1) of the Race Relations Act, with the proposals to move away from comparators as a legal requirement to establish “unlawful victimisation.”

7.31 All of the other equality stakeholders as well as most local authorities and trade unions supported this proposal. For example, Liberty endorsed the proposals to remove the requirement for a comparator in victimisation law, noting that the need for a comparator had resulted in considerable difficulty, complexity and costs. Many public sector bodies welcomed alignment with the employment law approach as it would make the law easier to understand and apply and would generally lead to a more effective approach to dealing with victimisation.

7.32 Nearly all responses from legal bodies supported our proposal. For example, the Bar Council “welcomed the expansion

and clarification of protection that this proposal brings”. It was also supported by the vast majority of education and research organisations.

7.33 Most business responses also supported these proposals, citing the difficulty in identifying appropriate comparators and that an aligned approach to victimisation would make it easier for business to understand and adhere to.

7.34 Some respondents however, queried the benefits of aligning the law, outlining concerns that differences between the discrimination and employment fields are likely to render alignment ineffective and calling for comparators to be retained to ensure that claimants have actually been treated differently, rather than just being dissatisfied.

Assessment

7.35 As the consultation document explained, currently victimisation in discrimination law is generally defined as less favourable treatment of someone who has made a complaint, given evidence or otherwise contributed towards a “protected act” under the discrimination legislation compared to a person in similar circumstances who has not done any of those things. By contrast, in employment law it is only necessary to demonstrate that the person has suffered a detriment – no comparator is considered necessary. We proposed to adopt this approach across discrimination law. We recommended ending the need for a comparator through aligning with the approach in employment law because this offers a more effective, workable system – not one in which it would necessarily be easier to win a case, but one where attention rightly focused on considering whether the “victim” suffered an absolute harm, irrespective of how others were being treated in the same circumstances.

7.36 Feedback suggests that the proposed change would be widely supported, as it will facilitate a simpler and more effective approach to victimisation, whether relating to a discrimination claim or to an employment claim.

7.37 Although not discussed in the consultation paper, we also intend to harmonise protection for children from victimisation in the education field, where their parent or sibling does a protected act

(for example makes a complaint, whether on their own behalf or the child's, or supports someone else's complaint) under the legislation. This will mean that parents or siblings will not be deterred from making a complaint or the like, for fear of their child or sibling suffering a detriment. Currently such protection only applies to a protected act done under the Disability Discrimination Act. We will extend this protection to the other relevant discrimination grounds. This will correct an anomaly dating from the Special Educational Needs and Disability Act 2001, where the scope of that Act only allowed such protection to be conferred within schools in the disability sphere.

Goods, facilities and services and public functions

7.38 Currently various pieces of discrimination legislation contain differences of approach between the provisions on goods, facilities and services (e.g. accommodation in a hotel or facilities for transport and travel or the provision of library or leisure services) and those relating to public functions (e.g. policing functions or the policy-making activities of local authorities and government organisations), albeit that they reflect the same policy intention i.e. to ensure that all the activities of public authorities are subject to the prohibition on discrimination unless expressly excepted.

7.39 We consulted on whether there would be benefits in adopting a harmonised approach to the way goods, facilities and services and public functions provisions are structured across all protected grounds and whether the exceptions could be streamlined in this area.

Feedback from the consultation

7.40 We received nearly 200 responses to the consultation question on whether to adopt a harmonised approach, of which 96 per cent were in favour of our proposal. This included the vast majority of local authorities, equality bodies and business stakeholders. No group of stakeholders was strongly opposed to the proposals.

7.41 Help the Aged supported “a unified approach to the way goods, facilities and services and public function provisions are structured across protected grounds, plus a streamlining of

exceptions which would avoid a two tier system'. Similar views were expressed by Age Concern England.

7.42 Almost all public bodies were in favour of a harmonised approach, given that the currently differing arrangements across the various strands can lead to administrative burdens for service providers. Many welcomed the clarity the changes would bring for service providers and users in terms of their respective responsibilities and rights under the law. Some organisations – for example The Crown Prosecution Service and Lancashire County Council made their support conditional on the retention of necessary exceptions for specific grounds.

7.43 All three former Equality Commissions also supported a harmonised approach to provisions for goods, facilities and services and public functions. The Disability Rights Commission said that harmonisation would deliver greater clarity and certainty but that care would need to be taken that the proposed changes didn't weaken protection.

7.44 The Chartered Institute of Personnel Development and the Trades Union Congress also agreed with the proposal.

7.45 On the question of whether exceptions should be streamlined, over 75 per cent were in favour. The Age and Employment Network's view was typical: "We believe that exceptions could be streamlined for both private bodies and public authorities. Streamlining exceptions would help to create a more consistent and simplified legislative framework, avoiding a "two tier" system".

7.46 However, the Crown Prosecution Service cautioned that streamlining must be qualified by the availability of exceptions as and when they may be needed. This was a view shared by the City of London who noted that private and public bodies often differ in the nature of the services they provide and so uniformity in exceptions would not be appropriate.

7.47 The former Equal Opportunities Commission did not find varying exceptions across the public and private sectors acceptable, since this would not make for easier to understand law and would not fit with the trend to outsource or privatise public services and functions. And the Trades Union Congress, did not

accept that public authorities should have access to additional exceptions.

Assessment

7.48 We recognise that having different models for goods, facilities and services and public functions for the different protected grounds can be unhelpful for both providers and users of public services. In view of the strong support in the consultation for our proposal, we have decided to adopt a harmonised approach to the way the law treats public functions and goods, facilities and services provisions across all the protected grounds. This will provide greater clarity and certainty. However we will retain any necessary exceptions relating to specific grounds.

7.49 We will also proceed with our proposal to streamline the exceptions in the public functions provisions in order to help create a more consistent legislative framework. However, in the light of the consultation responses we will consider further whether public authorities need more or different exceptions from private bodies.

Harmonising equal pay law and retaining separate approaches to contractual and non-contractual pay matters

7.50 Currently two separate Acts cover UK law on pay-related discrimination between women and men. The Equal Pay Act deals with contractual pay issues. The Sex Discrimination Act deals with discrimination related to discretionary pay, which could include non-contractual bonuses or employee share ownership plans.

7.51 The consultation paper proposed that the distinction between contractual and non-contractual pay matters should be retained.

Feedback from the consultation

7.52 A significant majority (70 per cent) of respondents were in agreement with the proposal to retain the distinction between contractual and non-contractual pay.

7.53 Those who agreed included Women's Voice and the British Bankers' Association, who argued that in simplifying the law care must be taken not to restrict it and in doing so exclude vital areas which need addressing, or leave the law inflexible to future

developments in employment. The Local Government Association also agreed with our proposal to bring the equal pay provisions within a single Equality Act but to retain the current distinction between contractual and non-contractual claims in relation to the different legal concepts and defences available to employers. The City of London argued that there are substantive differences between contractual and non-contractual pay matters, which require different approaches. The Law Society agreed with this view, as they felt that finality is required for contractual claims but case law is increasingly causing difficulties. The British Retail Consortium and Zurich Financial Services supported the proposal that employers should not be liable for aggravated or exemplary damages.

7.54 Those who opposed the proposal, including Unison, Prospect and Liberty, considered the Equal Pay Act to be inflexible, slow and expensive to litigate under. Unison stated that there should be a pro-active duty on employers to ensure equal pay, arguing that the current system is too individualistic and does nothing to address the systemic pay discrimination in the wider workforce. Prospect felt strongly that there should not be a distinction between contractual and non-contractual. They argued that this distinction is unnecessary and goes to the heart of the reason why the Equal Pay Act is so complex and therefore is less effective at achieving its stated aim.

7.55 Some, including Liberty and the Association of Women Barristers, argued that the distinction has the paradoxical result that women often argue that their pay entitlements are non-contractual as a means of keeping their claims out of the Equal Pay Act. The Crown Prosecution Service also wanted the distinction repealed and argued that there is a risk that employers will put in place non-contractual arrangements which are not equitable so as to avoid complaints.

7.56 Legal experts argued that a discrimination model need not lead to uncertainty if there was clear guidance on how the change affected the different types of claims. Furthermore, they did not necessarily agree that an employer could face unlimited aggravated or exemplary damages even where there is no deliberate discriminatory intent and argued that, even if this is the case, the defendant's conduct would have to be shown to be

calculated to make him a profit which would exceed the compensation otherwise payable.

7.57 Some respondents, including the Discrimination Law Association, suggested that a modified form of the contractual approach to pay matters should be retained alongside the standard discrimination-driven approach to gender discrimination.

Assessment

7.58 Having two approaches in the two existing Acts covering contractual terms and sex discrimination more generally arguably adds a level of complexity for those trying to understand the law. This is because different legal concepts and models are used; and there are differences in the way the defences operate; differences in the range of remedies; and different time limits for bringing claims. However, we remain of the view that it is better to retain the current approach to equal pay in principle. This is not least because the implied contractual equality provision provides a valuable guarantee to women in the workforce of their right to be employed on the same terms as men. Incorporating this model in the Bill will provide a valuable opportunity for us to clarify the law where possible, while retaining the connections with current case law.

7.59 In dealing with equal pay in the Equality Bill, we propose to focus on the inter-relationship between the provisions of the two current Acts and to ensure that together the provisions of the two Acts create a scheme of legislation with neither gap nor overlap, which maintains continuity with existing case law. We believe that this approach, together with the changes we are making to improve transparency about the gender pay gap and to increase access to justice through strengthened enforcement mechanisms, offers the best option for making our equal pay law more effective. The Government Equalities Office will work closely with other Government Departments to ensure that the changes support the good progress already being made in relation to public sector equal pay settlements.

Hypothetical comparators in Equal Pay

Feedback from the consultation

7.60 The majority of responses disagreed with our view that allowing the use of hypothetical comparators would be unlikely to give any benefit in practice.

7.61 The majority of gender organisations argued that the Bill should provide for the use of hypothetical comparators in equal pay claims. The former Equal Opportunities Commission and the Fawcett Society argued that this would benefit women who are currently unable to bring claims due to an inability to identify an actual male comparator. The Fawcett Society further commented that the requirement to identify an actual comparator is virtually impossible to comply with for those working in the private sector. Eaves supported the proposals of the Equal Opportunities Commission to allow both hypothetical comparators and representative actions in equal pay claims.

7.62 A number of legal stakeholders also disagreed with our proposal: the Law Society and the Association of Women Barristers, for example considered the use of hypothetical comparators would make a helpful contribution to resolving difficulties which arise in practice.

7.63 Liberty did not consider that the comparator requirement should be retained generally, but if it were to be, they thought that use of hypothetical comparators would likely be of real benefit, particularly where male comparators are difficult to identify, for example in segregated workplaces or occupations.

7.64 The Greater London Authority and London Councils supported the move to allow for hypothetical comparators to be used in claims for equal pay, particularly in areas where occupational segregation is typical and characterised by the undervaluing of work done by women. It would also help where matters such as starting salaries or bonus payments were at issue.

7.65 Of those that agreed with the proposal, the British Chambers of Commerce was opposed to the use of hypothetical comparators as, they argued, they are likely to increase uncertainty for employers and make it almost impossible to ensure that their employment practices are legally compliant. They added that a shift towards hypothetical comparators is also likely to increase the number of weak tribunal claims and in turn the costs for employers and employees. The British Bankers' Association agreed, arguing that hypothetical comparators are unhelpful and create uncertainty. The EEF also strongly supported our proposal to retain the requirement for an actual comparator in equal pay claims. Zurich Financial Services took a similar line.

Assessment

7.66 Respondents seeking the use of hypothetical comparators in Equal Pay cases cite a range of situations in which they consider they would be useful, mostly relating to claims about work of equal value. Some of these involve a gap in time between the work of the claimant and the existence of a comparator (i.e. there used to be someone doing an equivalent job but there is not now); in others the suggestion is that where work is accepted not to be equal, but the pay differential is bigger than the difference in work can justify, the law should be able to correct the situation; another is the case where there is strong evidence of discrimination, but no comparator at all (i.e. the employer says to a woman in his employment "you would have been paid more if you were a man"). Each of these situations presents particular challenges for the law.

7.67 We are concerned that there is a risk that allowing hypothetical comparators in equal pay claims could therefore result in perverse results: for example, at the extreme, a male gardener could potentially then claim the same pay as a caretaker (also male) on the grounds that the work was of equal value, by citing a hypothetical female caretaker as an example. In short equal pay law could be turned into a "fair pay for equal work law", potentially bringing about a large number of claims which would have nothing to do with gender inequality, and possibly even producing results which tend to increase, rather than decrease, the gender pay gap.

7.68 Nor does it seem that the equal pay framework and remedies are appropriate for dealing with cases where work is acknowledged to be different and of different value. We believe

that by adjusting the way the two elements of the law relate, as described above, we can ensure that gender discrimination in pay matters can be addressed without running the risk of allowing claims that have nothing to do with gender discrimination.

Codification of Equal Pay case law

Feedback from the consultation

7.69 Responses on the question of codification of case law were mixed, with roughly half of respondents considering that codification could bring benefits, and half emphasising the advantages of flexibility of case law and the risks of codification. There was no point of law which was widely cited as appropriate for codification. Simplification suggestions tended to focus on matters such as pay audits, representative actions and other transparency and enforcement issues, which have been discussed elsewhere in this document.

Assessment

7.70 We agree that measures which shine a spotlight on the gender pay gap, such as those we have outlined in Chapter 4 (Requiring transparency), and measures which help women access their right to equal pay, such as those we have outlined in Chapter 6 (Enforcement) are the best means of galvanising action to tackle unequal pay.

7.71 We have decided, that alongside the approach outlined above, we will seek to clarify the law in two ways: we will make clear how the burden of proof is to operate in this area of discrimination law, and how genuine material factors should be dealt with by the courts. Beyond this we do not consider that explicit codification would be helpful at this stage, although we note that there are significant cases currently before the higher courts.

Chapter 8: Exceptions

8.1 We have decided:

- **to adopt a simplified overall approach to exceptions by introducing the general occupational requirement test across all the protected grounds, except in the case of disability where such a test is not necessary;**
- **to remove the existing specified general occupational qualifications exceptions applying to gender, colour and nationality;**
- **to consider further whether there is a need to introduce more specific genuine occupational requirement tests in some cases to provide clarity;**
- **to work with the Equality and Human Rights Commission to raise awareness through guidance about exceptions so that people will understand the reasons for them and be encouraged to report misuse of exceptions (for example, in the case of advertising jobs) to the Equality and Human Rights Commission for it to take any necessary enforcement action;**
- **not to introduce a genuine service requirement test;**
- **to consider further what specific exceptions are appropriate as we develop the Bill, in the light of responses to the consultation;**
- **to remove the insurance exception which allows insurers to treat people differently on the grounds of sexual orientation.**

8.2 The consultation document set out the various existing different approaches to exceptions, and asked for views on how these approaches could be simplified. It made clear that our preferred approach was to simplify and harmonise exceptions where possible, while recognising that there needed to be a mix of general and specific exceptions to allow for both flexibility and certainty.

8.3 The consultation focused on a number of specific issues:

- whether there should be a genuine occupational test for all the grounds of discrimination (except disability);
- whether any of the existing genuine occupational qualifications in relation to gender and race should be retained;
- whether there should be a new genuine service requirement test;
- the particular nature of exceptions relating to insurance; and
- (in Annex A) two tables listing specific exceptions that we proposed to retain or to abolish.

8.4 We can now set out the general approach we will adopt to exceptions in the Equality Bill. We received a great variety and range of comments on specific exceptions and we want to consider these further before reaching individual decisions as we develop the Bill. It has been clear to us in reading and analysing the responses that the approach which would find general favour is one which delivers legislation which is flexible and capable of responding to future developments and which does not compound or create legal uncertainty.

Genuine occupational requirement test for all grounds; removal of genuine occupational qualifications

8.5 The consultation document explained how the genuine occupational requirement test already applies, as a result of European Directives, in all the equality strands except gender and race (for colour and nationality), or disability (where such a requirement is inappropriate because the Disability Discrimination Act does not protect non-disabled people). Where a genuine occupational requirement test applies, the law allows direct discrimination by an employer, but only where it can be shown that being of a particular race or religion or belief, for example, is a *genuine and determining* occupational requirement - in other words, a person without that characteristic would not be able to do the job adequately - and it is *proportionate* to apply the

requirement in the case in question. For example, an organisation advising on or promoting gay rights might be able to show that it is essential that its chief executive, as the public face of the organisation, should be gay.

Feedback from the consultation

8.6 The majority of respondents on this question agreed with introducing a genuine occupational requirement test for all grounds of discrimination (except disability). Responses from equality organisations commented that the genuine occupational requirement test was sufficiently broad and rigorous to be used appropriately and proportionately; but that it would be important for the legislation to make clear that the exception should only be used where there is a legitimate objective and the requirement is proportionate.

8.7 Business stakeholders thought that the test would provide consistency and would permit businesses to take a more flexible approach to meet their business requirements. The CBI commented that the Equality and Human Rights Commission should help in providing guidance and assistance.

8.8 Responses from religious stakeholder groups included Christian Action Research and Education which felt that the genuine occupational requirement test had been very important for the protection of religious ethos.

8.9 Among local authorities which responded, some supported the proposal which would clarify the legislation, but some commented on the need for legal certainty. There was also support for clear guidance to help employers understand what is and is not permitted. Responses from police organisations were also in line with the general balance of comments described above.

8.10 Some lesbian, gay, bisexual and transgender stakeholders commented that there were issues around genuine occupational requirements, particularly between sexual orientation and religious organisations. Comments suggested that case law had defined a very tight interpretation and any changes should not weaken this, and that there was a risk of re-opening issues which had already

been resolved with much difficulty. Stonewall did not agree with the proposal.

8.11 Responses from the Trade Union movement supported a genuine occupational requirement test and did not think it necessary to retain the specific exceptions in the Race Relations Act and Sex Discrimination Act as these would be covered under a generic test.

8.12 Some respondents opposed the proposal, commenting that specific exceptions provided more clarity and certainty. Help the Aged felt that adopting this proposal would reduce the level of protection available to workers by providing employers with the opportunity to justify direct discrimination in relation to a much wider number of occupations than under the current tests.

Assessment

8.13 In approaching this issue, the criteria which we have applied are those of simplicity, certainty, clarity, flexibility, minimisation of the possibility of abuse, and future-proofing. As we said above, we recognise – as indeed many respondents also recognised – that there are tensions between these criteria, particularly as between certainty (where complete certainty is probably only achievable through very specific exceptions) and flexibility/future-proofing (because it is impossible to encompass or foresee all the possible situations in which exceptions may be used).

8.14 Inevitably, therefore, a balance needs to be struck. For reasons of simplicity, we consider that our proposal to apply the genuine occupational requirement test across the board (with the exception of disability), extending it to sex and race (colour and nationality) is the right way forward. This also means abolishing the existing genuine occupational qualifications for sex and race (colour and nationality). Among other things, this standard approach will remove the current parallel approaches within the Race Relations Act and therefore reduce confusion. It will also bring the domestic provisions closer to the approach of the relevant European Directives.

8.15 At the same time, we recognise the understandable concern that the removal of the specific genuine occupational qualification exceptions might increase the scope for unjustifiable

discrimination. We are convinced that it is essential to reduce as far as possible the scope for people to abuse the more flexible approach of the genuine occupational requirement test. While we believe that the current genuine occupational requirement test is a high threshold, requiring the exception to be justified by a genuine and determining requirement for the job in question, in moving to this approach across the board, we will also wish to take the opportunity to explore the scope for standardising within domestic law so that the test is framed as tightly and explicitly as possible while, of course, remaining compliant with the relevant European Directives.

8.16 We also think that we can help to ensure that the test works properly by increasing people's awareness of how such exceptions work and of how, if they suspect that an exception has been misused, they can complain so that action is taken. We therefore consider that the Equality and Human Rights Commission could usefully produce further guidance, which might include a statutory code of practice, on the operation of the genuine occupational requirement test. Such guidance should be for the benefit of employers and employees and prospective employees. It could include a range of illustrative examples of cases which do and do not meet the genuine occupational requirement test; as well as advice on how to complain.

8.17 We also received several responses questioning why disability was omitted from the genuine occupational requirement proposal. The Disability Discrimination Act 1995 does not protect non-disabled people. The disability discrimination aspects of the Equality Bill will not do so either. A general occupational requirement for disability is therefore unnecessary.

Genuine service requirement test

8.18 The consultation document asked whether people would support or oppose the introduction of a genuine service requirement test, to justify direct discrimination in the provision of goods, facilities and services, housing and the exercise of public functions. Such an approach could enable service providers or public bodies exercising public functions to objectively justify actions which, while being apparently discriminatory, are a genuine requirement of the service or public function being provided. This

test would be in addition to any specific exceptions necessary for the sake of clarity and legal certainty.

Feedback from the consultation

8.19 There were over 150 respondents on this issue. The majority supported a genuine service requirement test, with a fairly large minority of respondents opposing such a test. On the whole, views were split within categories of respondents.

8.20 Among equality stakeholders, some expressed concern that a genuine service requirement would effectively provide a defence to direct discrimination in the supply of goods and services across all equality strands and that this was unnecessary, likely to lead to increased litigation and posed a significant threat to the level of protection that the legislation currently affords to individuals. Some organisations thought there was merit in the idea, but were cautious about the risk of making it too easy to justify discrimination outside the employment area. The Equality and Human Rights Commission considered that the form of the genuine service requirement suggested in the consultation document would not be acceptable as it could open the door to justification of direct discrimination on all grounds.

8.21 There were also mixed views from health stakeholders, local authorities, and legal bodies. Some supported such a provision because they thought it would allow, for example, single-sex services to be provided; others were concerned that it could be problematic and lead to uncertainty and widespread challenge.

8.22 The majority of responses from Trade Union organisations were not in support of a genuine service requirement. Comments included concerns that, as well as potentially causing more confusion, such a test would make it considerably more difficult for potential claimants to challenge discrimination.

8.23 The majority of responses from religion or belief stakeholders were in favour of a genuine service requirement test because they felt it would, for example, enable churches and other religious organisations to continue to provide services for people of a particular sex – for example mother and child groups, or men’s groups – on the basis that differentiating in this way would increase service take-up by the relevant group. However, the National

Secular Society were strongly opposed because they considered such a test could lead to attempts to justify aims which were not legitimate and would lead to a widening of areas of dispute.

Assessment

8.24 We have noted that, while the majority of respondents on this issue favoured introducing a genuine service requirement, a substantial minority of respondents were opposed and views were divided amongst some categories of respondents. In addition, many of those who supported a genuine service requirement gave examples of the benefits they thought it would provide which are actually examples of positive action measures (see Chapter 5).

8.25 While we can see some advantages in a genuine service requirement test (harmonisation and standardisation with the approach taken for exceptions in the workplace), we consider that there are too many uncertainties and imponderables about how such a test would operate in practice. It is also not clear what advantages or additional scope for action such an approach would bring, over and above the provisions we are bringing forward to allow positive action for under-represented or disadvantaged groups in service provision as well as in employment. In addition, it remains possible that a genuine service requirement test would be incompatible with the Race Directive.

8.26 We have therefore decided not to introduce a genuine service requirement test.

Approach to specific exceptions

8.27 The consultation document sought views on the proposal for a unified approach where exceptions apply to more than one protected ground, where this is appropriate. The consultation document also set out (in Tables 1 and 2 of Annex A¹⁴) specific exceptions that we considered should be retained; and specific exceptions that we considered should be removed.

¹⁴ The tables in Annex A contained two errors in listing the Disability Discrimination Act exceptions for retention and removal. Sections 24B(1) and (3) and 24H(1) and (3) were listed in both tables. They should have been listed only in Table 1 for retention. Section 22(2) was listed in Table 2 for removal. This section should have been listed in Table 1 for retention.

Feedback from the consultation

8.28 A wide variety of views were expressed on these and other specific exceptions in discrimination legislation. These included comments on exceptions for education authorities, the Charity Commission, in relation to disability discrimination and transport, ships and aircraft, volunteering, religious organisations, differences in uniform requirements and height of police officers, immigration and nationality, blood donation and other issues.

Assessment

8.29 We have not reached a final decision on all of these and other specific exceptions and will come to a view as we develop the Bill, in the light of the responses received.

Insurance exception: sexual orientation

8.30 The consultation document noted that the Equality Act (Sexual Orientation) Regulations 2007 included an insurance provision allowing differential treatment on grounds of sexual orientation, where supported by sound actuarial evidence. The intention was that this exception should not continue to apply beyond the end of 2008; and it was noted that the latest Association of British Insurers guidance made clear that insurers should not ask about sexual orientation or negative HIV tests but instead base risk assessment on answers about behaviour, regardless of sexual orientation.

Feedback from the consultation

8.31 There was consensus across the large majority of the more than 150 respondents on this issue that insurers should not be permitted to treat people differently on grounds of sexual orientation beyond 2008. All the responses from representatives of the insurance industry supported the removal of the exception. Comments included a statement from a financial services organisation that they do not use sexual orientation in their underwriting process and calls for premiums to be based on behaviour rather than sexual orientation. The Association of

British Insurers saw no need to differentiate between people in civil partnerships and married couples for insurance purposes. This was an area where there had already been very positive changes made: clear HIV and insurance guidelines had been introduced by the Association of British Insurers already which required insurance companies to treat gay men fairly when applying for life assurance products.

Assessment

8.32 We consider that the views expressed, particularly by those most directly affected, strongly support our proposal to abolish the exception for insurers to differentiate on grounds of sexual orientation. We will therefore abolish this exception in the Equality Bill. If this means abolishing it significantly beyond the end of 2008, we will consider whether there is an alternative suitable legislative opportunity which would allow us to abolish it earlier.

Chapter 9: Gender reassignment

9.1 We have decided:

- **to extend protection against discrimination because of gender reassignment in a number of ways:**
 - **providing protection against direct discrimination for people who associate with people who are planning to undergo, are undergoing or have undergone gender reassignment (but not for those who are – wrongly – perceived to be a transsexual person);**
 - **providing protection against indirect discrimination for people who are planning to undergo, are undergoing or have undergone gender reassignment;**
 - **providing protection against discrimination because of gender reassignment in the exercise of public functions; and**
 - **changing the definition to make clear who is protected from gender reassignment discrimination by ensuring that a person is protected whether or not they undergo medical supervision.**
- **not to extend protection against discrimination because of gender reassignment in schools**

9.2 The consultation document asked for views on a range of questions which are covered individually below.

Direct discrimination on grounds of gender reassignment: protection for people who associate with transsexual people

9.3 Currently, people are protected against direct discrimination if they are perceived to be of a particular race, religion/belief, age or sexual orientation, or because of their association with people who possess one of other of those characteristics. The

consultation paper proposed to extend such protection to transsexual people in relation to association. (Chapter 14 deals with our response on direct discrimination more generally.)

Feedback from the consultation

9.4 The great majority of respondents on this issue supported extending protection for people who associate with transsexual people. And the great majority also favoured going further, to provide protection against discrimination for people who are (wrongly) perceived to be transsexual. Lesbian, gay, bisexual and transsexual groups were strongly in favour of greater protection. a:gender pointed out that discrimination can occur against family and friends of transsexual people but also argued that protection must also be provided on the basis of perceived gender reassignment. Similar views were expressed by other lesbian, gay, bisexual and transsexual groups.

9.5 More broadly, support for extension of protection was expressed by stakeholders such as the former Equal Opportunities Commission, Liberty, Stonewall, the Bar Council (which considered that a consistent definition of protection by association should be applied to all equality strands), the Equality Network, Citizens Advice Bureau, various local and police authorities and others.

9.6 The majority of legal firms responding were in favour of the proposal to protect people who associate with transsexual people.

9.7 The majority of business responses were also in favour of the proposals, including the Confederation of British Industry.

Assessment

9.8 We welcome the broad support for our proposal to extend protection for people who associate with transsexual people – friends, family and others. We believe that such discrimination does take place and we intend to take this measure forward in the Equality Bill.

9.9 The question whether to extend protection to people who are wrongly perceived to be transsexual is more difficult and less clear-cut. We consider that the likelihood of such situations arising in the workplace is relatively low: people who are undergoing, have

undergone or are planning to undergo gender reassignment would normally make this apparent to the employer in some way, and be protected at work by virtue of their having done so.

9.10 We are clear that transsexual people must be protected against discrimination arising from their gender reassignment, whether or not they undergo medical supervision. However, our intention is not to protect a wider group such as transvestite people or others who have no intention or commitment to live life permanently in the sex opposite to their birth sex. Extending protection to perceived gender reassignment would encompass that wider group.

9.11 Therefore, while revising slightly the definition of gender reassignment to ensure that it covers all those we intend to protect (see below), we do not see a case for extending protection against direct discrimination to apply to those who are perceived to be a transsexual person.

Indirect discrimination: extend protection because of gender reassignment

9.12 The consultation document asked whether protection from indirect discrimination should be extended to cover gender reassignment. Of the responses received to the consultation on this issue, very nearly all were in favour of the Government's proposal to extend protection (the response on extension of indirect discrimination to disability discrimination law is dealt with in chapter 14).

Feedback from the consultation

9.13 Around 75 per cent of the more than 200 responses on this issue agreed with our proposal to extend indirect discrimination to cover gender reassignment.

9.14 A wide variety of respondents supported extending protection against indirect discrimination to transsexual people. A number of respondents asked why this could not be done ahead of the Equality Bill, through regulations implementing the Gender Directive. Some also referred to the definition of gender reassignment in this context, arguing for it to be widened. Some

religious bodies asked for exceptions to be permitted so that, for example, religious organisations could exclude transsexual people from belonging to their faith.

9.15 Those favouring speedier and/or wider extension of protection included individuals and organisations such as a:gender which agreed with the proposal to extend indirect discrimination to cover transsexual people, but on a wider basis than the narrow, medical, definition of gender reassignment. Other respondents made similar comments. The Trades Union Congress considered that such a measure was long overdue. A number of organisations supported extension of protection without further comment.

9.16 The Confederation of British Industry was concerned about employers being required to change an individual's records without being able to ask for proof of their transsexual status and said that in order to be workable, a gender recognition certificate would need to be provided and employers should be able to seek confirmation from a doctor that an individual was undergoing gender reassignment. BUPA had no objection in principle but was also concerned at the practical difficulty of dealing with new legislative measures in this field without the requirement of a gender recognition certificate.

9.17 The Church of England called for adequate protection for clergy and others, if protection were extended, to enable them to refuse to alter baptismal and other church registers, if they cannot in conscience accept this. The Catholic Bishops Conference of England and Wales made similar points, as did the Evangelical Alliance which made clear that it did not believe that it is possible for a person to change gender.

Assessment

9.18 We welcome the strong support for this measure which we have decided to include in the Equality Bill. We have not included the measure in the Regulations implementing the Gender Directive because in our view the Directive, as interpreted by reference to case law, covers only direct but not indirect discrimination and our intention was to implement the minimum standards required by the Directive. The Equality Bill is therefore the appropriate way to close this gap in protection.

9.19 We accept that there are good reasons to allow exceptions because of religious doctrine. However, we do not see a reason to allow exceptions where religious organisations carry out public functions (see below).

Protection against discrimination in the exercise of public functions

9.20 The consultation document proposed that there should be protection against discrimination because of gender reassignment, in the exercise of public functions. Public functions are activities carried out by a public authority (or a body acting as a public authority) which are not goods, facilities or service. Generally speaking, they are activities such as setting national or local government policies, policing functions or allocating funds.

Feedback from the consultation

9.21 Nearly 200 stakeholders responded on this issue, with only a handful opposing such an extension. Those in favour represented a wide range of respondents, including transgender groups, medical interests, businesses and legal respondents, as well as the former Equal Opportunities Commission, which provided examples of the reported experiences of transsexual people in healthcare, the prison system, policing and immigration.

9.22 Public authorities (local authorities, health authorities and police) were virtually unanimous in supporting the proposal.

9.23 The main objections to extending protection in this way came from religious organisations. Although some agreed to the principle of protection from discrimination, most qualified this by saying that many Christians believe that gender is given before birth and cannot change.

Assessment

9.24 We welcome the overwhelmingly positive response to our proposal to extend protection from discrimination against gender reassignment to include the exercise of public functions. The main benefits of extending protection in this way are consistency and fairness.

Non-application to schools

Feedback from the consultation

9.25 Around 65 per cent of more than 180 respondents thought that protection should be extended to cover schools. Education providers, local authorities and public service providers were broadly split on this issue; religious groups did not want to extend protection to cover schools; and equality groups, including transgender groups, were generally in favour of including schools.

Assessment

9.26 Although the majority of consultation respondents on this point favoured extending protection against discrimination because of gender reassignment in the exercise of public functions to include schools, we consider that there are good arguments for not applying the public function provisions to schools.

9.27 Some of those who called for schools to be included, including JUSTICE, the National Children's Bureau, some Unions and the Bar Council considered that legal protection is required as a means of protecting young people who are vulnerable to transphobic bullying and harassment in schools. While it is accepted that there may be a small number of children in schools who are undergoing gender reassignment, or intending to do so, the welfare and care of school pupils is already extensively covered by education legislation, common law and the Human Rights Act. For the very small number of cases of such a sensitive nature which may occur in schools, we believe that these provisions are sufficient.

9.28 Our homophobic bullying guidance¹⁵ was drafted in collaboration with Stonewall but does not cover transgender issues. However, we recognise that there could possibly be cases of this nature for schools to deal with and we are therefore currently considering guidance in relation to the bullying of young people because of gender or transgender issues.

Exceptions for organised religion

¹⁵ Issued by the Department for Children, Schools and Families

Feedback from the consultation

9.29 We received more than 1,500 responses on this, of which around 95 per cent agreed that there should be a provision allowing organised religions to treat people differently on the grounds of gender reassignment. Most of the responses supporting an exception were from individuals writing in as part of a campaign. Of the remainder, more than 30 responses considered that there are circumstances in which it is necessary for organised religions to treat people differently on the grounds of gender reassignment, but around 100 took the opposite view.

9.30 There were about a dozen responses from religion/belief organisations, none of which flagged up circumstances which fall within the sphere of the provision of public functions, that is to say when a religious body would itself be carrying out a public function. Where they considered there was a need for exceptions was to protect freedom of religious expression in the context of implementation of the Gender Directive, i.e. the provision of goods, facilities, services and management or disposal of premises.

Assessment

9.31 We want the Equality Bill to take full account of, and strike the right balance between, the rights of transsexual people and freedom of religious expression. This is why we sought views in the consultation on whether there are any circumstances in which it is necessary for organised religions to treat people differently on the grounds of gender reassignment. However, respondents, while identifying some areas for exceptions to do with religious doctrine or practice, did not identify any such circumstances in the area of public functions – that is, in cases where a religious body is itself carrying out a public function on behalf of a national or local authority such as a role in welfare or community care.

9.32 Instead, concerns about exceptions for religious organisations focussed firmly on the areas covered by the Regulations implementing the Gender Directive, i.e. the provision of goods, facilities, services and the management or disposal of premises. Most of the responses received on this issue, including more than 1,000 from individuals, raised issues relating to exceptions on the ground of sexual orientation rather than gender reassignment.

9.33 We consider that the balance we have struck in relation to exceptions because of religion or belief is the appropriate one.

Definition of gender reassignment

9.34 The consultation document asked whether consultees agreed that we should keep the existing definition of gender reassignment. The current definition of gender reassignment is:

“a process which is undertaken under medical supervision for the purpose of reassigning a person’s sex by changing physiological or other characteristics of sex, and includes any part of such a process.”¹⁶

Feedback from the consultation

9.35 Nearly 200 stakeholders responded on this issue, of whom over forty per cent said “yes” (we should keep the existing definition), and nearly fifty-five per cent said “no” (the remaining were recorded as unsure).

9.36 Those who said “yes” largely consisted of local authorities. They favoured the existing definition because, among other things, they thought it reflected a balanced view and is clear and understandable. Others supporting the existing definition included

¹⁶ The different groups of people who might be covered under different definitions are as follows.

(a) Transsexual people. Transsexual people may identify as a member of the opposite sex from a very early age. When young, they may describe it as ‘being born in the wrong body’. At some time in their life, depending on their personal and social circumstances, their family support and their own determination, they will seek medical advice and many will be diagnosed as having *gender dysphoria/gender identity disorder*, i.e. as being a transsexual person. Most will begin living permanently in the gender they are acquiring. With medical support, some will also start hormone therapies and possibly gender reassignment surgeries, but these steps are not essential to being a trans man or trans woman.

(b) Transgender people/gender identity. The terms transgender and gender identity include transsexual people, cross-dressers (transvestites), and other groups of ‘gender-variant’ people. ‘Transgender’ has also been used to refer to all persons who express gender in ways not traditionally associated with their sex. Gender identity covers an individual’s own concept of their gender.

(c) The trans community. This is an umbrella term. The three categories generally used to describe the trans community are transvestite, transgender and transsexual. However, this is very simplistic. Trans people may move from one ‘trans’ category into another over time.

other public service and education providers, and some business organisations.

9.37 Of those who said “no” to retaining the current definition the majority (over forty responses) were individual responses and the next largest response group (16 responses) were lesbian, gay, bisexual and transsexual groups. In many cases it was argued that the definition should be expanded to include people who are not under any medical supervision. Other respondents who favoured widening the definition argued that transsexuals should not be defined by whether or not they chose to seek medical advice.

9.38 In many of these cases, the responses expressed concern that there is a widespread misunderstanding that the reference to ‘medical supervision’ means surgical intervention. The transgender lobby group, Press for Change, in its report on gender reassignment for the Equalities Review, pointed out that in the survey for the report that 38 per cent of respondents did not meet the current definition of gender reassignment.

9.39 The former Equal Opportunities Commission, various trades unions and gender and equality organisations also called for more radical change: they wanted to extend protection under discrimination law beyond transsexual people (see above) to include the wider ‘trans’ community. Suggestions for defining the protected ground included ‘gender identity and expression’, ‘transgender’ and ‘gender variance’.

Assessment

9.40 Responses to the consultation demonstrated that our intentions underpinning the reference to ‘medical supervision’ in the definition of gender reassignment are generally misunderstood. Our intention has never been to limit the protection of discrimination law to transsexual people who undergo ongoing medical supervision or gender reassignment surgery. Rather, the definition is intended to apply to people who make a commitment over a period of time to live permanently in their non-birth gender, with or without requiring surgical intervention.

9.41 The largest number who wanted a change in the definition took issue with the reference to ‘medical supervision’ in the current

definition of gender reassignment. Having analysed the responses received, we have decided to amend the definition to make clear that the reference to gender reassignment being a process taken under medical supervision does not go so far as to require either ongoing medical supervision or gender reassignment surgery.

9.42 This definition does not cover transvestites or others who choose temporarily to adopt the appearance of the opposite gender. Whilst we do not condone anyone being treated badly because of the way they present themselves, we do not consider it appropriate to provide a person who presents themselves temporarily in other than their birth gender with the same protection against discrimination that is available to a person with gender dysphoria.

Chapter 10: Pregnancy and maternity

10.1 We have decided to:

- **extend the public functions provisions to cover pregnancy and maternity;**
- **exclude schools from any increased protection;**
- **make it absolutely clear that it is unlawful to ask a woman to leave a café or restaurant or to get off a bus because she is breastfeeding a baby.**

Providing clarity for public authorities

10.2 The consultation document made clear that we would provide protection from discrimination on grounds of pregnancy and maternity in the provision of goods, facilities or services and the management or disposal of premises, to comply with the requirements of the European Gender Directive¹⁷. However, the Gender Directive does not explicitly apply to the exercise of public functions, but British discrimination law does cover the exercise of public functions as a matter of course. The consultation document therefore proposed that we should make less favourable treatment of a woman on grounds of pregnancy and maternity unlawful in the exercise of public functions.

Feedback from the consultation

10.3 We received over 150 consultation responses to this question, of which nearly all were in favour of our proposal. This included all responding gender bodies, other equality bodies such as Liberty, Fawcett and Justice, the majority of legal stakeholders such as the Discrimination Law Association and the Law Society, the majority of local authorities, and religious organisations such as the Evangelical Alliance and Churches Together in Oxfordshire. The main reasons which respondents gave in favour were consistency and clarity of protection. Women's Voice argued that ensuring that those who are pregnant or new mothers are protected against direct discrimination across the board in public sector activities would give a clear statement that less favourable

¹⁷ Council Directive 2004/113/EC (also referred to as the "Gender Directive")

treatment of women on the basis of pregnancy and maternity is unacceptable. Liberty said that pregnancy remains a key cause of discrimination and disadvantage for women, both within and outside the employment fields. It considered that legislation addressing pregnancy discrimination had repeatedly been found wanting.

10.4 Northumbria Police saw no reason why the protection should not be extended to public functions for as long as health and safety were paramount (and there were sensible exceptions based on those grounds). The Police Superintendents Association of England and Wales also considered our proposal necessary.

10.5 Most of the responses from business stakeholders supported the proposal. Glaxo Smith Kline agreed for reasons of fairness and equity. Some, such as Royal Mail, called for exceptions to be prescribed carefully. The British Library thought that there needs to be some control through objective justification. For example, a new mother using a library with a fretful baby and causing a disturbance might not be acceptable regarding conditions of use and other readers.

10.6 The Association of British Insurers however opposed the proposal, arguing that there may well be legitimate reasons why certain public functions treat women differently as a result of pregnancy and maternity; and recommended that if we do decide to make differential treatment unlawful, we should consult widely and carefully on the language of the provision. Staffordshire County Council reported that they envisaged no benefits relating to their services from the proposal.

Assessment

10.7 We agree with the great majority of respondents that it makes sense to extend protection against discrimination on grounds of pregnancy and maternity to include the exercise of public functions, for reasons of consistency, clarity and fairness. The obligations of public authorities in relation to pregnant women and new mothers will then be consistent with their existing obligations towards other groups (which are already protected against discrimination in the exercise of public functions). This will lead to a fairer outcome for pregnant women and new mothers who otherwise would not have had the same degree of protection.

Excluding schools from any increased protection

10.8 We proposed that it was neither necessary nor appropriate to extend protection on grounds of pregnancy and maternity to school pupils and education in schools.

Feedback from the consultation

10.9 We received nearly 150 responses to this question. Nearly 60 per cent of respondents felt that protection should be extended to cover schools, whilst around 40 per cent opposed.

10.10 A range of local authorities agreed with our proposal and emphasised that schools and local authorities already have duties under education law to deal with these issues. Lancashire County Council, while agreeing with our proposal, requested that the law must apply to pregnant women and mothers in extended school activities, for example, those attending night school classes etc.

10.11 Northumbria Police felt that the purposes for which a pregnant pupil is at school are enshrined in other legislative duties. The Metropolitan Police supported our proposal and Nottinghamshire Police said schools already have flexible and effective processes for addressing the individual needs of pregnant schoolgirls. The British Library agreed to our proposal on the basis that there is already adequate protection for school pupils in pregnancy and maternity.

10.12 BUPA supported our proposal. Zurich Financial Services stated that other legislation and guidance already exists for school age parents, so it agreed that it is not necessary or appropriate to extend protection to school pupils and education.

10.13 The Association of Teachers and Lecturers maintained that although guidance for schools states that pregnancy is not a reason for exclusion from school, research by Sheffield University shows that many pregnant pupils feel compelled to self-exclude because of the inaction and/or intransigence of schools in making concessions to the girl's pregnancy. Pregnant pupils are, for example, more likely to be bullied, they tend to receive no extra support as it is often assumed that the problem lies with the girl when she gets pregnant, and schools might not allow for missed

time at school due to morning sickness or around the time of giving birth. They therefore recommended that we adopt a comprehensive and inclusive approach to pregnancy and maternity.

10.14 Churches Together in Oxfordshire felt that a teenage girl becoming pregnant should not be a reason for depriving them of appropriate education.

10.15 The former Equal Opportunities Commission reported that there are both legal and practical reasons for extending protection on grounds of pregnancy and maternity to school pupils and education. They therefore disagreed with our proposal, as did Liberty, Fawcett and the Children's Rights Alliance for England. Some local authorities also disagreed. Oxfordshire County Council, for example, pointed out that young mothers or expectant young mothers should not only be seen as school pupils or teenagers but must be treated with the same respect as any other woman; they should have access to appropriate services and support during pregnancy and maternity, and should not only have recourse to this through their education provision.

Assessment

10.16 We take a similar approach to this issue as to the question of whether to prohibit discrimination in public functions in schools in relation to gender reassignment. We consider that pregnant pupils, like pupils with gender identity issues, are best supported on an individual basis rather than by treating them equally with other pupils. Schools should therefore have the flexibility to treat such pupils appropriately and sensitively, in a way that will serve with the individual's best interests.

10.17 We will not, therefore, extend discrimination protection on grounds of pregnancy and maternity to school pupils in the Equality Bill. The welfare and care of school pupils is already extensively covered by education legislation, common law and the Human Rights Act. Schools are under a duty to provide suitable education to all children, including those who are pregnant. It must remain open to schools to be able to treat pregnant pupils and pupils who have children differently from other pupils, on the basis of providing the necessary individual care and attention to all. The

general duty of care on schools should ensure that the right treatment is provided.

10.18 Our Teenage Pregnancy Strategy aims to ensure that school age parents receive the support and appropriate tuition they need to complete their compulsory education, with the aim of enabling them to continue in learning post-16. In July 2007, the Department for Children, Schools and Families and the Department of Health jointly published a comprehensive guidance on supporting Teenage Parents Next Steps: Guidance for Local Authorities and Primary Care Trusts.

Breastfeeding

10.19 The consultation document did not ask a specific question about breastfeeding, but in relation to the implementation of the Gender Directive we sought views on the definition of maternity in the provision of goods, facilities or services and premises.

Feedback from the consultation

10.20 We received nearly 600 responses from individuals and a number of organisations including the Breastfeeding Network, Association of Breastfeeding Mothers and Breastfeeding Manifesto Coalition, calling for us to make an explicit protection for mothers to be able to breastfeed in public.

10.21 The National Childbirth Trust welcomed the proposal to make less favourable treatment of women on the grounds of maternity unlawful in terms of breastfeeding. It stated that breastfeeding is recognised as the best way to feed babies for optimal health, growth and development, though breastfeeding rates in the United Kingdom remain low.

10.22 The Association of British Insurers suggested that a 52-week definition of maternity would disadvantage some insurers who currently use a much shorter, medically based definition of maternity of around eight - twelve weeks. It reported that insurance companies could face additional costs, envisaged from claims by new mothers, made over a whole year. AEGON suggested that, while a period of a year would be too long, it would recommend a period of up to six months for protection from maternity discrimination.

Assessment

10.23 We will make it absolutely clear that it is unlawful to ask a woman to leave a café or restaurant or to get off a bus if she is breastfeeding a baby.

10.24 The existing law already implicitly protects breastfeeding women against discrimination when they are in this kind of situation, and we will make it clear when the new Equality Bill is published that this protection continues.

10.25 There is no reason why a breastfeeding mother should feel deterred from going about her normal business like everyone else. And there is every reason to encourage breastfeeding.

Chapter 11: Disability

11.1 We have decided to:

- **replace the separate definitions of discrimination currently contained in Part 3 of the Disability Discrimination Act 1995 with a single definition of disability discrimination for rights of access beyond the employment field, without diminishing the legal protection which disabled people have under current law;**
- **make clear in the Equality Bill that less favourable treatment amounting to direct discrimination will not be justifiable in the provision of: goods, facilities and services; public functions; private clubs; and premises;**
- **replace the different justification tests in disability anti-discrimination law with a single objective justification test;**
- **remove the possibility of justifying a failure to make a reasonable adjustment in the provision of: goods, facilities and services; public functions; private clubs; and premises;**
- **establish a single threshold for the point at which the duty to make reasonable adjustments is triggered;**
- **repeal the Disability Discrimination Act's list of capacities;**
- **create a duty on landlords and managers of premises to make disability-related alterations to the common parts of residential premises, where reasonable and when requested by a disabled tenant or occupier;**
- **make discriminatory advertisements unlawful in relation to the provision of goods, facilities and services for disabled people, as with all other equality strands;**
- **outlaw discrimination against disabled people in the provision of goods, facilities and services in respect of relationships which have ended, as part of a harmonisation measure across all equality strands;**

- **change the law to permit both disabled and non-disabled people to make a complaint about a term of a contract etc which might be unlawful under disability anti-discrimination law;**
- **harmonise the law by providing for the burden of proof in non-employment disability discrimination cases to be transferred to the respondent once a *prima facie* case has been made;**
- **repeal our power to exclude certain cancers from the automatic coverage disability anti-discrimination law gives to people diagnosed with cancer; and**
- **amend the law so that the duty on private clubs to make reasonable adjustments will apply fully in respect of prospective members and prospective guests.**

The definition of disability discrimination

11.2 Significant improvements to the Disability Discrimination Act 1995 were made by the Disability Discrimination Act 2005. In particular, new provisions covering discrimination beyond the employment field were added. As a result, the Disability Discrimination Act has evolved to contain separate definitions of discrimination for: goods, facilities and services; public functions; private clubs; and premises. These separate definitions of discrimination have attracted criticism for making the law complex and difficult to follow. The consultation paper proposed that the law should be simplified by replacing the separate definitions with a single definition of disability discrimination, subject to the overriding principle that doing this should not result in any diminution of disabled people's rights.

Feedback from the consultation

11.3 Around 75 per cent of a total of more than 180 responses were in favour of this proposal.

11.4 Among these, there was evident support for the former Disability Rights Commission's recommendation that a new single definition of discrimination should be formulated which not only simplifies the law but also strengthens protection for disabled people. The Disability Rights Commission argued that this would be achieved by basing the single definition on that relating to employment, so that direct discrimination is also specifically prohibited in relation to the provision of goods, facilities and services etc., and so that it is no longer possible to justify a failure to make a reasonable adjustment in these areas.

11.5 Some responses from a variety of stakeholders emphasised that it would be important to formulate a new definition carefully to ensure that there would be no loss of protection. The Bar Council, while also agreeing that it would be useful to harmonise the definitions, cautioned against creating a single definition that was unwieldy and difficult to apply, thus creating new uncertainty for disabled people and businesses. Several organisations, including Mencap and the National Autistic Society, indicated that they agreed in principle with a single definition, but that they would need to see what the new definition looked like before fully endorsing it.

11.6 Among dissenting responses, Lancashire County Council were against the proposal because they believe that the current separate definitions mean different things, while Sheffield City Council were in favour of keeping the existing definitions unless a new single definition actually improved protection.

11.7 Responses from a range of organisations and individuals also commented on this question - often in support of the Disability Rights Commission's call for a fundamental change to the definition of disability - by stating the case for new law which would abolish the current requirement that a person has a substantial and long-term impairment. A single definition of discrimination could then contribute to legislation which focuses on the act of discrimination, and not the extent and impact of the impairment.

Assessment

11.8 We agree that care will need to be taken to ensure that the new single definition of disability discrimination is formulated so

that there is no diminution of disabled people's rights, and will not compromise any of these rights merely to simplify the law.

11.9 We have also considered the case made by the Disability Rights Commission and others for the new definition to be modelled on the definition of discrimination contained in the Disability Discrimination Act's employment provisions. Among other things, this would mean creating specific provision making it clear that treatment in the provision of goods, facilities and services etc. which amounts to direct discrimination would be an unjustifiable act.

11.10 In considering this, we also took account of concern expressed in some responses that the proposal to adopt a single overarching 'objective justification' defence (see below) for disability anti-discrimination law would widen the scope for justifying disability discrimination too widely. The Disability Rights Commission, in supporting the proposal, argued that this new single justification defence would make it all the more important to outlaw direct discrimination in the provision of goods, facilities and services etc.

11.11 We are persuaded that the case has been made that treating a disabled person less favourably on the ground of his or her disability should not be permissible in areas beyond employment and occupation. Outlawing direct discrimination in this way will address concerns that a single objective justification defence would give too much scope for justifying discrimination, and will simplify disability anti-discrimination law by aligning more closely the provisions governing access to goods, facilities, services etc with those for employment and occupation.

Justification defences in disability anti-discrimination law

11.12 All anti-discrimination law contains provisions, known as justification defences, which enable an employer or service provider to justify their actions in certain situations where Parliament has decided that it should be possible for discrimination to be lawful. At present the Disability Discrimination Act contains a variety of justification defences, covering a range of circumstances in the employment field and in the provision of goods, facilities and services etc. We want to replace these different justification

defences with a single 'objective justification' test, which would require that the conduct in question is 'a proportionate means of achieving a legitimate aim'. This is a test which is already well established in British anti-discrimination law, notably as a justification defence for an act which might otherwise amount to unlawful indirect discrimination.

Feedback from the consultation

11.13 Around 85 per cent of nearly 160 responses were in favour of the proposal.

11.14 Those who supported the proposal included the former Disability Rights Commission, the Disability Charities Consortium and the Employers' Forum on Disability. Several, including Leonard Cheshire and Capability Scotland, explicitly welcomed the effect this would have on making the justification regime more stringent by removing the two partly subjective tests (described below in the *Assessment* section).

11.15 Several responses, including that of the Confederation of British Industry, stated the need for clear guidance if this new justification regime is introduced.

11.16 A number of responses from legal organisations were also in favour of a single objective justification defence. Of these, the Discrimination Law Association, Justice and the Law Society all supported the Disability Rights Commission's call for the definition of objective justification to be based on that contained in European law. This would mean that the action - or 'means' - taken by the employer or service provider would need to be 'appropriate and necessary' rather than 'proportionate' in order to be justifiable. The argument for this approach was that the inclusion of the concept of necessity would provide a more robust test.

11.17 The Disability Rights Commission also argued that the introduction of a single objective justification defence would mean that it would then be important to make direct discrimination a separate act in the provision of goods, facilities and services etc. which would not be justifiable.

11.18 The Bar Council was against the proposal, arguing that it would create a vague test in place of the current restricted set of

circumstances where discrimination can currently be justified, and would weaken protection for disabled people by removing these restrictions. This concern was shared by the National Deaf Children's Society, which argued that a generalised test which was likely to be vaguer was likely to discourage disabled people from challenging discrimination through litigation.

11.19 Inclusion Scotland and ECAS (a Scottish organisation for physically disabled people) similarly argued for the retention of the current regime, and the Mental Health Act Commission and Staffordshire County Council could only support the proposal if the range of circumstances in which justification would be possible was not widened.

11.20 Some responses from the employer/service provider perspective were against the proposal, and argued variously: that the proposed new test would tip the balance of rights and responsibilities too far against those with duties; that the subjective elements contain important safeguards for those with duties under the Disability Discrimination Act; and/or that the proposal would not simplify the law, but would lead to more complexity and uncertainty.

11.21 The Association of British Insurers and AEGON (a life insurance and pension company) argued for retaining the current specific justification defence for the insurance industry, even if the Government decides to proceed with the proposal for a single objective justification defence in all other circumstances. The Association of British Insurers asserted that the current arrangements work well, and that they could not see the justification for changing existing arrangements, nor the consumer benefit that would arise from doing so.

Assessment

11.22 Although we have set out the arguments made against this proposal in some detail, there was a clear overall majority in favour of it, and we therefore intend to proceed with including it in the Equality Bill. We note the concern expressed in some responses about the risk of creating uncertainty about the law, and agree that guidance will serve an important role in enabling both those with rights and those with responsibilities to familiarise themselves with the new regime. It should also be remembered that this will not

introduce a new concept into British law: 'objective justification' is already well established in anti-discrimination law covering indirect discrimination.

11.23 We also note that disagreement with the proposal has been expressed both from the points of view of employers and service providers and also of disabled people, to the effect that the balance between rights and responsibilities would be disturbed.

11.24 Some employers and service providers were concerned that the new objective justification test would be more stringent than those currently contained in the Disability Discrimination Act because it will remove two partly subjective elements which courts and tribunals currently take into account in deciding whether unlawful discrimination has occurred. For discrimination in employment, an employer can currently justify their action if the reason for it 'is both material to the circumstances of the particular case and substantial'. Outside the employment field, service providers etc can currently justify their refusal to provide a service if they reasonably held the opinion that one of the specific Disability Discrimination Act's justifications applied and it was reasonable to have that opinion given all the circumstances of the case.

11.25 On the other hand, some equality groups were unhappy that, while the removal of these partly subjective elements will create a stricter test for employers and service providers, the current restrictions on the use of justification defences would also be removed, widening the range of circumstances where it is possible to justify discrimination.

11.26 We have considered these contrasting views, but believe the appropriate balance between rights of disabled people and responsibilities of employers and service providers etc will be maintained: while the justification test will be stricter, it will also be available in a wider range of circumstances.

11.27 We note that several responses in favour of the proposal called for the formulation of the objective justification defence to be based on that contained in European law, i.e. based on the formulation of 'appropriate and necessary'. Our position on this proposed formulation is discussed in Chapter 7.

11.28 We are, however, persuaded that a specific justification defence for the insurance industry should be included in the Equality Bill, because we do not wish to risk disturbing the current competitive market in insurance products for disabled people. The specific justification contained in the Disability Discrimination Act already requires that any defence against a claim of disability discrimination should be based on factual information, such as actuarial or statistical data or a medical report. The insurance industry will therefore still need to produce a high level of objectively demonstrable evidence in any case brought against them.

Removing the justification for a failure to make a reasonable adjustment

11.29 The Disability Rights Commission and others also called for the new definition of discrimination for service providers etc to align more closely with the equivalent employment field provisions, by specifying that a failure to make a reasonable adjustment could not be justified.

11.30 We have decided that including such a provision would not make the adjustment duty for service providers etc any more onerous, because they would still be required only to make adjustments which were reasonable in all the circumstances of the case. On balance, we consider that the current possibility of justifying a failure to make an adjustment is unnecessary and superfluous: if the failure to make an adjustment could be justified, it would be unreasonable in any case. Removing the justification provision will also simplify the law by aligning the employment and non-employment disability anti-discrimination provisions more closely.

Establishing a single threshold for the point at which the duty to make a reasonable adjustment is triggered

11.31 The duty to make reasonable adjustments is one of the cornerstones of the Disability Discrimination Act. However, the circumstances in which the duty arises, also known as the threshold or trigger, differ according to which area of life is concerned. There are two levels of threshold: one which applies in the employment and education fields, and another in relation to the

provision of goods, facilities and services etc.

11.32 Currently under the law, employers have a duty to consider making a reasonable adjustment whenever an employee or job applicant would be placed at a 'substantial disadvantage' compared with other non-disabled employees/applicants if no adjustment were made. This 'substantial disadvantage' trigger also applies to the Disability Discrimination Act's education provisions.

11.33 In the case of the provision of goods, facilities and services etc, currently service providers must consider making an adjustment when a failure to do so would make it 'impossible or unreasonably difficult' for the disabled person to use the service.

11.34 We intend to simplify the law by introducing a single threshold for making reasonable adjustments, using the threshold that currently applies to the Disability Discrimination Act's employment and education provisions - that is, whenever a disabled person would be at a 'substantial disadvantage' compared to a non-disabled person if no adjustment were made.

Feedback from the consultation

11.35 Over 80% of around 170 responses were in favour of this proposal, including the Disability Rights Commission, Disability Charities Consortium and all major disability equality groups. The Disability Rights Commission, for example, agreed that a single threshold 'would make it clearer to disabled people, employers and service providers what their rights and responsibilities are under the law'.

11.36 The majority of private sector organisations who responded were also in favour of the proposal. The Employers' Forum on Disability reported however that, while its public sector members agreed with the proposal on the basis that it would provide greater clarity, its private sector members were concerned that it could cause confusion for service providers when deciding at what point a reasonable adjustment needed to be considered.

11.37 Other private sector responses which were not in favour of the proposal were mostly concerned about the potential additional

costs which would be imposed by the proposal. This concern was also registered in responses from other sectors.

11.38 The British Property Federation, while not objecting to adopting a single threshold in the main, disagreed with applying this threshold in respect of our proposal to provide for reasonable adjustments to the common parts of let residential premises (see below), and the Association of Residential Managing Agents also expressed reservation in this specific regard.

11.39 The Bar Council commented that the 'substantial disadvantage' wording makes the trigger unclear and that the wording 'must be explicit and intelligible to the lay person'. This was echoed in Capability Scotland's and the Crown Prosecution Service's responses, which suggested using 'particular disadvantage', and also in that of the National Deaf Children's Society, which suggested putting the accepted meaning of 'substantial' in the Act itself by using 'more than minor or trivial disadvantage'.

11.40 Other responses did not call for a new legal formulation of the trigger, but pointed out the need for clear guidance to illustrate the concepts of reasonable adjustment and substantial disadvantage.

Assessment

11.41 The majority of those who responded on this point agreed that this proposal would make it easier for disabled people, employers and service providers to understand their rights and responsibilities under the legislation.

11.42 We note the concern expressed in some responses that service providers etc would incur increased costs in order to comply with this proposal. Our calculations of the additional cost to service providers were published in the Impact Assessment which accompanied the consultation and stated: 'this change will increase the number of reasonable adjustments by between one per cent and three per cent and therefore the annual cost will be between £2 million and £6 million, based on the average cost of adjustments.'

11.43 However, service providers will benefit from the increased

customer base that will be available to them and, while there will be an increased requirement to make adjustments, this will be substantially mitigated by the fact that these adjustments will continue to be required only where *reasonable*. Factors such as the cost and practicability of making the adjustment, and the resources available to the service provider may all be taken into account in determining what is reasonable.

11.44 We do not agree that a case has been made for 'substantial disadvantage' to be replaced with 'particular' or 'more than minor or trivial' disadvantage: we believe that the meaning of 'substantial' is already well-established, having been in place since the Disability Discrimination Act first came into force in 1996, and expresses appropriately the level at which the threshold is reached.

Indirect discrimination in disability discrimination law

Feedback from the consultation

11.45 The consultation paper proposed that protection from indirect discrimination should be extended to cover gender reassignment, but that it should not be explicitly introduced into disability discrimination law. Around 75 per cent of respondents agreed with this. However, it is not possible to specify a percentage of responses for or against the disability aspect of this proposal because the question covered gender reassignment as well, and not all respondents took a view on both parts of the question. The responses in respect of gender reassignment are dealt with in Chapter 9.

11.46 Respondents who supported a different approach to protection for disabled people in this area included organisations representing disabled people and equality organisations more generally. They tended to contest the argument that reasonable adjustments adequately protect disabled people and called for indirect discrimination to be extended, or supported the Disability Rights Commission's proposal for an 'anticipatory duty'. This would place a duty on employers to consider in advance reasonable adjustments that might be needed by disabled applicants or employees.

Assessment

Indirect Discrimination

11.47 We are considering the implications of a recent House of Lords judgement which has relevance to the issue of indirect discrimination and disability anti-discrimination law.¹⁸

An anticipatory duty on employers to make adjustments

11.48 We do not intend to change the employer's duty to make reasonable adjustments so that it is anticipatory. We are, of course, strongly in favour of employers factoring disability considerations into all aspects of their business operations, and there is already a sound economic incentive for them to do so when, for example, undertaking building refurbishment or purchasing new communications and information technology systems.

11.49 However, the employer/employee relationship differs significantly from the service provider/customer relationship in that employees spend a large part of their lives in their working environment. For this reason, it is much more important that adjustments made for them are tailored to the individual and to the specific demands and structure of the job, in consultation with the employee him/herself.

11.50 The anticipatory activity described above is not capable of this individual focus. There is a risk that introducing a legal anticipatory requirement could lead employers to spend money on adjustments which turned out to be unsuited to disabled people they subsequently employed. And having spent money on these anticipatory measures, they might have insufficient remaining resources to make adequate individual adjustments.

Repealing the Disability Discrimination Act's list of capacities

11.51 The Disability Discrimination Act generally defines a disabled person as someone with a mental or physical impairment

¹⁸ Lewisham London Borough Council v Malcolm [2008] UKHL 43; on appeal from [2007] EWCA Civ 763

which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. In addition, the Act currently requires that the impairment must affect one or more of a list of 'capacities', which are:

- mobility
- manual dexterity
- physical co-ordination
- continence
- ability to lift, carry or otherwise move everyday objects
- speech, hearing or eyesight
- memory or ability to concentrate, learn or understand
- perception of the risk of physical danger.

11.52 Therefore, if a person making a complaint of disability discrimination in a court or tribunal is challenged to prove that they are disabled, they would have to give evidence to show how their impairment had an impact on at least one of these capacities.

11.53 We announced in the consultation paper our intention to repeal this list of capacities. This decision was based on evidence indicating that the list served little or no purpose in helping to establish whether someone is disabled in the eyes of the law, and was an unnecessary extra barrier to disabled people taking cases in courts and tribunals. Furthermore, the list of capacities has led to some confusion, and has frequently been misinterpreted as a list of day-to-day activities. There is also evidence that it can be harder for people with a mental health condition to demonstrate their impairment's effect on one of these capacities (although revised statutory guidance on the definition of disability has alleviated this).

Feedback from the consultation

11.54 Around 85 per cent of a total of almost 160 responses were in favour of the proposal. Commonly, responses mentioned the difficulties that people with mental health or short-term but recurrent conditions had experienced in showing how their impairment impacted on one or more of the capacities. Some responses, in agreeing with the proposal, recommended that further detailed guidance for tribunals and/or employers should be provided on the definition of disability if the list of capacities is removed.

11.55 The Disability Rights Commission, while agreeing that repealing the list would help some disabled people who currently struggle to exercise their legal rights, argued that we could do more by pursuing the approach recommended by their review of the definition of disability. This would involve the removal of the requirement that a person's impairment must be long-term in order to satisfy the law's definition of disability. This argument was supported in a number of other responses, including several major disability organisations.

11.56 Responses which expressed either outright opposition to removing the list, or a preference for retaining it, all came from organisations which felt that the list had a useful role in clarifying the law. A number of these responses, such as that of the National Disabled Staff Network, also suggested that additions could be made to the list of capacities to make it easier for people with a mental health condition to show that they had legal protection as a disabled person.

Assessment

11.57 We remain committed to simplifying the definition of disability by removing the list of capacities, and the majority of responses were in favour of this. While noting the argument that the list provides useful clarity, we also note the acknowledgement in other responses - such as the Disability Rights Commission's - that guidance available to courts, employers etc has proved to be effective in explaining the definition of disability. A number of responses in favour of the list's removal emphasised the need for clear guidance, and we agree that this is an important element in helping both those with rights and responsibilities to navigate and understand the law.

11.58 We also note that the proposal has prompted a number of calls, led by the Disability Rights Commission, for a fundamental overhaul of the definition of disability. However, we continue to believe that disability discrimination law should continue to protect only those people who are disabled in the generally recognised sense of that term - i.e. because they have a long-term or permanent impairment with substantial adverse effects - and that a substantial change to the definition risks broadening coverage of disability discrimination law too widely.

11.59 Furthermore, our proposals for the Equality Bill will have wide implications for those with rights and duties under anti-discrimination legislation, and it is only recently that significant changes to the law were introduced by the Disability Discrimination Act 2005, which have still to bed in. We do not consider that it would currently be right to add significantly to the changes we have already made or plan to introduce by recasting radically the definition of disability as the Disability Rights Commission proposed.

Adjustments to Common Parts

11.60 In the consultation paper, we proposed to place a duty on landlords to make disability-related alterations to the common parts of residential premises (hallways, stairs etc), where reasonable and when requested to do so. This would apply where the disabled person is placed at a substantial disadvantage compared to a non-disabled person. Failure to comply with the duty would be treated as discrimination. This proposal followed a recommendation of the Review Group on Common Parts in its report of 2006.¹⁹

11.61 Some disabled people can become confined to their own homes because their use and enjoyment of the common parts of the premises, including access to and from their own property, can be limited without reasonable adaptations being made. Our proposal will increase disabled people's independence by allowing them to request and have installed disability-related alterations to the common parts where it is reasonable to do so. The tenant would be responsible for paying for the alteration and any reasonable maintenance costs.

Feedback from the consultation

11.62 Over 90 per cent of more than 150 responses on this issue were in favour of the proposal.

¹⁹ The Review Group on Common Parts was established in 2005 to review the law on common parts of residential premises and to make recommendations to Government in order to improve access for disabled people. It was made up of a broad spectrum of housing and disability experts, and of representatives of relevant Government departments. A range of other organisations was also involved in its work.

11.63 Respondents who supported the proposal included disability groups, local authorities, public service providers and private individuals. The main benefit identified by most respondents was lowering the risk of disabled people being isolated in their homes.

11.64 However, the main concern raised, both by individuals and organisations that were for and against the proposal, was the issue of the cost of the alterations. Many private individuals raised the point that disabled people would not be able to afford the alterations, so few alterations would be made and the current situation would prevail. Some councils were concerned about the extra burden that placing the costs on the disabled person would mean. Stonewall Housing made the point that all alterations would be to the benefit of all tenants, whether disabled or not, and so the costs should not be the sole responsibility of the disabled tenant or occupier.

11.65 Several responses mentioned the importance of the Disabled Facilities Grant, and Leonard Cheshire suggested that, without adequate funding, only more prosperous disabled people would benefit. Some responses went further to argue that the disabled person should not have to pay for the alteration. The Access Association's response suggested including it in tenants' service charges. The Royal National Institute of Blind People questioned the extent to which a disabled person should have to pay for an alteration if this could have been borne by the landlord or manager at no additional cost as part of a refurbishment programme.

11.66 Responses from landlords' organisations were broadly in favour, but the British Property Federation, which was a member of the Review Group on Common Parts, said that its support was conditional on full consultation. The National Landlords Association stated that the terms 'reasonable' and 'common parts' should be clearly defined in a statutory Code and guidance respectively. The Chartered Institute of Housing also stated the case for a Code of Practice, and recommended that all new accommodation and services should ensure access to / use of premises for disabled people.

11.67 Opposition to the proposal was prompted mainly by concern about the additional burdens it would place on landlords, including

court costs incurred in the event of a dispute. Enfield Council, while not expressly registering opposition in their response, raised queries about funding for costs of initial compliance and for setting up mechanisms to enforce repayment, and on provisions regarding recouping costs where tenancies are short-lived. The British Property Federation stated that it was opposed to the linked proposal to lower the threshold for making reasonable adjustments to that of 'substantial disadvantage', and the Association of Residential Managing Agents also expressed a reservation about that proposal.

Assessment

11.68 We welcome the clear support for this proposal whilst appreciating the concerns expressed about the question of who pays for a disability-related alteration to common parts. However, our primary aim is to facilitate disability-related alterations to common parts in order to improve disabled people's opportunities to participate in society.

11.69 On balance, we consider it appropriate to introduce a new measure to require landlords and managers of premises to make disability-related alterations to the common parts of residential premises, where it is reasonable to do so, and when requested by a disabled tenant or occupier.

11.70 However, this does not mean that forward-thinking landlords, who can see the benefits of having accessible housing to let, should not install alterations at their own expense, or during refurbishment of the premises as suggested by the Royal National Institute of Blind People. The Review Group on Common Parts noted that some private and social landlords were already providing alterations for disabled tenants. Good practices and detailed information about the proposal would be included in relevant Codes of Practice.

Other improvements to disability anti-discrimination law

Discriminatory advertisements

11.71 Under current disability anti-discrimination law, discriminatory advertisements are only unlawful in relation to employment and education. In contrast, such advertisements are also already unlawful in race, gender and sexual orientation legislation in the provision of goods, facilities and services. We consider that the law should be harmonised across all strands, including disability, so we have decided to make this change in the Equality Bill.

Relationships which have ended

11.72 Currently disability anti-discrimination law outlaws discrimination by an employer of a disabled person who no longer works for them, i.e. where the employer/employee relationship has ended.

11.73 While the Race Relations Act extends this protection to cover the provision of goods, facilities and services, disability legislation, in common with all other equality strands except race, does not. And whereas such protection exists for disabled students who have left further or higher education, schools are excluded.

11.74 We intend to harmonise the law so that all equality strands will benefit from the same protection as now applies to race. We will therefore extend protection from disability discrimination in respect of relationships which have ended to cover the provision of goods, facilities and services and the provision of education, including in schools.

Collective agreements and validity of contracts

11.75 All of the current anti-discrimination laws contain provisions which invalidate any terms of contracts, collective agreements or rules of undertakings which would be unlawful, or would require

someone to act unlawfully, under the employment provisions of those laws.

11.76 The employment provisions of the Disability Discrimination Act, however, restrict the right of complaint about any such term in a contract etc to someone who is a disabled person. We have decided to harmonise the law by extending this provision to permit non-disabled people to make a complaint in these circumstances.

Reversing the burden of proof

11.77 Current anti-discrimination law for all equality strands specifies that, once it has been established that there is a discrimination case to answer, the person making the complaint no longer has to prove that unlawful discrimination occurred. Instead, the burden of proof is reversed so that it is up to the subject of the complaint (the respondent) to show that discrimination did not occur.

11.78 However, the Disability Discrimination Act is out of step with other anti-discrimination law in that the burden of proof is reversed only in employment cases, and not for the goods, facilities and services and education fields. We have decided to harmonise disability anti-discrimination law with the other equality strands so that the burden of proof is reversed in such cases.

The power to exclude certain cancers from disability anti-discrimination law coverage

11.79 The Disability Discrimination Act 2005 introduced a regulation-making power to exclude certain types of cancer as a disability for the purposes of the law. At the time, the intention was to exclude some minor cancers where a complete cure and full recovery would not be in doubt. However, after consulting in 2005 on the use of the power, we concluded that it would be too difficult to exclude any minor cancers without also risking the exclusion of more serious conditions.

11.80 We have no intention of exercising this power, and we have therefore decided to repeal it.

Reasonable adjustment duty to prospective members and prospective guests in private members clubs

11.81 The Disability Discrimination Act 2005 extended protection for disabled people to cover access to private clubs (with 25 members or more), and it was always the intention that prospective members and prospective guests would be included in this protection. However, it has become apparent that they do not currently have full coverage: the reasonable adjustment duty for these cases covers policies, practices and procedures, and auxiliary aids, but it does not cover physical features.

11.82 We will rectify this in the Equality Bill by including prospective members and prospective guests of private clubs in all aspects of the reasonable adjustment duty.

Chapter 12: Private clubs

12.1 We have decided to make it unlawful for private clubs with 25 or more members to discriminate:

- **between men and women members where they have mixed-sex membership (but this would not apply to single-sex clubs);**
- **on grounds of religion or belief, (but this would not apply to clubs for members of a particular religion or belief);**
- **against pregnant women or young mothers, but to allow specific clubs for pregnant women and young mothers;**
- **against transsexual people, but to allow specific clubs for transsexual people;**
- **against people on grounds of their age, (but this would not apply to clubs for people of particular ages);**
- **against guests on any of the above grounds, as well as on grounds of race or sexual orientation.**

Feedback from the consultation

12.2 We consulted on whether to standardise protection against discrimination in private clubs, across the equality strands. It is already unlawful for a private club (with 25 or more members) to discriminate against its members, associates or applicants for membership on grounds of race, disability or sexual orientation. In addition, private clubs are also prohibited from discriminating against disabled people as guests. This leaves gaps in protection from discrimination against members on grounds of sex, religion or belief, pregnancy and maternity, gender reassignment and age; as well as there being no protection from discrimination against guests other than disabled guests.

Sex

12.3 We received nearly 200 consultation responses to the question whether to extend protection on grounds of sex in mixed-sex clubs, of which about 75 per cent were in favour. These included the Equality and Human Rights Commission, the Fawcett Society, Justice, Unison, the Equality Network and the National Secular Society. The main reason for supporting the proposal was given as fairness and consistency of protection across the equality strands, since it is already unlawful for private clubs to discriminate on grounds of race, disability and sexual orientation.

12.4 The majority of business responses (including representatives of the leisure industry) were also in favour of the proposal. Among the golf clubs in favour, England Golf and the English Ladies Golf Association agreed that protection should be extended as this would have, in the long term, a beneficial impact on the participation of women in golf. The Royal Yacht Club also supported the proposal on the basis that, where a club is open to all and is not established for a particular group, there should be no place for discrimination. However, the Royal Yacht Club pointed out that clubs should still be able to have different classes of membership which attract different fees and offer different benefits provided these were open to all; and that because of the very competitive nature of sports clubs, they should be able to run competitions which were limited to particular sex/age/ability.

12.5 A number of golf clubs were against this proposal because of concern that the new law might actually lead to a reduction in female membership as female members would have to pay full membership. One golf club asked for a five year period to phase in the changes, during which female golfers could elect to pay full membership or not.

Religion or belief

12.6 Half of the responses from religion or belief groups supported the proposal to extend protection on this basis. The National Secular Society, however, considered that the trigger of 25 members was too high (a significant number of other respondents also queried the rationale for the threshold of 25 people). The Church of England cautioned that it is important to

ensure that provisions in this area do not confuse the issue in relation to religious organisations. The Catholic Parliamentary Office was concerned that clubs would be prevented from selectively choosing members who uphold their religious principles.

Other

12.7 Some respondents, for example, a:gender, Press for Change, and the Equality Network argued for protection to be extended to transsexual people and pregnant women and new mothers explicitly.

Assessment

12.8 In the light of the consultation responses, which broadly supported the consultation proposals, we intend to make it unlawful for clubs with 25 or more members to discriminate against a member, associate member or prospective (applicant) member because of their sex, religion or belief, because they are intending to undergo, undergoing or have gone through gender reassignment or because they are pregnant or a new mother; or because they are of a particular age.

12.9 We consider that there are good reasons of fairness and consistency to extend protection in this way. The response to the consultation made clear that there are difficulties at present, particularly in relation to sex discrimination. There have been reports that some clubs with mixed male/female membership do not allow women to vote as full members; or they restrict women's access to the club's facilities. Women golf players have written to complain about their playing times being restricted or lack of access to the bar. As recently as October 2006, the Club and Institute Union (CIU) stated that some 40 per cent of the 2,500 working men's clubs in the Union still deny their female members full rights, including access to the Annual General Meeting.

12.10 We do not think it is right for mixed-membership clubs thus to treat some of their members or guests on less favourable terms than others and the consultation response broadly confirms this, with trade union, sexual orientation, race, legal, disability and gender stakeholders unanimous in their support of the proposals.

12.11 We see no reason why this approach should not be harmonised across all the remaining equality strands. We therefore also intend to extend the protection against discrimination by private clubs on grounds of religion or belief, pregnancy and maternity, gender reassignment and age.

12.12 In none of these cases will it be unlawful to set up or to maintain private clubs for people with a shared characteristic: single-sex clubs will continue to be lawful, as will clubs for people of a particular race, ethnicity or nationality, disability, sexual orientation, religion or belief, people undergoing gender reassignment, women who are pregnant or new mothers, or for people in a particular age range. Over 90 per cent of respondents on this point agreed, recognising that it can be a positive benefit to have clubs set up for groups against whom discrimination is prohibited; and that it is important for groups of people to have their own space. We agree that this must not provide an excuse for people to set up clubs just so as to exclude particular vulnerable groups of people and that it should be for a real positive benefit rather than for purposes of segregation.

12.13 The protection will therefore come into play where clubs admit a variety of members. A single law based on a single set of principles will make it easier for all private clubs to understand their rights and responsibilities.

12.14 We are maintaining the existing threshold of 25 members. People are familiar with this threshold in relation to race, disability and sexual orientation. It has not proved problematic, and setting the threshold at this number, as it applies to clubs and associations, will ensure that the law does not impinge on private gatherings.

Extension to cover guests as well as members and associates

Feedback from the consultation

12.15 We received nearly 150 consultation responses on whether we should extend protection to cover guests of private members' clubs as well as members and associates. Over 90 per cent were in favour of this proposal.

12.16 Typical of the supportive responses was that from the former Equal Opportunities Commission which made clear that it could see no reason for protecting members, but not guests, against discrimination; that some members would have been guests before becoming members and that to permit discrimination against them to continue would be to deny them the business and social opportunities afforded by becoming a member. Likewise, the Equality Network considered that this change would remove an anomaly in the law, and would harmonise the provision for private clubs across the strands.

12.17 Similar support was expressed by business respondents, including a number of private club representatives.

12.18 Most of the religious bodies and belief organisations which responded were in favour of the proposal.

Assessment

12.19 We consider that extending protection to guests of private clubs would provide clarity and consistency. Such protection is already available for disabled guests. It is difficult to justify why it would be acceptable to discriminate against a guest when it would not be acceptable to discriminate against a member.

12.20 This means that where both men and women are invited to a private club as guests, for example, it will be unlawful to treat women guests less favourably than men guests. Thus if a male guest is free to use the main staircase, or buy a drink at the bar, it will be unacceptable to require a woman guest to use the back stairs or rely on a man to purchase her drinks.

12.21 Clubs will, if they wish, be able to distinguish between the services and facilities available to members and those available to guests.

Chapter 13: Harassment

13.1 We have decided:

- **to extend the freestanding statutory protection against harassment in the Race Relations Act 1976 to apply to colour and nationality in the same way as it applies to race and ethnic and national origins. This could not be done when race harassment provisions were first introduced domestically because colour and nationality were not covered by the European Race Directive that required EU countries to introduce such provisions;**
- **to extend statutory protection against harassment related to sex, in schools, and harassment on the grounds of gender reassignment, in the exercise of public functions. These areas were outside the scope of the Gender Directive so could not be covered by the Regulations which implemented this Directive in Britain;**
- **not to extend express statutory protection against harassment on grounds of sexual orientation or religion or belief, in the provision of goods, facilities and services, education in schools, the management or disposal of premises, and the exercise of public functions;**
- **to give further consideration to the case for extending liability of employers for persistent harassment of their employees by third parties in relation to race, disability, sexual orientation, religion or belief and age;**
- **not to impose liability on providers for third party harassment outside the employment field, e.g. by customer on customer; and**
- **to provide statutory protection against age harassment as part of our proposals to prohibit age discrimination outside the workplace (see chapter 6).**

13.2 We have not yet come to a decision on how far the different definitions of harassment in discrimination law can

be harmonised. To arrive at this decision, we have been taking account of consultation responses and considering them in the context of the following key principles set out in the consultation paper:

- not eroding existing levels of protection;
- ensuring that harassment provisions in the Equality Bill meet the requirements of EU law; and
- legislating on harassment only if this is a proportionate response to a real problem.

13.3 It is important that we take this decision in the light of all relevant information available. The European Court of Justice has only recently handed down a judgment in the *Coleman* case²⁰ which covers, among other things, the definition of harassment. It would be premature for us to come to a decision on how to define harassment in the Equality Bill before we have had an opportunity to consider the *Coleman* judgment carefully.

13.4 Subject to our decision about how harassment should be defined, we will also consider:

- extending statutory protection against harassment to the ground of disability in the provision of goods, facilities and services, education in schools, the management or disposal of premises, and the exercise of public functions.

13.5 The consultation document set out the current patchwork of statutory protection against harassment both in and outside the workplace. In the workplace, employees are already explicitly protected against harassment (e.g. by the employer or by fellow employees) on all the equality grounds (race, sex including gender reassignment, disability, sexual orientation, religion or belief and age). Separately, following judicial review of our implementation of

²⁰ C-303/06 *Coleman v Attridge Law*. ²⁰ Ms Coleman, the mother of a disabled child, was employed at a law firm. She asked for particular working arrangements so that she could care for her child but was refused and brought a case for compensation. The tribunal referred the case to the ECJ for a decision whether the relevant EU Directive protects not just disabled people but also people “associated with” (i.e. carers) disabled people.

the Equal Treatment Amendment Directive in Britain, the Court judgment obliged us to amend the Sex Discrimination Act 1975 to provide protection for employees whose employer knowingly fails to protect them from repeated harassment by a third party such as a customer or supplier, so that the law reflects what is set out in a Government factsheet published by the former Women and Equality Unit in October 2005. This protection is purely a domestic measure as the Court did not hold that such liability was required to comply with European law. Such protection against harassment by third parties at work does not, however, currently exist in relation to the other equality protected grounds. Outside work (i.e. in the provision of goods, facilities and services, education in schools, the disposal and management of premises and in the exercise of public functions), explicit statutory protection against harassment is provided related to sex²¹ and on grounds of race²² but not on grounds of sexual orientation, religion or belief, age or disability.

13.6 The consultation document therefore asked:

- for examples of harassment outside the workplace on grounds of religion or belief, sexual orientation, age or disability which would fall outside the existing protections in discrimination and other law;
- for views on whether express statutory protection against harassment should be provided on grounds of religion or belief, sexual orientation, age or disability and if so, in which fields: the provision of goods, facilities and services, education in schools, the management or disposal of premises, and the exercise of public functions;
- for views on whether specific exceptions would be desirable, if protection were extended;
- whether harassment on grounds of religion or belief should be treated differently and whether a different definition of harassment would be appropriate in this case;

²¹ Protection is not yet provided for education, but we will provide this in the Equality Bill

²² Excluding colour and nationality

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- whether there is a valid distinction, and whether there should be an appropriate differentiation, between harassment in an “open” environment and in a “closed” environment; and
- for evidence of harassment by third parties in the workplace on grounds other than sex, and if so, whether such harassment should be dealt with in a similar way to harassment related to sex.

Examples of harassment outside the workplace on grounds of religion or belief, sexual orientation, age or disability

Feedback from the consultation

13.7 Just over 60 responses were received to the request to provide examples of harassment which occurs or could occur on the grounds of religion or belief, sexual orientation, age or disability which would fall outside the existing protections in discrimination and other law.

13.8 The former Equal Opportunities Commission drew on a number of sources for examples of harassment, referring to a report by Stonewall²³ which found that homophobic bullying is almost endemic in Britain’s schools; and that almost two-thirds of young lesbian, gay and bisexual people attending faith schools have experienced homophobic bullying. The Commission also referred to research by the former Disability Rights Commission which found that one in four disabled people – and nine in ten people with learning difficulties – have had their self esteem, dignity and personal safety compromised by verbal or physical abuse and harassment.²⁴ The Equal Opportunities Commission recognised, however, that some of these incidents might fall outside the activities caught by discrimination law, e.g. incidents of harassment in the street.

13.9 According to further research referred to by the Equal Opportunities Commission, transphobic bullying is widespread: 91 per cent of natal females with a male identify and 66 per cent of natal males with a female identity were reported to experience harassment or bullying at school, leading to depression, isolation

²³ The School Report: the experiences of young gay people in Britain’s schools (2007).

²⁴ http://83.137.212.42/sitearchive/DRC/newsroom/news_releases/2003/government-moves_to_outlaw_dis.html

and a desire to leave education as early as possible²⁵. Some specific examples quoted include:

- a teacher trying to “toughen up” natal male students with female identities in sports classes;
- natal female students with male identities victimised for wearing trousers to school rather than a uniform skirt or dress; and
- trans pupils suffering constant harassment and bullying, the result being that they are withdrawn from school and taught at home.

13.10 A number of the responses were from disability organisations. However, in the main, examples they provided would fall outside the fields to be covered by the Equality Bill.

13.11 We received a handful of responses from lesbian, gay, bisexual and transgender stakeholders. The Lesbian & Gay Christian Movement drew attention particularly to problems of homophobic bullying in schools.

13.12 We had a similar number of responses from religious organisations, although most of these provided general comment rather than examples.

13.13 There were a small number of responses from age stakeholders on this issue. They drew attention in particular to concerns about the human rights of older people in a healthcare context.

Assessment

13.14 A large number of these responses provided broad statements about the desirability of providing protection equally across all grounds for reasons of fairness and consistency, but comparatively few provided examples outside the employment field. And where examples were provided, they tended to address issues such as bullying, abuse between individuals, and physical

²⁵ Whittle et al (2007). The authors point out that the difference in numbers between students with male and female identities who experienced harassment at school may be due to a tendency in boys to hide their cross-gender behaviour of identity.

or verbal attacks in the street, none of which are intended to be covered by the Equality Bill.

Explicit statutory protection against harassment on the grounds of religion or belief, sexual orientation, age and disability, in the provision of goods, facilities and services, education in schools, disposal or management of premises or exercise of public functions

Feedback from the consultation

13.15 More than 2,000 responses were received on this issue of which just over 1,800 were from individual Christian people writing in as part of a campaign. They argued against extending protection from harassment in any of the above-mentioned areas and particularly in relation to sexual orientation and religion or belief. In doing so they reflected views expressed by religious bodies such as the Evangelical Alliance, the Christian Institute and the Lawyers Christian Fellowship.

13.16 The great majority of some 30 religious, faith or belief bodies which responded on this question were opposed to extending protection against harassment to sexual orientation or religion or belief. The Church of England was concerned to ensure that the correct balance is struck between the right not to suffer harassment, and the right to freedom to manifest religion or belief, including through evangelism/proselytising. However, while Christian organisations were against extending protection against harassment on grounds of religion or belief, they were also concerned to ensure that whatever protection might be offered in relation to sexual orientation should also be offered in relation to religion or belief. So, if it was decided to provide protection against harassment outside the workplace on grounds of sexual orientation, these bodies argued that there would also need to be similar protection against harassment on grounds of religion or belief. The Muslim Council of Britain was one of the few religious organisations supporting extension of protection against harassment on grounds of religion or belief.

13.17 All of the small numbers of gender and race organisations responding were in favour of extending protection from harassment, as were all of the ten or so responding lesbian, gay, bisexual and transgender organisations, all the similar number of

trade unions and all but one of the 19 disability organisations. The former Disability Rights Commission supported extending protection to all protected grounds. The Disability Charities Consortium made clear that it would welcome a freestanding statutory protection against harassment in goods, facilities and services, education in schools, the disposal and management of premises, and in the exercise of public functions. The Consortium noted that almost nine out of ten people with learning disabilities had reported bullying²⁶.

13.18 Although only a small number of age organisations responded to this question, all of which supported extending protection, they stressed that it is recognised that harassment of older people occurs in the health and social fields. Examples of such conduct were provided in response to the previous question.

13.19 Five private sector organisations responded, of which only B&Q provided comment. They welcomed extension of protection into the area of goods, facilities and services but only on the grounds of sexual orientation, religion or belief and disability, and only if there are sufficient safeguards to prevent unmeritorious claims that would not be severe enough to be regarded properly as harassment.

13.20 A significant majority of the almost 40 local authorities which responded were in favour of extending protection to cover harassment to all protected grounds in all fields for reasons of consistency and fairness. Calderdale Council recognised that there might be some different considerations relating to freedom of speech, but that this should be able to be protected by statutory means, for example by providing a more stringent reasonable consideration test.

Assessment

13.21 We have considered carefully whether to provide freestanding protection from harassment outside employment and vocational training to cover any or all of the grounds of religion or belief, sexual orientation, age or disability. The obvious benefit of doing so would be harmonisation and simplification of the

²⁶ Mencap (1999) *Living in Fear: The need to combat bullying of people with a learning disability*

harassment provisions across all protected grounds. However, the consultation did not throw up substantial evidence that there is a need for such protection except in the case of age-based harassment where concerns raised by respondents were similar. There was a limited amount of evidence to indicate that disability-related harassment in the areas outside employment covered by discrimination law causes real problems for people with disabilities. Nevertheless, we recognise that many of the types of situations faced by old people, in care homes for example, will also apply to disabled people in similar circumstances.

13.22 We consider that there is a case for providing protection against age harassment outside the workplace. We believe that such protection would provide important protection for older people at risk of maltreatment in segregated services such as care homes, where there may be no comparator thus making it difficult if not impossible to prove discrimination – an issue raised in responses to our consultation. We have therefore decided to provide freestanding statutory protection against age harassment as part of our proposals to prohibit age discrimination outside the workplace (see chapter 6).

13.23 Once we have considered the implications of the *Coleman* judgment for the definition of disability harassment, we will consider further whether there is a case for extending the freestanding statutory protection against harassment to disability.

13.24 We do not consider that consultation responses have demonstrated sufficient evidence of need for us to extend explicit statutory protection against harassment outside the workplace on grounds of sexual orientation or religion or belief. Furthermore, we do not consider that harmonisation alone, which some respondents supported, is sufficient reason to extend protection.

Specific exceptions

Feedback from the consultation

13.25 Of almost 150 responses to this consultation question, over 65 per cent did not support specific exceptions if protection were to be extended to one or more of the above grounds in one or more of the above areas.

13.26 The vast majority of gender, race, disability, age and lesbian, gay, bisexual and transgender stakeholders did not want any exceptions. The Equal Opportunities Commission stated that apart from ensuring that the guarantees contained within the Human Rights Act were not in any way undermined by the protections afforded against harassment (e.g. freedom of speech), then they consider that no exceptions should be introduced. The Disability Rights Commission made similar points, as did Press for Change.

13.27 Almost all of the responses from religion or belief organisations were in favour of specific exceptions if harassment protection were to be extended to sexual orientation or religion or belief. The Christian Institute argued that in these circumstances, robust exceptions would be needed to protect freedom of speech and freedom of religion.

13.28 The majority of almost 30 local authorities which responded were in favour of not having any exceptions. Manchester City Council for example argued that exceptions (e.g. for special interest groups) run the risk of undermining the legislation. However, Calderdale County Council made the point that it may be necessary to make some exceptions in relation to religion and belief in order to safeguard freedom of speech, and that at the least, it would be important to create a more robust reasonable consideration test for religion and belief.

Assessment

13.29 We have decided to extend explicit protection against harassment outside the workplace to the ground of age; no responses made a case for specific exceptions on this ground.

Whether harassment on the grounds of religion or belief should be treated differently from the other protected grounds

Feedback from the consultation

13.30 Around 60 per cent of just over 130 responses to this consultation question expressed the view that harassment on the grounds of religion or belief should not be treated differently from the other protected grounds so there would be no need for a different definition of harassment.

13.31 Religion and belief organisations seemed split on this issue. Four organisations thought that there should be different treatment and six thought that there should not. Of those which thought that there should be different treatment the National Secular Society responded that the harassment provision for religion or belief should be different from the other areas in that there should be a more stringent reasonable consideration test. Similarly the Scottish Inter Faith Council responded that their Members felt that there must be an effective way to legislate on harassment based on religious grounds, in a way that does not unduly interfere with the right to freedom of speech. Among those organisations which considered that there was no good reason for treating religion or belief differently, the Evangelical Alliance stated that it is not acceptable to have different definitions of harassment applying to different groups.

13.32 The majority of local authorities did not consider that there was any reason to treat harassment on the grounds of religion or belief differently.

13.33 Race, gender, disability and age organisations expressed a range of views. The Grampian Racial Equality Council, for example, said that they believed it would be more effective to have a consistent definition across all the protected areas and protected grounds. The former Equal Opportunities Commission responded that to provide for some broader or specific exemption for religion or belief would undermine the aspiration for harmonisation and assume a hierarchy of protected grounds and even classes within grounds (with some religious groups enjoying the enhanced protection of the Race Relations Act 1976 because they also constitute racial groups). They also said that experience shows that religion is often used as a proxy for race and that free speech issues might also arise in the context of the other protected grounds. However, the National Disabled Staff Network argued that religion or belief should be treated differently from other grounds because of the need to uphold free speech and the subtle but crucial difference between harassment and giving offence.

13.34 Fewer than 10 lesbian, gay, bisexual and transgender organisations responded with the majority being opposed to differential treatment on grounds of religion or belief.

13.35 A small number of legal organisations responded to this question of which all but one also opposed differential treatment.

Assessment

13.36 Whilst the majority of respondents favoured not treating harassment on grounds of religion or belief differently, a significant minority took the opposing view; they considered that a different definition of harassment on the grounds of religion or belief should be provided to ensure that discrimination law does not interfere with the right to freedom of speech. However, to date, no compelling evidence of material interference with the freedom to manifest religious belief has been brought to our attention. In legislating to outlaw discrimination, we fully recognise the importance of respecting other fundamental rights and freedoms, and we consider that the current definition strikes the right balance between these competing rights. It should be noted however that we have yet to come to a decision on the definitional aspect of harassment (see paragraph 13.2) but will retain the principle of balancing competing rights.

Distinction between harassment in an “open” and “closed” environment

Feedback from the consultation

13.37 Around 70 per cent of more than 120 responses to this question took the view that there is no real distinction to be made between harassment in an “open” and in a “closed” environment.

13.38 This was the view taken by the vast majority of the gender equality and the lesbian, gay, bisexual and transgender organisations which responded. Similarly 10 of the 12 disability organisations which responded saw no distinction; nor did the sole age organisation.

13.39 However, all but one of the small number of religion and belief organisations that responded supported different treatment in “open” and “closed” environments. The Christian Institute stated that whilst it is difficult for a person to leave the workplace to get away from an environment they find hostile, it is very easy to walk out of a shop in similar circumstances.

13.40 A small number of legal organisations responded on this point, the majority of which considered that there is a distinction between harassment in “open” and “closed” environments. The Bar Council said that a service provider’s liability for harassment should not go beyond the extent of what the provider can control.

Harassment by third parties in the workplace

Feedback from the consultation

13.41 Almost 70 per cent of just over 100 responses to this question stated that they had evidence of harassment by third parties in the workplace in relation to protected grounds other than sex.

13.42 The Equal Opportunities Commission cited examples of caselaw under race and sexual orientation legislation²⁷. They added that in their view there is no reason why a service provider should not be liable for customer on customer harassment where that provider could have taken reasonably practicable steps to prevent it, and that this would ensure that harassment was discouraged and prevented by service providers.

13.43 A small number of disability organisations responded to this question all stating that there were many examples of discrimination by third parties in the workplace. The UK Disabled People’s Council provided an example of a deaf person working for a local authority in their post room who faced daily harassment because his colleagues would deliberately turn away from him to talk so that he was unable to lip-read what they were saying²⁸.

13.44 The Public Sector People Managers’ Association Diversity Network stated that there is anecdotal evidence that could be substantiated with limited research that reception staff in a number of contexts have been subjected to harassment including on grounds of race and sexual orientation by service users and that employers have had to take action to protect them using health and safety considerations among others.

²⁷ *Burton & Rhule v De Vere Hotels* [1996] IRLR 596 (race discrimination) and *Pearce v Governing Body of Mayfields School* [2003] IRLR 512 (sexual orientation discrimination)

²⁸ This organisation also referred us to the Human Rights Violations Database created and run by Disability Awareness in Action – www.daa.org.uk – as a source of evidence of workplace harassment.

13.45 All six responses from lesbian, gay, bisexual and transgender stakeholders provided a number of anecdotal examples.

13.46 The Trades Union Congress responded that they are aware of examples of public service workers e.g. traffic wardens, teachers, care assistants, nurses frequently experiencing racial harassment in the course of their jobs. Other Unions supported this view.

13.47 The Evangelical Alliance cited examples of discrimination based on Christian beliefs. They said that they have increasing anecdotal evidence of Christians facing mounting hostility from employers and employees, many of which are in the public sector, not least over being required to work on religious holy days. They further stated that there is an increasing perceived threat to silence or remove expression of faith in public which appears to single out religion and belief and appears unfair and discriminatory.

Assessment (“open” and “closed” environment; third party harassment)

13.48 A number of responses supporting no distinction between “open” and “closed” environments referred to equality of treatment whether a person was at home or elsewhere. Our consultation paper indicated that a “closed” environment referred to the type of close relationship enjoyed by an employer and employee, whereas an “open” environment is one where no such relationship exists, and an individual is not bound to enter that environment. We do not consider the arguments presented for a single approach to dealing with harassment in both of these environments are compelling. Therefore we consider that it is appropriate to differentiate in the way we prohibit harassment according to the environment.

13.49 We considered carefully whether to extend employer liability for third party harassment of employees, based on the model introduced in the Sex Discrimination Act 1975, to all other protected grounds in the employment context. When we introduced the harassment provisions into the Sex Discrimination Act, we took the view that where harassment under that Act is repeated, and the employer knows that it has been occurring and fails to take reasonably practicable steps to stop it happening

again, this is sufficiently serious as to incur the employer's liability for harassment. We wish however to consider further whether there is a case for extending such employer liability under any or all of the protected grounds.

13.50 Our assessment of the responses on different approaches to the prohibition of harassment in "open" and "closed" environments and the evidence of harassment occurring has led to our decision that extending liability for third party harassment outside the employment context would be neither necessary nor desirable.

Chapter 14: Purpose clause

14.1 We have decided:

- **not to have a purpose clause in the Equality Bill. Our priority is to have legislation that is as clear as possible, and we do not believe that a purpose clause will assist that aim. We will shortly be consulting on the possibility of a Bill of Rights and Responsibilities including a constitutional equality provision.**

Consultation Feedback

14.2 The consultation document referred to earlier suggestions that the new Equality Bill should have a purpose clause. It did not ask specifically for comments on this, but a number of respondents raised the issue, nearly all favouring inclusion of a clause. Generally, arguments in favour concerned the need for clarity in interpreting the Act and/or providing guidance on its requirements, or broad principle-based statements about the importance of equality.

Assessment

14.3 Our aim is to have legislation which is as clear as possible and which achieves legal certainty. We believe that those who are calling for a purpose clause share this aim. The difference is that we do not consider that a purpose clause is the right means for achieving the necessary clarity.

14.4 One of the main aims of the Bill is to set out the law in clear and unambiguous terms. A purpose clause would undermine that aim because there would be an inevitable tension between a general statement of purpose and specific provisions in the Bill. There could well be an increase in litigation as a result, with perhaps unexpected outcomes in some cases. If the purpose clause is intended to mean the same as the substantive provisions, it would be unnecessary duplication. And it might still be interpreted by the courts and tribunals as meaning something different on the basis that Parliament must have decided to include the clause for a reason. Or, if it was intended to mean something

different or otherwise provide some kind of interpretative gloss, the meaning of the specific provisions in the Bill would be undermined.

14.5 So, while appreciating the desire for clarity and consistency which underlies the call for a purpose clause from many of the respondents on this issue, we do not believe that ultimately it will lead to an improvement in the way the courts or tribunals interpret the legislation, or provide guidance to others. In fact, we believe it is likely to have the opposite effect. Instead, we consider that the right place for a statement on the objectives of the Bill is in Parliament, typically at Second Reading.

14.6 We are shortly to publish proposals for a Bill of Rights and Responsibilities for the United Kingdom, building on the Human Rights Act. There will be a public consultation on these proposals, which will include the possibility that a Bill of Rights and Responsibilities should include a constitutional equality provision, reflecting the central place of equality in our society as one of the values which informs governmental and public authority decision-making.

Chapter 15: Who is protected by the law

15.1 We have decided:

- **not to extend protection against discrimination specifically on the grounds of parenting or caring responsibilities. However, in the light of the European Court of Justice judgment in the *Coleman* case, we will consider what the implications may be for protection from discrimination against a person who associates with someone who is disabled, or with someone of a particular age.**
- **not to extend protection against discrimination on the ground of genetic predisposition. We have recently agreed to the insurance industry's proposal to extend until 2014 the existing arrangements for a voluntary moratorium on insurers' use of predictive genetic test results and consider that this, along with continued monitoring of the use of genetic testing in the UK, should provide sufficient reassurance.**
- **not to extend protection against caste discrimination. While recognising that caste discrimination is unacceptable, we have found no strong evidence of such discrimination in Britain, in the context of employment or the provision of goods, facilities or services. We would, however, consult the Equality and Human Rights Commission about monitoring the position.**
- **not to extend protection against discrimination on grounds of Welsh-speaking. We are not convinced of the need to legislate on grounds of language alone.**
- **to preserve the existing protection against discrimination in employment on grounds of a person being married or a civil partner.**

Carers

15.2 The consultation document set out the substantial support which the Government has provided to date for carers and indicated that we were not persuaded of the need to create broad-based freestanding discrimination legislation for carers, considering it more appropriate to continue with targeted provisions and specific measures instead. We asked for comments on this approach.

Feedback from the consultation

15.3 A majority of the more than 150 responses received on this issue supported extending protection to carers.

15.4 There was a strong response from carers' organisations and equality groups, particularly disability organisations, in favour of providing specific protection for carers as an additional ground under discrimination law.

15.5 Carers UK argued for all-round protection for carers. The Princess Royal Trust for Carers wanted specifically to extend protection by association with disabled people (the point at issue in the *Coleman* case) and argued that usually carers do not choose their role but do so due to lack of viable alternative sources of care. The former Disability Rights Commission argued for extension of protection to all carers, including parents, a view which was also expressed by the Equal Opportunities Commission.

15.6 Clear views in favour of extending protection were also received from various disability and equality groups, legal bodies, healthcare organisations, trade unions and other respondents. For example, the Trades Union Congress acknowledged the significant measures the Government had put in place to recognise the vital role of parents and carers, but considered that the Equality Bill should recognise the employment and other disadvantages which many carers suffer as a result of their status.

15.7 Respondents objecting to specific protection for carers included, but were not confined to, businesses. Various business respondents considered that such an extension would be problematic. The Confederation of British Industry supported the current, targeted approach to addressing the needs of parents and carers and found that the right to request flexible working had a positive impact on employee relations for 74 per cent of employers.

Other respondents stressed the risk of unintended consequences; the view that flexible working arrangements had taken the law far enough for the time being, making a broader-based anti-discrimination provision unnecessary; and that any extension of protection specifically to parents or carers would dilute current equality legislation. For example, the London Borough of Enfield considered that we should continue to deal with issues relating to parents and carers through targeted provisions and specific measures rather than a broad anti-discrimination provision.

15.8 The Welsh Assembly Government agreed that a broad anti-discrimination approach would not be appropriate. The Scottish Executive would welcome a clearer assessment of the implications of extending rights to unpaid carers.

Assessment

15.9 We have decided not to extend protection against discrimination for carers as carers; or for parents as parents. We recognise the very valuable role which carers play and the additional responsibilities and challenges that people face when they act as carers – and have acted to target specific measures that support people in this position, particularly to help them balance work/life responsibilities.

15.10 In particular, following the recent report by Imelda Walsh, we have decided to extend the right to request flexible working to apply to all parents of children up to the age of 16. We have also adopted a new 10-year carers strategy, announced on 10 June 2008. The strategy focuses on providing greater services and support for carers, including an additional £150 million on breaks for carers, up to £38 million in helping carers combine paid employment and caring; and over £6 million in support for young carers, within a total of £255 million on short-term improvements, on top of the £244 million granted to local authorities to support carers in 2008/09. In the longer term, we will be examining the structure of the benefits available to carers.

15.11 We continue to believe that such measures are better suited to supporting carers than the provision of an additional ground in discrimination law. The role of carer applies more to what a person does, than to what a person is (their innate or chosen characteristics). A person may be in a caring role for only

a very short period, or for a substantially extended period – but it is unlikely to be an unchanging situation. Furthermore, there may be large numbers of people who do not identify themselves as “carers”, even though they take care of another person from time to time.

15.12 As such, being a carer is less appropriate as a separate specifically protected characteristic than the existing strands of race, age, disability, gender etc.

15.13 We will be studying the implications of the Coleman ruling further, to assess whether the Equality Bill should make further changes, for example by extending protection to cover discrimination by association on grounds of disability, in the employment field.

Genetic Predisposition

15.14 The consultation document asked for views on whether protection should be introduced to prevent discrimination based on genetic predisposition: that is to say, the increased likelihood of a particular individual developing a health condition in the future. There had been some concern that people with a genetic predisposition might be discriminated against by employers and insurers, but we considered that there was currently no need to legislate to prohibit discrimination on grounds of genetic predisposition.

15.15 The existing situation is closely monitored by the Human Genetics Commission, an independent body which advises Government on genetics issues. While there is currently no protection against discrimination on grounds of genetic predisposition, the use of genetic data is subject to the Data Protection Act. In 2005 the Government and the insurance industry published a Concordat which included a moratorium on insurers’ use of predictive genetic test results until 2011 so that customers are not required to disclose the results of any such test if their policy falls below specific financial limits. The Association of British Insurers announced a further extension of the moratorium in June, to 2014.

Feedback from the consultation

15.16 There were mixed views from a variety of respondents on this issue. The response was fairly evenly split: around 40 per cent agreed with the proposal in the consultation document (i.e. that there should not be new protection against discrimination on grounds of genetic predisposition), around 60 per cent disagreed.

15.17 Those in favour of legislation included the Human Genetics Commission which considered that there is anecdotal evidence of genetic discrimination which constitutes an adequate justification for legislating now; and that there are reasons to believe that opportunities for genetic discrimination will increase. The Commission recognised that existing voluntary arrangements and codes of practice appeared to secure a high level of compliance in some important contexts; but saw legislation through the Equality Bill as the most effective way of addressing individuals' fears. Other specialist groups in favour of legislation included GeneWatch UK, the Genetic Interest Group, the British Psychological Society and Breakthrough Breast Cancer, A large number of disability groups also favoured legislation. Trades unions were also strongly in favour of legislation as was some legal opinion, including the Bar Council who argued that the Government should introduce primary legislation giving the Minister powers to quickly prohibit discriminatory practices as they arise by means of secondary legislation.

15.18 On the other hand, a variety of respondents agreed with the view expressed in the consultation document that there was no need to legislate at present. Most prominent amongst these were insurance companies and other businesses or their representatives.

15.19 The Association of British Insurers pointed out that there already exists an agreed Concordat and Moratorium on insurers' use of predictive genetic test results (recently extended to 2014); that this struck the right balance between the customers' access to insurance and the insurer's right of equal access to information about the risks they were managing; that the number of policies affected by non-disclosure of predictive genetic test results was low, and as such the risks could be spread round the larger pool of customers. Various individual insurers supported this line, A number of respondents took the view that it is too early to legislate yet and that the situation should be monitored – these respondents

included some trade and employers associations, local authorities and NHS bodies.

15.20 The Law Society considered a decision should be deferred until the Equality and Human Rights Commission had had an opportunity to consider it. The Chartered Institute of Personnel and Development were not aware of any reason for legislating at the moment but considered this may need to be reviewed in the longer term on the basis of evidence of poor practice leading to unfair exclusion and disadvantage.

Assessment

15.21 The situation is not clear-cut, as the mixed responses indicate. Different respondents, even in the same category, took different views as to whether legislation is appropriate at this moment.

15.22 To a large extent, this comes down to a question of evidence. We consider there is little practical evidence of discrimination against individuals on the ground of genetic predisposition. The anecdotal evidence provided by some respondents is not, in our view, persuasive and does not point to any systemic use of data in a discriminatory way.

15.23 A number of respondents mentioned the existing moratorium and the Government's concordat with the insurance industry, as providing a degree of safeguard against discriminatory practices.

15.24 We have considered the arguments on both sides and decided that the balance does not, at this time, favour legislation to prohibit genetic discrimination, for the following reasons:

- there remains little hard evidence of a problem at present;
- the moratorium appears to be working and has recently been extended to 2014;
- it is not clear that discrimination law is the right route to deal with any problems that might now or in the future exist;
- we would expect, along with the Human Genetics Commission, the Equality and Human Rights Commission to take an interest in this area, under its duty to keep the need

for legislation under review, taking into account scientific advances and the effectiveness of non-legislative options.

15.25 Should legislation appear necessary in the future, it may be more appropriate to strengthen data protection legislation or make specific rules as to what can be done with genetic information in this respect.

Caste discrimination

15.26 The consultation document did not specifically address the issue of caste discrimination. However, a number of representations have been received on this matter before and since the consultation, particularly since publication of a 2006 Dalit Solidarity Network Report on caste discrimination in the UK²⁹. It is the Dalits (or “untouchables”) who are seen as the victims of caste discrimination.

15.27 Caste discrimination is claimed to affect around 300 million people worldwide. The Communities and Local Government department has recently concluded an informal survey of around 20 key stakeholders to determine whether they were aware of any evidence that individuals or communities had been discriminated against on grounds of caste, in the UK.

15.28 On the basis of the responses received to the recent informal survey, we have concluded that there is no strong evidence of caste discrimination in the UK. In particular, there is no evidence of caste discrimination occurring in the specific fields which discrimination law covers: employment; vocational training; provision of goods, facilities and services; management or disposal of premises; education; the exercise of public functions.

15.29 To the extent that caste may be a factor in individual decision-making, some anecdotal evidence suggests that this would appear to be a reflection of social or cultural considerations, for example in choice of whom to marry. However, an individual’s marriage choice is not a matter for discrimination law. We have therefore decided not to provide protection against caste discrimination in the Equality Bill.

²⁹ http://www.dsnu.org/other/Caste%20Discrimination%20in%20the%20UK%202006%20_latest_.pdf

15.30 We will consult the Equality and Human Rights Commission about monitoring for any future evidence of caste discrimination in the UK and advising Government accordingly, in line with its statutory duties.

Language (Welsh speakers)

Feedback from the consultation

15.31 The consultation document did not specifically address the issue of discrimination on grounds of language. A small number of responses were received, specifically on protection of Welsh speakers against discrimination, of which the most substantial was from the Welsh Language Board. In its written response and in follow-up meetings on this subject, the Board argued that;

- the Welsh language is an equality issue and has a special status in the law under the Welsh Language Act;
- there are references to language as an equality issue in various statutes including the Scotland Act (Schedule 5);
- there is evidence of firms discriminating against Welsh speakers by preventing staff communicating with each other in Welsh;
- Welsh speakers suffer discrimination because certain public services such as health care, childcare, education may not be provided in Welsh;
- Existing enforcement powers under the Welsh Language Act are too weak and Crown bodies such as Government departments are not required to comply.

15.32 The Board pointed out that it was not seeking protection for Welsh speakers against direct discrimination, because it had found no evidence of this. Instead, it wanted protection against indirect discrimination for Welsh speakers in Wales.

Assessment

15.33 Even though there are references to language under an equality head in the Scotland Act, as also elsewhere in European legislation, language is not included as a protected ground in existing European or domestic discrimination law. There would be significant policy implications in introducing language generally as

an additional protected ground because this would raise questions about the equivalence or otherwise of the many languages spoken in this country. There would also be significant practical implications, given the large number of different languages used. We do not therefore consider that it is appropriate to add an additional protected ground of “language”, and do not envisage having provisions on language within the Equality Bill. Nor does it seem appropriate to legislate in the discrimination field specifically to protect Welsh speakers. It would be unusual to protect Welsh speakers against indirect discrimination but not direct discrimination; and the Welsh Language Board has found little evidence of direct discrimination. It is more appropriate that duties relating to the use of the Welsh language in the provision of public services should continue to be provided through the Welsh Language Act or equivalent legislation.

15.34 The Welsh Assembly Government is seeking legislative competence to be conferred on the National Assembly of Wales in respect to the Welsh Language, by means of an Order in Council under the Government of Wales Act 2006. The Government and Welsh Assembly Government are currently discussing the proposals.

Married persons/civil partners

15.35 The consultation document asked for views on whether section 3 of the Sex Discrimination Act, which makes it unlawful to discriminate against a person who is married or a civil partner, should be retained. It pointed out that it might be argued that the original purpose of the provision (to prevent women having to leave a job on getting married) was no longer needed; and that the provision was in fact having a counter-productive effect as a result of case law which had ruled that employers could not discriminate by keeping married couples or civil partners out of the same management chain.

Feedback from the consultation

15.36 The response on this issue was split almost 50/50 for and against retention of the existing protection.

15.37 Examples of those in favour of retention included Liberty, on the basis that the protection does not just address marriage

bars, but also discrimination connected to marriage and there is evidence that such discrimination continues. The City of London was concerned that religious and faith-based organisations might attempt to discriminate on the basis of marital or civil partnership status. Both the Church of England and the Catholic Bishops' Conference favoured retaining the existing protection, with modification to allow for cases which could be justified – such as preventing husbands and wives working in the same management chain or having similar budget or spending responsibilities. Among those favouring retention, a number supported extending protection to include unmarried couples and single people as well as married people. The former Equal Opportunities Commission, the Gay London Police Monitoring Group and the Bar Council were among those who took this line.

15.38 Respondents who favoured removing the existing protection included the British Bankers Association which could not envisage any employment circumstances in which a person could be required to resign on marrying. Zurich Financial Services considered that there was sufficient protection under other employment legislation. Stonewall recognised that the provision might not be required for its original purpose but wanted to be sure that its repeal would not inadvertently lead to civil partners being treated less favourably than married people.

Assessment

15.39 On further reflection and in the light of the consultation feedback, we have decided to retain this provision. We consider that removing this protection may run the risk of discrimination against married partners and civil partners re-emerging.

15.40 The existing provision will continue to enable employers to keep husbands and wives and civil partners in different parts of an organisation, following rules that prevent family members or people in relationships from working together, or to assign them to different tasks, so long as this is a proportionate means of achieving a legitimate aim.

15.41 We do not consider that additional protection is required for single people or unmarried couples. While single people without children, for example, do not currently have a right to request flexible working, the Government has extended this right for

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parents as a matter of public policy, designed to improve work/life balance in a family context. As regards unmarried couples, any legislation would have difficulty in drawing a line reflecting the permanence or otherwise of any particular relationship.

Chapter 16: The Gender Directive

16.1 We have:

- **extended protection from direct discrimination on grounds of gender reassignment to the provision of goods, facilities, services and premises;**
- **made it explicit that sexual harassment, sex harassment and gender reassignment harassment in the provision of goods, facilities, services and premises are unlawful;**
- **made it explicit that less favourable treatment on the ground of a woman's pregnancy (subject to a health and safety exemption) or maternity in the provision of goods, facilities, services and premises is unlawful; and**
- **made it clear that, in relation to financial and insurance products, where there are differences in an individual's premiums and benefits as a result of sex being a determinant factor in risk assessment, then these differences must be proportionate, based on relevant and accurate data, and this data must be compiled, published and regularly updated.**

16.2 The European Gender Directive³⁰ required Member States to implement it by 21 December 2007. We notified the European Commission in advance of the deadline that there would be a short delay in implementing the Directive in the United Kingdom. Implementation was achieved through the Sex Discrimination (Amendment of Legislation) Regulations 2008³¹ which came into force on 6 April 2008. These Regulations amended both the Sex Discrimination Act 1975 and the Sex Discrimination (Northern Ireland) Order 1976. The Regulations and accompanying Explanatory Memorandum can be accessed from the Office of Public Sector Information website³². A guide to the 2008

³⁰ 2004/113 EC

³¹ SI 2008/963

³² http://www.opsi.gov.uk/si/si2008/uksi_20080963_en_1 and http://www.opsi.gov.uk/si/si2008/em/uksiem_20080963_en.pdf

Regulations is available on the Government Equalities Office website³³.

16.3 The Gender Directive implements the principle of equal treatment between men and women in relation to the access to and supply of goods and services. The Sex Discrimination Act and the Sex Discrimination Order, which apply to both women and men, are the main pieces of legislation in Great Britain and Northern Ireland respectively which prohibit certain kinds of discrimination on the ground of sex, including gender reassignment.

16.4 In some respects the Sex Discrimination Act and Sex Discrimination Order already provided wider protection than that required by the Gender Directive, and already went a long way towards meeting the United Kingdom's obligations under it. However, some amendments had to be made to the Act and the Order to make them compatible with the Directive.

16.5 Separate consultations on implementation of the Gender Directive took place in Britain and Northern Ireland. The consultation feedback that follows relates to the consultation in Britain only.

Retaining, removing or amending existing exceptions in the Sex Discrimination Act 1975

16.6 The Sex Discrimination Act includes a small number of exceptions that allow facilities or services to be provided on a single-sex basis, e.g. for reasons of privacy and decency. The Directive permits different treatment of women and men in two respects. Firstly, where there is a legitimate aim and the different treatment is a proportionate means of achieving that aim. And secondly, where the different treatment has the aim of preventing or compensating for disadvantages linked to sex, i.e. positive action. The consultation paper sought views on proposals to bring the pre-existing exceptions in the Sex Discrimination Act into line with the Gender Directive. These exceptions range through services provided for men or women only for reasons of decency to facilities or services restricted to one sex in a place occupied or used by an organised religion and the restriction is made in order

³³ http://www.equalities.gov.uk/publications/080408_Fact%20sheet_GD_final.doc

to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of its followers.

Feedback from the consultation

16.7 Nearly 100 responses to this question were received. The response from lesbian, gay, bisexual and transgender organisations was mixed. Press for Change welcomed proposals to clarify the circumstances under these sections, where discrimination is lawful, and where it is not. However a:gender disagreed with what they considered to be the virtually blanket religious exception being proposed in respect of transsexual people.

16.8 The responses received from business organisations were unanimous in their support for the proposed changes, and nearly all local authorities and other public bodies that responded were in favour.

16.9 All of the religious organisations which responded expressed the view that there should be exceptions to allow religious organisations, religious business owners and religious professionals to ensure freedom of conscience, religion and speech.

Assessment

16.10 The main focus of the responses on exceptions was how they might affect religious organisations. The need to respect the right to freedom of religion when prohibiting discrimination was foreseen in Recital 3 of the Gender Directive. Accordingly, the implementing Regulations specifically put out of scope goods, facilities or services, which are likely to be related to religious observance or worship. The Regulations do not introduce into the Sex Discrimination Act an exemption for individual religious believers or organisations who, like anyone else, are bound by the prohibition on discrimination, or harassment, on grounds of sex and gender reassignment. We believe that this strikes the correct balance between the rights of transsexual people (Article 8 of the European Convention on Human Rights) and the right to manifest a religious belief and freedom of expression (Articles 9 and 10).

16.11 Where the exceptions as they existed in the Sex Discrimination Act before 6 April 2008 ran the risk of not complying fully with the Directive, the Regulations have tightened the drafting so that the differential treatment of men and women that the exceptions permit is compatible with European law.

16.12 The Regulations have also amended the specific exceptions in the Sex Discrimination Act that allow provision to women or to men only, other than in relation to the excluded matters³⁴, to allow for different treatment of transsexual people on the ground of gender reassignment, but only where such treatment is a proportionate means of achieving a legitimate aim, or in respect of voluntary bodies and charities, as positive action measures.

Insurance and related financial products

16.13 Pre-existing provisions in the Sex Discrimination Act enabled the insurance industry to offer differential premiums and policies on the grounds of sex provided that the treatment is reasonable and is supported by reliable, actuarial evidence. The consultation paper sought views on the likely impact of the Gender Directive's insurance provisions on providers and/or customers of insurance and related financial products.

Feedback from the consultation

16.14 More than 70 responses provided comments on this issue.

16.15 Around 75 per cent of the private sector organisations which responded on this issue were in favour of our proposals on insurance. In particular, the Association of British Insurers was pleased that the Government secured provisions for insurance which minimise the cost and anti-competitiveness effects on the industry. Nearly all the local authorities which responded were in favour of this proposal as were all fire authorities, and a significant majority of police and health authorities. Equality groups stressed the need for safeguards. For example, the former Equal Opportunities Commission recommended as essential mandatory record keeping and full disclosure of underwriting data and assumptions by insurance companies, with new reporting,

³⁴ "Excluded matters" in the 2008 Regulations set out those areas with which we consider the Gender Directive is not concerned.

inspection and compliance functions for the Financial Services Authority. They also recommended that insurance be provided in the acquired gender to those who fall within the definition of gender reassignment a:gender put forward similar arguments. They welcomed proposals to provide clarity for transsexual people in this area so that both transsexual people and the insurance companies know where they stand. This general approach was supported by all of the lesbian, gay, bisexual and transgender stakeholders and by the women's organisations which responded.

Assessment

16.16 We have worked closely with the insurance industry to amend the exception in a way that satisfies the requirements of the Directive while still allowing the insurance sector to operate effectively as a competitive market. So the Sex Discrimination Act now requires the insurance industry to compile, publish and regularly update data on which any gender differences in premiums or benefits which are different, in line with Treasury guidance. The Treasury's guidance is available on its website³⁵.

16.17 The premiums and benefits for a transsexual person should only be based on that person's acquired gender if they hold a Gender Recognition Certificate and have therefore legally changed their gender from their birth sex; in all other cases premiums and benefits will be based on birth gender.

Deferring the ban on differences in insurance premiums and benefits due to maternity or pregnancy

16.18 The Gender Directive permits Member States to defer implementing the required ban on differences in insurance premiums and benefits due to maternity or pregnancy until 20 December 2009. The consultation paper asked whether we should take advantage of this opportunity to defer.

Feedback from the consultation

³⁵ http://www.hm-treasury.gov.uk/consultations_and_legislation/gender_insurance/consult_gender_insurance.cfm

16.19 Over 50 responses were received to this question, of which around 75 per cent took the view that a ban on differences due to maternity or pregnancy costs should be implemented in 2007. The remaining responses supported deferred implementation in 2009. Equality groups, lesbian, gay, bisexual and transgender stakeholders, nearly all the local authorities, the fire authorities, most police authorities and half of the health authorities responding on this issue favoured implementation in 2007.

16.20 All responses from insurance representatives were in favour of implementation in 2009 in order to provide time to adapt to the changes. The Association of British Insurers stated that removing these exclusions earlier would expose insurers to additional costs, part of which would fall on other policyholders. They also considered that preparing for the prohibition would take considerable resource and time in e.g. re-printing policy documentation. They estimated the cost to be around £3.25 million.

Assessment

16.21 We have deferred implementation of the requirement that costs related to pregnancy or maternity shall not result in differences in insurance premiums and benefits, but for one year and not the full two years which the Directive permits. So differences in treatment resulting from costs related to pregnancy or maternity will be prohibited from 22 December 2008. We are satisfied that this will allow insurers sufficient time to introduce the necessary adaptations to their policies and systems, bringing about compliance with the Directive as early as possible.

Definition of maternity

16.22 The consultation paper asked for views on whether maternity should be defined for the purposes of the Sex Discrimination Act provisions covering goods, facilities or services and premises and, if so, how it should be defined. It offered four options.

Feedback from the consultation

16.23 Over 70 responses were received on this issue and nearly all agreed that maternity should be defined for the purposes of the relevant Sex Discrimination Act provisions.

Assessment

16.24 The Regulations amended the Sex Discrimination Act 1975 to make it explicitly unlawful to subject a woman to less favourable treatment because she is pregnant or because of her maternity. Maternity is defined by reference to the period of time that has elapsed since childbirth, so as to provide the greatest legal certainty – this period of time is 26 weeks. An exception permits a service provider to not offer a pregnant woman certain services if that provider believes this would put her or her unborn child's health at risk, provided such health and safety considerations are also applied to other people with health conditions which make them vulnerable.

ORGANISATIONS WHICH RESPONDED TO THE CONSULTATION

Note: for privacy reasons, the names of the individuals who responded are not shown

1990 Trust
A:Gender
Aberdeen City Council
Aberdeenshire Council
Access Association
Accord Housing Group
Action for Blind People
Action for M.E
Additional Support Needs Tribunals for Scotland
Advisory, Conciliation and Arbitration Service (ACAS)
Advocates Europe
AEGON
Affinity
Affinity Sutton Group
Age and Employment Network
Age Concern Cymru
Age Concern England
Age Concern Hampshire
All Party Parliamentary Group Against Anti Semitism
All Party Parliamentary Group on Disability
Alliance for Inclusive Education
Al-Manaar Muslim Cultural Heritage Centre
Alzheimer's Society
Amber Valley Borough Council
Amnesty International
Ann Craft Trust, Voice UK and Respond [joint response]
Arthritis Care
Arts and Humanities Research Council Centre for Law, Gender and Sexuality
ASDA
Aspect Consultation Response
Aspire
Associated Society of Locomotive Engineers and Firemen (ASLEF)
Association of Directors of Adult Social Services, and Local Government
Association [joint response]
Association for Spina Bifida and Hydrocephalus (ASBAH)
Association of Breastfeeding Mothers
Association of British Insurers
Association of Chief Police Officers
Association of Colleges
Association of Directors of Children's Services
Association of Disabled Professionals
Association of Greater London older Women
Association of Greater Manchester Authorities

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Association of Police Authorities
Association of Registration and Celebratory Services
Association of Residential Managing Agents
Association of Retirement Housing Managers
Association of School and college Leaders
Association of Scotland's Colleges
Association of Teachers and Lecturers
Association of Women Barristers,
Association of Women Solicitors
Audit Commission
Aurora Group in Croydon
B&Q
Basingstoke and Deane Borough Council
Basingstoke Community Churches
Berkshire Consultancy Ltd
Beverley & East Riding Golf Club
Birmingham Law Society's Employment Law Committee
Birmingham Public Care Trust
Black and Minority Ethnic Network East of England
Black Majority Church Conservative Consortium
Blackpool North Shore Golf Club
Blandford Evangelical Church
Board of Deputies of British Jews
Bord Na Gaidhlig
Boston Belles Transgendered Support Group
Braintree Pensioners Action Group
Breakthrough Breast Cancer
Breakthrough UK Ltd
Breastfeeding Manifesto Coalition
Breastfeeding Network
Brecknock & Radnor Crossroads
Brecknock Access Group
Brethren Christian Fellowship
Bristol Employment Tribunal Members' Association
British Air Transportation Association
British Airways Plc
British Bankers Association
British Broadcasting Corporation
British Chambers of Commission
British Holiday and Homeparks Association
British Hospitality Association
British Humanist Association
British Institute for Human Rights
British Library
British Medical Association
British Property Federation
British Psychological Society
British Retail Consortium
British Stammering Association
British Transport Police

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British Youth Council
BT Kaleidoscope
Buckinghamshire County Council
Building Societies Association
BUPA
Business Services Association
Calderdale Metropolitan Borough Council
CALL Centre
Cambridgeshire County Council
Cancer Backup
Capability Scotland
Careers Scotland
Carers Association Rochdale
Carers Group - Durham CC
Carers Subgroup of the Learning Difficulties Partnership Board in Bristol
Carers UK
Cathkin Braes Golf Club
Catholic Bishops' Conference of England and Wales
Catholic Parliamentary Office
Cayman Minister's Association
Central Council of Recreative Physical Training (CCPR)
Central Scotland Racial Equality Council
Centre for Equality and Diversity
Centre for European Law and Integration, University of Leicester
Centre for Excellence
Centre for Research in Equality and Diversity
Centre for the Analysis of Social Exclusion.
Chamber of Shipping
Changing Faces
Charity Commission
Chartered Institute of Housing
Chartered Institute of Personnel and Development
Chartered Society of Physiotherapy
Chief Fire Officers Association, Wales
Children and Family Court Advisory and Support Service
Children in Scotland
Children's Commissioner for England
Children's Commissioner for Wales
Children's Law Centre
Children's Legal Centre
Children's Rights Alliance for England
Children's Society
Christian Action Research and Education
Christian Council of Britain
Christian Institute
Church of England
Church of Scotland
Church Society
Churches Together in Oxfordshire
Chwarae Teg

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Citizens Advice Bureau
City & Hackney Older Peoples Advisory Group
City and Guilds
City of London
City of London Access Group
City of London Police
City of York Council
Clearpoint Consulting
Coalition on Sexual Orientation
Cobbetts Solicitors Employment Department
Colchester Borough Council
Commission for Equality & Human Rights
Commission for Racial Equality
Commission for Social Care Inspection
Communication Workers Union
Comparative Organisation and Equality Research Centre and Working Lives
Confederation of British Industry
Connect
Convention of Scottish Local Authorities
Co-operative, The
Cornwall Equality and Diversity Group
Corporate Equality Unit East Renfrewshire Council
Council for Disabled Children
Council of Her Majesty's Circuit Judges and Association of District Judges,
Council on Tribunals
Coventry City Council
Crown Prosecution Service
Croydon Volunteer Centre
Cumbria County Council
Cumbria police Authority
Cyngor Bwrdeistref Sirol CONWY County Borough Council
DEFRA LGBT Network
Denbighshire County Council
Department for Christian Responsibility and Citizenship
Derby City Council's Diversity Forums and Employee Networks
Derby Racial Equality Council
Derbyshire County Council
Devon County Branch of Unison
Devon NHS trust
Disability Action
Disability Action in Islington
Disability Agenda Scotland
Disability Charities Consortium
Disability Equals Business
Disability Law Service
Disability Rights Commission
Disability Wales
Disabled Persons Transport Advisory Committee
Discrimination Law Association
Diversity and Citizen Focus Directorate Metropolitan Police Service

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DLA Piper UK LLP
Dorset Fire and Rescue Service
Dunstable and District Association of Senior Citizens
East Ayrshire Council
East Dunbartonshire Council
East Lindsey District Council
East Staffordshire Borough Council
EAVES
ECAS
Employers' Forum on Age
Employers' Forum on Disability
Employment Lawyers Association
Employment Tribunal Chairmen
End Violence against Women
Enfield Council
Engender
England Golf
English Association of Self Catering Operators
English Ladies Golf Assoc
Epilepsy Action
Equal Ability CIC
Equal Opportunities Commission
Equalities Coordinating Group
Equalities in Service Provision Group
Equality 2025
Equality and Diversity Committee of the Bar Council
Equality and Diversity Forum
Equality and Diversity Lead, Cornwall and Isles of Scilly Primary Care Trust
Equality and Human Rights Commission
Equality Challenge Unit
Equality Commission for Northern Ireland
Equality Network
Equality North East
Equality South West
Equity
Equity Partnership, Bradford LGB Strategic Partnership
Ernst & Young
ESRC Deafness, Cognition and Language Research Centre
Essex County Council
Ethnic Minority Advisory Group
Ethox Centre
European Centre for Law and Justice
Evangelical Alliance
Faculty of Advocates
Faculty of Law, University of Cambridge
Fair for All LGBT
Fairplay South West
Faithworks
Families Need Fathers
Family Education Trust

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FATIMA Women's Network
Fawcett Society
Federation of Irish Societies
Federation of Private Residents' Associations
Federation of Small Business
Fife Partnership
Ford Motor Company
Forth Valley College of Further and Higher Education
Free Representation Unit
Freshfields Bruckhaus Deringer
Friends Provident
Froud Consultancy Ltd
Future East
Future Inclusion
Gallant 2000 Ltd
Gateshead Metropolitan Borough Council
Gay and Lesbian Humanist Association
Gay and Lesbian Youth in Calderdale
Gay London Police Monitoring Group
General Secretary of the Police Federation of England and Wales
Genetic Interest Group
Genetics and Insurance Committee
GeneWatch UK
GirlGuiding UK
Glasgow Access Panel
Glasgow Centre for Inclusive Living
Glasgow City Council
Glaxo Smith Kline
Gloucestershire Constabulary Disability Association
Gloucestershire County Council
Grampian Racial Equality Council
Greater London Authority
Group for Solicitors with Disabilities
Halton Borough Council
Hampshire County Council
Hanover Housing Association
Help the Aged
Her Majesty's Inspectorate of Constabulary
Herriot-Watt university
Higher Education Disability Co-ordinators Advisers National Network
Higher Education Funding Council for England
HM Inspectorate of Court Administration
HMI Probation Unit
Human Genetics Commission
Human Rights Coalition Wales
Imam Al-Khoei Foundation
Implementation Review Unit
In Trust Community Empowerment Network
Inclusion Scotland
Inclusion South West

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Inspectorate for the Crown Prosecution Service
Investment and Life Assurance Group
Ipswich and Suffolk Council for Racial Equality
Irish Traveller Movement
Isle of Wight Council
Islington Deaf Campaign
Joint Council for the Welfare of Immigrants
Jubilee Campaign NL
Justice
King's Church International
La Leche League Great Britain
Lambeth Teachers Association
Lancashire County Council
Lancashire Probation Unit
Law Society Scotland
Law Society
Lawyer's Christian Fellowship
Learning and Skills Council
Learning and Skills Network
Leeds City Council
Leeds Racial Equality Council
Leeds University Business School
Legal action Group
Leicester Equality and Diversity Partnership
Leicestershire County Council
Leighton Christian Fellowship
Leonard Cheshire
Lesbian and Gay Christian Movement
Lewisham Council
Lewisham Public Care Trust
LGBT Carers Group of the Alzheimers Society
LGBT Labour
LGBT Tayside Forum
LGBT Youth Scotland
Liberal Democrat Disability Association
Libertarian Alliance
Liberty
Liverpool Law Society
Lobby to End Age Discrimination
Local Authority Coordinators of Regulatory Services
Local Government Association, the Improvement and Development Agency
and Local Government Employers [joint response]
Local Government East Midlands
London Borough of Barking and Dagenham
London Borough of Camden
London Borough of Southwark
London Borough of Tower Hamlets
London Borough of Waltham Forest
London Councils
London Development Agency

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London Fire and Emergency Planning Authority
London Older People's Strategies Group
London School of Islamics
London Voluntary Service Council
Manchester City Council
Maranatha Community
Mayor of London
MENCAP
Men's Health Forum
Men's Probus Club, Exeter and District
Mental Health Act Commission
Mercer Human Resource Consulting
Merseyside Employment Relations Forum
Merseyside Fire and Rescue Service
Merseyside Police Unit
Metropolitan Police Authority
Migrants Rights Network
MIND
Monmouthshire County Council
Multiple Sclerosis Society
Muslim Council of Britain
Muslim Women's Network UK
Nabarro Nathansen
Nacro
National Aids Trust
National Assembly Against Racism
National Assembly of Women
National Association of Head Teachers
National Association of Round Tables of Great Britain and Ireland
National Association of Schoolmasters, Union of Women Teachers
National Autistic Society
National Black Boys Can Association
National Caravan Council Ltd
National Childbirth Trust
National Children's Bureau
National Coalition of Black led Organisations
National Council of Women of Great Britain
National Deaf Children's Society
National Disabled Staff Network
National Employment Panel
National Housing Federation
National Institute of Adult Continuing Education
National Landlords Association
National Museum Wales
National Organisation of Disabled Lesbians, Gay Men, Bisexual and Transgendered People
National Pensioners Convention
National Public Health Service for Wales
National Resource Centre for Ethnic Minority Health
National Secular Society

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National Union of Journalists
National Union of Rail, Maritime and Transport Workers,
National Union of Students
National Union of Teachers
National Youth Advocacy Service
National Youth Agency
Nautilus UK
Network Partnership
New Club Edinburgh
New College Swindon
Newspaper Society
NHS Ayrshire and Arran
NHS Centre for Equality and Human rights
NHS Confederation
NHS Greater Glasgow and Clyde
NHS North East
North West Employers
North West Equality and Diversity Group
North West London NHS Trust
North West Regional Development Agency
Northamptonshire Lesbian, Gay and Bisexual Alliance
Northumbria Police
Norwich and Norfolk Racial Equality Council
Norwich Union
Notting Hill Housing Group
Nottinghamshire Police
Nuffield Council on Bioethics
Nursing and Midwifery Council
Office of the Scottish Charity Regulator
Ofsted
Open University
Organisation Development
Orkney Islands Council
Oxfordshire County Council
Papworth Trust
Parliamentary and Health Service Ombudsman
PATH National Ltd
People First
Peterborough City Council, The Register Office
PHG Foundation
Police Federation of England and Wales
Police Superintendents' Association of England and Wales
Policy Research Centre on Ageing and Ethnicity
Polygender Scotland
PPMA Diversity Network
Press for Change
Preston City Council
PricewaterhouseCoopers
Princess Royal Trust for Carers
Professional Contractors Group

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Prospect Union for Professionals
Prospects
Public Commercial and Services Union
Quarriers
Queen Margaret University
Queer Youth Network, Gay Youth UK, Gendered Intelligence and NUS LGBT
Race Equality First
Race Equality Foundation
Rainbow Forum
RBS Insurance
Recruitment and Employment Confederation
Refugee Council
Regional Action and Involvement South East
Registrar Births, Deaths and Marriages
Rescare
Research Institute, London Metropolitan University
Resolve ASL and Common Ground Mediation
Rethink
Rhondda Cynon Taf CBC
Rhwydiaith- Welsh Language Officers Network
Rights of Women
Royal College of Nursing
Royal College of Psychiatrists
Royal Mail Group Plc
Royal National Institute of Blind People
Royal National Institute of Deaf People
Royal Yachting Assoc
Runnymede Trust
SAGA Group Ltd
Salford City Council
Save the Children
Schools Out
Scope Response
Scottish Child Law Centre
Scottish Consumer Council
Scottish Council on Deafness
Scottish Disability Equality Forum
Scottish Discrimination Law Association
Scottish Enterprise
Scottish Executive Health Department
Scottish Golf Union
Scottish Government
Scottish Inter Faith Council
Scottish Low Pay
Scottish National Equalities Organisations
Scottish Social Services Council
Scottish Trades Union Congress
Scottish Transgender Alliance
Scottish Traveller Education Programme
Scottish Women's Aid

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Scottish Women's Convention
Sefton Equalities Partnership
Sense
Sense Scotland
Sheffield Care Trust
Sheffield City Council
Sheriffs' Association
Shropshire Fire and Rescue Service
Skill National Bureau for Students with Disabilities
Society of Pension Consultants
Solicitors Regulation Authority
South Ayrshire Council
South East England Development Agency
South East Leeds
South London Fawcett Group
South West Fire Services Equality Practitioners
South West LGB Network and Union out West
South Western Ambulance Service
Southampton City Council
Southampton Seniors Council
Southwark Council Black and Minority Ethnic Staff Consultative Group
Special Education Consortium
Sport Scotland
St Theresa's Catholic Church
Staffordshire Fire and Rescue Service
Staffordshire Moorlands District Council
Stirling Council
Stonewall
Stonewall Housing
Stonewall Scotland
Stratford Employment Tribunal
Stratford Upon Avon Baptist Church
Strathclyde Fire and Rescue
Suffolk Staff Disability Network
Surrey Police
Surrey Police Authority
Swansea Disability Forum
Tameside Racial Equality Council Ltd
Telford Race, Equality and Diversity Partnership
Terrence Higgins Trust
The Manufacturers' Organisation
Thompson Solicitors
Trade union and Professional Association for CAFCASS and Probation Staff
Trade Union Congress
Trade Union Disability
Transport for London (TFL)
Transport Salaried Staffs' Association
Traveller Law Reform Project
Trust Housing Association Ltd
Tunbridge Wells Borough Council and Sevenoaks District Council

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UK Coalition Against Poverty
UK Resource Centre for Women in Science, Engineering or Technology
UK Sport
Union of Shop, Distributive and Allied Workers
UNISON
Unite
Unite Amicus Section
United Kingdom's Disabled People's Council
University and College Union
University of Edinburgh
University of Glasgow
University of Hertfordshire
University of Paisley
Vale of Glamorgan council
Velindre NHS Trust
Virgin Atlantic
Warwick Pride
Warwickshire Children, Young People and Families Directorate
Watson Wyatt Worldwide
Wealden District Council
Wear Valley District Council
Welsh Assembly Government
Welsh Language Board
Welsh Women's Aid
Wembley Christian Centre
West Dunbartonshire Council
West Midlands Racial Equality Consortium
West Yorks Fire and Rescue Service
West Yorkshire Police Authority
Wigan Metropolitan Borough Council
Wiltshire and Swindon Users Network
Wise Thoughts
Wolverhampton LGBT Network
Women and Manual Trades
Women's Aid
Women's National Commission
Women's Resource Centre
Women's Voice
Working Families
Wygeston and Queen Elizabeth 1 College
YWCA England and Wales
Zurich Financial Services

Glossary

Direct discrimination

Treating a person less favourably on the ground of their sex, sexual orientation, gender reassignment, status as a married person or civil partner, race, religion or belief, disability or age, compared with a person who does not possess the relevant characteristic. Only in the case of pregnancy/maternity/leave is a comparator not required.

Harassment

Unwanted conduct which focuses on, for example, a person's sex (including their physical characteristics), sexual orientation or race and which has the purpose or effect of violating their dignity/demeaning them or creating an intimidating, hostile, degrading humiliating or offensive environment for that person.

Indirect discrimination

Broadly speaking, indirect discrimination occurs when a provision, criterion or practice is applied equally to everybody, but creates a disproportionate disadvantage for people who share a protected characteristic (race, gender, disability etc), when compared to the impact on people who do not have that characteristic. It may be justified if there is a legitimate reason for doing it and what is done is proportionate to the aim being pursued.

Reasonable Adjustment

The Disability Discrimination Act requires 'reasonable adjustments' to be made by employers and service providers etc. in order to accommodate the needs of disabled people. . In practice this means doing things differently if the usual way would significantly disadvantage a disabled person. Or it might mean providing additional services or equipment.

Sex harassment

Harassment (unwanted conduct as defined as above) which is related to a person's sex. So an example might be an employer calling his female secretary an "airhead" - a derogatory term generally used about women

Sexual harassment

Sexual harassment is unwanted conduct with the purpose or effect described under 'harassment', but which differs from sex harassment in that it is unwanted conduct of a sexual nature. For example, a city worker, female or male who has been told to attend a team outing to a strip-club despite making it clear that s/he was not happy to do so might have a claim from sexual harassment.

Victimisation

The less favourable treatment of a person because they have done, or intend to do (or are suspected of doing or intending to do) a protected act. Protected acts include making a complaint of discrimination or bringing proceedings, supporting someone else's complaint, or raising any other concerns under the discrimination legislation.

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