

supplement to advisory bulletin 530

**Discrimination Law Review - A
Framework for Fairness: Proposals
for a Single Equality Bill for Great
Britain**

**Executive summary and response
form**

August 2007

Introduction

This supplement to Advisory Bulletin 530

- captures the key background facts
- identifies the Government's proposals
- sets out the consultation questions

Local authorities are invited to submit comments on the Government's proposals to help inform a co-ordinated response to the Discrimination Law Review by the Local Government Association.

Throughout this executive summary, there is space for comments following each of the 36 questions posed by the Government. Please use this form to contribute your views on all, or some, of the issues raised in the consultation document.

Please return the response form to andy.wilson@lge.gov.uk by **Friday 17 August 2007**.

Part 1: Harmonising and simplifying the law

- ✓ *The Commission for Equality and Human Rights will have primary responsibility for issuing guidance and codes of practice*

Promoting compliance and good practice, simplifying definitions, tests and exceptions

The use of a comparator in a direct discrimination claim

- ✓ *Keep the existing requirement for a comparator in direct discrimination claims*

Q1 Do you have any comments on the Government's intention to keep the existing requirement for a comparator in direct discrimination claims?

Response/Comments

Discrimination based upon perception and association

In the race, religion or belief and sexual orientation regulations, the current legislation covers both perception and association.

In the DDA, protection is limited to discrimination against the actual person who is disabled. There is no scope for prohibiting discrimination on the grounds of perception or association.

The SDA does not currently provide any protection against discrimination based upon perception or association.

The Age Regulations prohibit discrimination on the basis of perception, but there is no provision preventing discrimination based upon the age of a person that someone is associated with.

- ✓ *The government does not propose to change these provisions*

Currently, there is no protection against discrimination based upon a perception that a person is transsexual, or that they associate with a transsexual.

- ✓ *The Government proposes to extend protection to include discrimination on the grounds of a person's association with a transsexual, but not to extend the protection to discrimination on the grounds that the person is perceived to be transsexual.*

Q2 Do you agree that the Government should largely keep the existing approach in relation to discrimination on the basis of perception and association, except for an extension to protect discrimination on the grounds of association with transsexual people?

Response/Comments

Indirect discrimination

Current British discrimination law prohibits indirect discrimination on the basis of all of the protected grounds except gender reassignment and disability.

- ✓ *The Government proposes to extend protection against indirect discrimination to gender reassignment.*

Under the DDA, there is a duty to make reasonable adjustments to remove or reduce barriers encountered by disabled people. The Government believes that this can help to address group disadvantage experienced by disabled people in a similar way to the indirect discrimination provisions operating in the other strands of discrimination law.

- ✓ *The government does not propose to explicitly extend protection against indirect discrimination to the DDA.*

Q3 Do you agree with the Government's proposal to extend indirect discrimination to cover gender reassignment, but not to explicitly introduce it to disability discrimination law?

Response/Comments

Definition of indirect discrimination

The government wants to harmonise the definition of indirect discrimination so that it is consistently applied across discrimination legislation.

- ✓ *The proposal is to use the wording currently found in the majority of the relevant legislation that defines indirect discrimination as an apparently neutral "provision, criterion or practice" which puts or would put people of the claimant's group at a particular disadvantage.*

Q4 Do you agree with the proposal to harmonise the definition of indirect discrimination where it applies across the protected grounds?

Response/Comments

Objective justification

The Government proposes to adopt the same objective justification test for all indirect discrimination provisions (and for direct discrimination on the grounds of age).

- ✓ *The proposal is that the formulation of the test should be “a proportionate means of achieving a legitimate aim.”*

Q5 Do you agree with the proposal to harmonise the objective justification test?

Response/Comments

Justification of disability discrimination

Disability discrimination law does not generally use an objective justification test. While the principle of justification does exist, there are different legal tests depending on the activity covered.

The Government wants to replace these different provisions with a single objective justification test.

- ✓ *The proposal is to use the same test as that used to justify indirect discrimination in other discrimination legislation, namely that the conduct in question is a proportionate means of achieving a legitimate aim.*

Q6 Do you agree that there should be a single test of objective justification for disability in employment and vocational training, goods, facilities and services, housing, education, private clubs and private functions?

Response/Comments

The threshold for reasonable adjustments in the DDA

- ✓ *The Government proposes to establish a single threshold for the point at which the duty to make adjustments is triggered based upon the lower “substantial disadvantage” threshold that currently applies in relation to employment and education.*

Q7 Do you have any comments about the proposal to establish a single threshold for the point at which the duty to make adjustments is triggered?

Response/Comments

Victimisation

The Government proposes to align the approach to victimisation across discrimination and general employment law.

- ✓ *The proposal is to remove the requirement for a comparator for victimisation in discrimination law.*

Q8 Do you agree that the approach to victimisation in discrimination law should be aligned with the employment law approach?

Response/Comments

Genuine occupational requirement test

- ✓ *The Government proposes to introduce a genuine occupational requirement test for all the grounds of discrimination, with the exception of disability (where it is not considered necessary).*

Q9 Do you agree that a genuine occupational requirement test should be introduced for all the grounds of discrimination, with the exception of disability (where it is not necessary)?

Q10 Do you think there is a need to retain any of the genuine occupational qualifications listed in the SDA and RRA? If so, please explain why.

Response/Comments

Goods, facilities and services, and public functions

The two main proposals are;

- ✓ *To adopt a harmonised approach to the way the law treats public functions and goods, facilities and services provisions across all protected grounds*
- ✓ *To streamline exceptions in this area, but consider whether public authorities need more or different exceptions from private bodies*

Further discussion on these proposals is outside of the scope of the Advisory Bulletin, but details can be found in the consultation paper in Part 1, Chapter 2 – pages 50-52.

Equal pay

In general terms, the majority of sex discrimination claims relating to pay and benefits are brought under the Equal Pay Act. Claims arising from non-contractual matters, such as exceptional bonuses, childcare subsidies, etc, are brought under the SDA.

- ✓ *The Government proposes 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.*

Q11 Do you agree that the distinction should be retained?

Response/Comments

Clarifying and simplifying the law

The Government intends to clarify and simplify the law by incorporating settled case law principles within the legislation.

- ✓ *The Government proposes to clarify in legislation the following key principles:*
 - *with whom a comparison can be made*
 - *what can be compared (such as all terms of the contract of employment)*
 - *what constitutes a defence*

Q12 Do you consider there are further areas of the law of equal pay developed by case law that it would be helpful to codify?

Q13 Do you have any further suggestions on how the Government could simplify equal pay legislation or make it easier for it to work in practice?

Response/Comments

Hypothetical comparators

At the moment it is necessary to identify an actual comparator before bringing an equal pay claim.

- ✓ *The Government does not propose to allow claims to be brought against a hypothetical comparator.*

Q14 Do you agree that allowing the use of hypothetical comparators would be unlikely to give any benefit in practice?

Response/Comments

Part 2: More Effective Law

Extending the scope for positive action measures

The Government recognises that a lot of progress towards equality has been made in society, and that there is also a greater recognition of the benefits of diversity.

However, the Government also feels that it might be helpful to allow institutions a greater degree of flexibility in order to fulfil their basic functions effectively.

Q15 What evidence is there of the extent to which current “positive action” provisions are being used? Do you consider that the current provisions limit the action that employers and others would like to take?

Q16 Do you agree that it would be helpful for organisations seeking to make progress towards their goals of tackling under-representation and disadvantage to be able to use a wider range of voluntary balancing measures?

Response/Comments

The Government acknowledges that there will be an important role for the CEHR to develop clear and consistent guidance on the scope for balancing measures generally, but does not propose to give it the role of approving positive action programmes.

Q17 Do you agree with these proposals for the issuing of guidance by the CEHR, but that the Commission should not have a role for approving positive action programmes?

Response/Comments

Public sector equality duties

The race, disability and gender equality duties each have slightly different features, together placing a range of requirements on public authorities. In addition, each duty operates on a different three-yearly cycle.

- ✓ *The Government considers that a single public sector equality duty would be simpler and more practical for public authorities to implement and therefore proposes to replace the different duties on race, disability and gender with a single duty on public authorities.*

Q18 Do you agree that the race, disability and gender equality duties should be replaced with a single duty on public authorities to promote race, disability and gender equality?

A strategic equality duty

The Government would also like to consider whether a single public sector equality duty would be more effective if it required public authorities to focus on taking action in a limited number of priority areas.

- ✓ *While recognising that public authorities need to balance the resources they expend on promoting equality within the overall demands placed upon them, the Government proposes to develop an approach in the legislation that places on public authorities a clear requirement to identify priority race, disability and gender equality objectives and take proportionate action towards their achievement.*
- ✓ *The Government proposes that priority equality objectives will need to be reviewed at least every three years to enable them to be updated to reflect progress and changing circumstances.*

Q19 Do you believe that a single public sector equality duty should require public authorities to identify priority race, disability and gender equality objectives and take proportionate action towards their achievement? If not, please give your reasons and any alternative suggestions.

Q20 Do you agree that public authorities should be required to review their priority equality objectives at least every three years? If not, please give your reasons and any alternative suggestions.

Response/Comments

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Ensuring effective performance

The current public sector equality duties include specific duties placed on certain public authorities through secondary legislation which are designed to support better performance of the general duty. The Government envisages that under a single duty there will remain a need for the legislation to say how public authorities should respond to the duty.

Rather than prescribing exactly what processes public authorities should adopt, the Government wishes to consider whether public authorities should be given flexibility to respond to the duty in ways which are appropriate for their particular functions and circumstances.

- ✓ The Government states the following as the four key principles it believes underpin effective performance of public sector equality duties: consultation and involvement; use of evidence; transparency; capability.

Q21 We would welcome views on the proposed new approach to supporting effective performance of a single public sector equality duty by requiring proportionate action towards the achievement of priority equality objectives, and on the four key principles we identified. Do you prefer this approach, or an extension of the type of specific duties adopted so far in the race, disability and gender equality duties? Please give your reasons.

Q22 If you prefer an extension of the type of specific duties adopted so far in the race, disability and gender equality duties, which elements of the specific duties do you think should be retained for a single public sector equality duty and why?

Response/Comments

Extending the coverage of the duty

The Government is considering whether or not to extend the coverage of a single public sector equality duty to all the protected grounds of discrimination to include age, sexual orientation and religion or belief.

Q23 Do you think that a single public sector equality duty should be extended to cover:

- a) age,
- b) sexual orientation, and
- c) religion or belief

Q24 Please state your reasons, including examples of the types of disadvantage you believe are experienced by people because of their age, sexual orientation and religion or belief which could be addressed effectively through such a duty.

Q25 Might there be disadvantages in extending the duty to any of these groups? If so, please give examples.

Response/Comments

Implementing a single equality duty

If the Government does decide to extend the duty, consideration needs to be given to the following consultation questions:

- Q26** Over what timescale do you think a single public sector duty and any extensions to it should be implemented to ensure we have learned as much as possible from the recently introduced duties on disability and gender?
- Q27** Do you think public authorities should be given the option to implement any new approach in advance of it becoming a legal requirement, enabling those authorities who have already taken an integrated approach to build on existing work?

Response/Comments

Enforcement of a single public sector equality duty

If a single duty is adopted, the CEHR will play a key role in raising awareness of the duty and providing advice, guidance and support to public authorities. The Commission will also have some enforcement powers which are intended for strategic use.

- Q28** Do you think there should be a single enforcement mechanism for the proposed single equality duty, enabling the CEHR to issue a compliance notice with or without an assessment, as appropriate in the circumstances, enforceable in the county court or Sheriff's court in Scotland?

Response/Comments

Public sector procurement

It is the Government's view that as procurement is a function of public authorities, and the obligations under the general duties apply to a public authority's functions as a whole, in carrying out procurement public authorities need to have due regard to the need to eliminate unlawful discrimination and promote equality as well as continuing to ensure compliance with the legal and policy framework for public sector procurement.

- ✓ *The Government proposes that there should be straightforward, practical guidance for public authorities on procurement and public sector equality duties that will be agreed jointly between the CEHR and the Government*
- ✓ *The Government also proposes that further action is needed to encourage good practice, simplify processes and explore the scope to develop streamlined approaches and minimise the burden on the private sector and public authorities alike.*

Q29 What issues would you like to see included in practical guidance on how public sector procurement can be used to achieve equality outcomes in the delivery of public services by the private sector, while ensuring that the guidance works well for business?

Response/Comments

Promoting good equality practice in the private sector

The Government proposes:

- ✓ *to develop a light touch "equality check tool" for private sector employers to use and consider introducing a voluntary equality standard scheme*
- ✓ *to consider suggestions for ways in which good equality practice could be encouraged and embedded in the private sector without introducing additional legislation.*

Effective dispute resolution

In early 2007, the Government published a consultation paper: “Resolving Disputes in the Workplace” which proposed a number of far-reaching measures which are outlined and discussed in Advisory Bulletins 525 and 527.

Multiple discrimination

The Government acknowledges that people can belong to more than one protected group, and thus if a person experiences discrimination it may be difficult to disentangle which of their protected characteristics is driving the less favourable treatment to which they have been subjected, or whether more than one protected characteristic was involved – that is, they may have experienced multiple discrimination.

Some commentators argue that the current system does not provide adequate redress for those who face multiple discrimination as any protection provided is on the basis of separate grounds. They therefore propose that fully combined multiple claims should be permitted.

- ✓ The Government believes that such a move would seriously complicate the law and place additional burdens on business and the public sector. Also, they do not have any evidence that in practice people are losing or failing to bring cases because they involve more than one protected ground and would therefore welcome information about instances of this happening.

Q30 Can you provide us with evidence illustrating any difficulties of gaining legal redress in cases of multiple discrimination?

Q31 Are there particular issues you would want to see addressed in relation to multiple discrimination cases?

Response/Comments

Part 3: Modernising the law

The grounds of discrimination

The Government is committed to considering the case for updating the grounds or personal characteristics protected under discrimination law only in as much as changing the law would be a proportionate response to a real problem experienced by individuals who share a particular characteristic. In this regard, the Government proposes to:

- ✓ *Simplify how the definition of disability operates in relation to “normal day-to-day activities” by removing the list of “capacities”*
- ✓ *Continue to deal with issues relating to parents and carers through targeted provisions and specific measures*
- ✓ *Consider whether specific protection for married people and civil partners is still needed in the absence of a “marriage bar” in employment*
- ✓ *Continue with the current non-legislative approach to genetic predisposition*

Updating the definition of disability to remove the list of “capacities”

In general, the DDA protects anyone who has a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, and people who have had a disability in the past. The Act does not define “normal day-to-day activities”, but requires that they must affect one or more of the following “capacities”, including, for example: mobility, manual dexterity, speech, hearing and eyesight.

- ✓ *The Government intends to remove the list of “capacities” from the definition of disability.*

Q32 Do you have any comments on whether we should remove the list of “capacities” from the definition of disability?

Response/Comments

Addressing the needs of parents and carers

The Government recognises the vital role parents and carers play in society, and have introduced a range of legal rights and practical support.

- ✓ *There have been calls to provide protection against discrimination on the specific ground of having parenting or caring responsibilities, but the Government believes that issues relating to parents and carers are best dealt with through targeted provisions in employment legislation and specific measures to address the issues they face in areas other than employment.*

Q33 Do you have any comments on our approach to addressing the needs of parents and carers?

Response/Comments

Married persons and civil partners

The Sex Discrimination Act currently prohibits direct or indirect discrimination in employment against people on the ground that they are married or a civil partner. The original purpose of this provision when it was introduced in 1975 was to ensure that women affected by the “marriage bar” – a requirement in some workplaces that women had to resign from employment on marriage – would be able to claim discrimination. This provision was extended to civil partners in the Civil Partnership Act 2004, but unmarried partners or single people are not covered.

- ✓ *It is now generally considered that this provision is no longer required for its original purpose and the Government is proposing to remove this protection.*

Q34 Do you consider that the protection for married persons and civil partners is still needed in the absence of a “marriage bar” in employment? Please give your reasons.

Response/Comments

Genetic predisposition

A genetic predisposition can take the form of an increased likelihood of developing a health condition in the future.

- ✓ *As there is currently no real evidence of discrimination against those who have a genetic predisposition, or that genetic testing is being used in a way that would give rise to such discrimination, the Government does not believe there is a need at present to legislate to prohibit discrimination in this area.*

Q35 Do you agree that there is no current justification for legislating to prohibit genetic predisposition discrimination?

Response/Comments

Gender reassignment

Transsexual people are protected from direct discrimination, harassment and victimisation in employment and vocational training under the Sex Discrimination Act 1975, as amended by the Sex Discrimination (Gender Reassignment) Regulations 1999. These provisions provide protection for people who plan to undergo, are undergoing, or have undergone gender reassignment. Gender reassignment is defined as:

- “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”.

However, the concept of indirect discrimination does not currently apply in respect of discrimination on grounds of gender reassignment, and the Government proposes to introduce protection for transsexual people against indirect discrimination through the Single Equality Bill.

- ✓ *For this purpose the Government proposes to maintain the existing definition of gender reassignment.*

Q36 Do you agree that we should keep the existing definition of gender reassignment?

Response/Comments

Harassment at work

A specific and freestanding right to be protected from harassment in employment (and in vocational training) on all the grounds prohibited by discrimination law was introduced into British discrimination legislation recently as a result of the implementation of European Directives - the Race Directive, the Employment Directive and the Equal Treatment Amendment Directive.

- ✓ *However, this freestanding protection does not cover colour or nationality and it is the Government's intention to correct this.*