

A Framework For Fairness: Proposals for a Single Equality Act for Great Britain

Response of The Law Society of England and Wales

September 2007

INTRODUCTION

The Law Society is the representative body for more than 100,000 solicitors in England and Wales. The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared with input from the Society's Employment Law Committee and its Mental Health and Disability Committee. Both Committees are made up of senior and specialist lawyers from across the country. Employment Law Committee members provide advice and representation to employers and employees through practice in City and regional firms, the public sector and law centres. This diversity of composition is intentional. Committee members' experience includes part-time chairmanship of employment tribunals.

REPLIES TO QUESTIONS

Definitions and tests

Q1

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

We disagree.

Identifying a comparator is an evidential matter and should not be elevated to the status of a statutory requirement. In most cases identifying a comparator

will be the most expedient way for a claimant to show that she or he has been discriminated against on a prohibited ground, but it is not the only way.

Removing the need for a comparator will not open the door to allowing claimants to show only that they have been subjected to a detriment or to unfair treatment. In this respect, we consider that paragraph 1.15 of the consultation paper is mistaken. Claimants will have to show that any detriment or unfair treatment was on a prohibited ground, that this is the reason for the treatment (“the reason why”: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2001] NICA 23).

EU law has necessitated the removal of the requirement for a comparator in cases of maternity and pregnancy discrimination, and sexual harassment. It has not however removed the requirement to demonstrate that the detriment or unfair treatment was on a prohibited ground.

Q2

Do you have any comments on our proposal to replace the separate definitions of discrimination in Part 3 of the Disability Discrimination Act with a single definition?

We agree.

Q3

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

No.

We welcome the extension of protection to cover discrimination on the grounds of association with transsexual people.

In relation to disability, paragraph 1.22 states:

Extending protection to people who are perceived to be disabled, but are not disabled, or who associate with disabled people, would potentially extend coverage of the disability legislation to several million extra people who are not themselves disabled.

We respectfully disagree. In cases of (mistaken) perceived disability the issue for the tribunal would be: would this treatment have been unlawful if the claimant had indeed been disabled in the way s/he was believed to be by the defendant? In cases of association the question would be: has this claimant suffered a detriment by reason of her / his association with a disabled person or persons? It would operate in a way akin to victimisation (s.55 and elsewhere). There is no reason to believe millions of people would be able to claim. By the same token, practically the entire working population can claim

unfair dismissal, but this is rightly not considered to be a reason for not having an unfair dismissal law.

In relation to age, paragraph 1.25 states:

... discrimination experienced by someone because of the age of those with whom he or she associates is not covered. Extending the definition to include association could potentially bring in parents, carers, teachers, dependants and many others, taking the legislation far beyond its intended scope.

Again, we must disagree, and for similar reasons. We believe it is inherent in the concept of age discrimination that it covers less favourable treatment by reason of a person's age or the age of those they associate with. It is the less favourable treatment that is key. What are the supposed adverse consequences of extending protection to carers? The point is asserted, not argued.

Q4

Do you agree with our proposal to extend indirect discrimination to cover gender reassignment, but not to explicitly introduce it to disability discrimination law?

Yes. We agree that it should be extended to cover gender reassignment. We are not persuaded of the need to introduce the concept of indirect discrimination into disability discrimination law.

Q5

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

Yes.

Q6

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

Yes, but we do not agree with your proposed wording. In our response to *Equality & Diversity: The Way Ahead* we wrote: "We consider the formulation in the Regulations is, at best, unhelpful. It is in the interests of all users of the legislation that the Regulations clearly state the test as it has been established in the case law of the European Court of Justice and the European Court of Human Rights, which must be followed here. We therefore propose that the formulation in the Directive be adopted, so making clear that the test is an objective one and involves a necessity element."

We note that the European Commission has recently expressed the opinion that your proposed wording does not comply with the Race Directive 2000/43/EC (and, by extension, the Equal Treatment Directive 2000/78/EC).¹

Q7

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

We support this. We particularly welcome the proposal to narrow the discretion available to employers (partially reversing *Jones v The Post Office*).

The wording of the directives should be followed (see our reply to Question 6, above).

Q8

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

We support this.

Q9

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

Yes.

Simplifying exceptions

Q10

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)?

Yes

Q11

Do you think there is a need to retain any of the genuine occupational qualifications listed in the Sex Discrimination and Race Relations Acts? If so, please explain why.

No.

¹ Press release IP/07/1928 Brussels, 27 June 200: "Commission acts to close gaps in race equality rules".

Q12

Do you support or oppose the introduction of a genuine service requirement test for differentiation in the provision of goods, facilities or services, housing and the exercise of public functions? Please give your reasons and examples of what it might cover.

We support it. We think a specific exemption will be required for charities, and for certain types of health and personal services. Exemptions should be tightly drawn.

Q13

Do you agree with the proposal for a unified approach where exceptions apply to more than one protected ground, where this is appropriate?

Yes.

Q14

Do you have any comments on our proposals for retaining the specific exceptions set out in Table 1 in Annex A?

No.

Q15

Do you agree that the exceptions listed in Table 2 in Annex A should be removed? If not, please explain why.

Yes.

Q16

Is there any need to retain an exception to allow insurers to treat people differently on grounds of sexual orientation, where supported by sound actuarial evidence, beyond the end of 2008? If yes, what should this seek to achieve and why

No.

GFS and public functions

Q17

Do you agree that 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?

Yes, in principle.

Q18

Do you think the exceptions could be streamlined in this area, or do you think that there are any exceptions that should apply to public

authorities that it would not be appropriate to apply to the provision of goods, facilities or services by private bodies?

We are not aware of any exceptions.

Equal pay

Q19

Do you agree that the distinction [between contractual and non-contractual pay matters] should be retained?

We somewhat reluctantly agree that the distinction between contractual and non-contractual pay matters should be retained. All time limits are arbitrary, and can operate harshly. They represent an attempt to balance the need for justice against economic reality and the need for finality. We think certainty and finality are required in relation to contractual claims especially.

However, we think this is an area where the case law is causing increasing difficulty; see for example *Unison v Allen & Ors* [2007] UKEAT 0056_07_2607.

With reference to paragraph 3.19 of the consultation document, we are not persuaded that it is wrong in principle that tribunals should be empowered to order employers - or others such as trade unions - to compensate employees for injury to feelings caused by unequal pay.

Q20

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

No.

Q21

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

We oppose a moratorium, for the reasons given in paragraph 3.23.

Q22

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

We disagree. The use of hypothetical comparators would in our view make a helpful contribution to resolving difficulties which arise all too often in practice. For instance, it would enable a claim to proceed where part of a public sector workforce had been contracted out. Similarly, it would in principle make possible a claim by women employed in a sector such as the provision of personal care where the main workforce may be exclusively female and pay is

demonstrably low because of that fact. A comparator for such a workforce might be a hypothetical male maintenance worker.

Balancing measures

Q23

What evidence is there of the extent to which the 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?

As an employer the Law Society uses the usual targeting measures, such as selecting where we place advertisements. This is not very effective in correcting gender imbalance in those occupations, for instance human resources, in which there is a preponderance of women. For a medium sized employer that does not offer traineeships, it can be very difficult to enlarge the pool of candidates.

Broadening the circumstances in which an employer can draw attention to an imbalance in an advertisement might be helpful.

We would not wish, ever, to recruit other than the best candidate for the job.

Q24

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?

Yes.

Q25

Do you agree that measures to meet special needs in relation to education, training or welfare or any ancillary benefits should be permitted in respect of all protected groups?

Yes.

Q26

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

Yes.

Q27

Do you agree that we should have a power to continue the operation of the current provision beyond 2015, if this is still necessary and proportionate?

Yes.

Q28

Do you agree that we should widen the scope of voluntary positive measures for political parties to target the selection of candidates beyond gender?

Yes, but this provision should extend to gender, race and disability only. We do not consider selection targets to be appropriate for religion or sexual orientation: religion, because there are many religions, and many forms of agnosticism, atheism and humanism, and it would be invidious to target some and not others; sexual orientation, because it is essentially a private matter. Naturally, we strongly oppose *discrimination* on either ground in the selection of candidates.

We should like to see provision for voluntary positive measures extended to membership organisations such as the Law Society, which can encounter similar problems in achieving diversity in their governance structures.

Public sector equality duties

Q29

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?

Yes. However, we think statutory guidance should emphasise the need to address each strand individually and should strongly discourage a “one size fits all” approach.

Q30

Do you agree that it would be helpful to provide a clear statement of the purpose of a single public sector duty which public authorities should use as a foundation for taking action to promote equality and good relations?

Yes.

Q31

Do you agree with the four areas set out in the proposed statement of purpose? If not, please give your reasons and any alternative suggestions.

Yes; but in the second “area” we question your wording. The reference to the equal worth of different *groups* [our emphasis] is not to be found in the paper by Sarah Spencer and Sandra Fredman which you refer to. We should prefer to see this first limb refer to *individuals*, in order to emphasise that it is individuals who have rights; this is in contrast to the second limb, which concerns good relations within and between *groups*.

Q32

Do you think that the proposed statement of purpose adequately captures the need for work to build good relations and promote positive attitudes within and between groups and underpins efforts to build integration and cohesion?

Yes.

Q33

Do you agree 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.

Yes. We very much support evidence-based prioritisation of equality objectives.

Q34

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.

Yes.

Q35

Would it be helpful for strategic equality outcomes to be set by the appropriate national Government? If so, what would be an appropriate way of doing this?

In principle we support this, as it would encourage partnership working, which would be necessary to achieve such national priorities. However, we think meaningful priorities are more likely to be set regionally and locally, where partnership working should be strongly encouraged.

Q36

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 have 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.

Please see our reply to Question 35 above. We favour identification of strategic equality goals nationally, regionally or locally, as may be appropriate, and regional and local strategies for partnership working to achieve those goals.

It is widely accepted that the specific race equality duties have too often permitted a “tick-box” approach. If the approach above is adopted, there will need to be fewer specific duties, but we do not agree that none will be needed.

Q37

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?

Firstly, there needs to be a requirement to produce a written equality plan. The fact that such plans are often inadequate is not a reason to abandon them, but to make them better. This can be achieved by a combination of information – presented in a persuasive manner – and enforcement. No authority can deliver equality without publishing and consulting on its plans.

Secondly, there is a strong case for being prescriptive in relation to employee monitoring. The Equality Review argued persuasively that rigorous and consistent monitoring is essential for the attainment of equality goals. It is inconceivable that any equality goal relating to the workforce could be successfully pursued without employee monitoring; but if such monitoring is no longer to be compulsory, there is a clear risk that some public authorities may be tempted to drop it. Even if they later come to see, or are brought to see, the error of their decision, continuity of data will in the meantime have been lost. We think therefore that employee monitoring should remain compulsory; it should also be standardised so as to permit comparison over time and across authorities.

Thirdly, we consider also that the requirement for standardised employee monitoring should be extended to some of the private sector; for example, to enterprises employing more than a specified number of workers. This should be the subject of a separate consultation.

Fourthly, it is necessary to retain a duty to undertake diversity impact assessment of policies and decisions.

Lastly, and very importantly, there must be a specific requirement to involve and consult target groups. In this regard the disability equality duty should be the model.

Q38

Do you think that the proposed single public sector equality duty should apply to all public authorities? If not, please say how you think it should be targeted and give your reasons.

We think all public authorities should be subject to the same duty, but the duty should be applied in a proportionate manner.

In view of the decision of the House of Lords in *YL v. Birmingham City Council & Ors* [2007] UKHL 27 we think it essential not to adopt the Human Rights Act definition of 'public authority' but to have a separate, far wider, definition for the purposes of equality legislation. In particular, we think that private bodies carrying out public services on behalf of a public authority ought in principle to be covered, although exceptions may be needed.

We are aware of the practical problems that arise when authorities have to be listed, and we had hoped that listing could be avoided. However, we are unaware of any alternative to listing.

Q39

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

- a) age;
- b) sexual orientation; and/or
- c) religion or belief?

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

a) age:

Yes. We favour extending the duty to age, for the reasons set out in paragraph 5.61, namely the key role played by the public sector in ensuring the provision of health and social care services to both older people and vulnerable young adults. We state in our reply to Q.60 below our reasons for considering that it would be possible and desirable to extend goods and services protection to children.

b) sexual orientation

Yes. We favour extending the duty to sexual orientation, for the reasons stated in paragraph 5.64.

c) religion or belief

We favour extension of the duty to cover religion and belief (which includes the absence of religion or belief); to do otherwise might give a message to

people who have a strong religious identity that they are not equal in the eyes of society and the law.

We recommend that this issue be approached with the greatest care. The law protects individuals, not groups, from discrimination; but, regardless of the language used, the public duty is inevitably seen as applying to groups. Given the diversity of religion and belief in Great Britain, and the strongly ideological nature of the positions on social issues sometimes taken by organisations purporting to represent those with and those without religious belief, we think that it is less than ideal to allow groups defined by religion, or its absence, a role in public policy making. As stated above in reply to Question 28, there are many religions, and many forms of agnosticism, atheism and humanism, and it would be invidious to target some and not others. The fact that communities may define themselves by religion is not, in itself, a reason to prioritise the needs or wishes of such communities (as opposed to protecting their members from discrimination); especially since it is rare for a community to define itself by its lack of religion or belief, yet giving recognition to representatives of the one must require doing the same in relation to representatives of the other. There can be questions, in relation to all of them, about whom, exactly, they represent.

In our view, to bring representatives of a group into consultation is to raise expectations that their principal concerns will be addressed and met. Yet those concerns may well be extremely controversial and impinge adversely on the interests of others, including those who have no religion. The temptation politically will be to make concessions to vocal and well organised interest groups. Paragraph 5.71, with its references to proportionality and so on, fails to address the issues of misplaced expectations and political pressure.

Q40

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

Giving rights to groups identified by religion or belief may cause them to assert their need and right to pursue policies or practices which are unacceptable in terms of public policy. To give some examples: we do not believe that religion or belief should “trump” considerations of public policy in relation to sex education, the teaching of creationism, gender segregation, homosexuality, or female genital mutilation.

Q41

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?

We have no view, save that we wish to see implementation as soon as possible.

Q42

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?

Yes.

Q43

Do you think there should be a single enforcement mechanism for the proposed single equality duty, enabling the Commission for Equality and Human Rights 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?

If not, please give your reasons.

No.

Enforcement measures in relation to the general duty have been curiously lacking. While acknowledging that judicial review is a cumbersome enforcement tool, we find it surprising that the Commissions have, to the best of our knowledge, failed to pursue *any* public authority for breach of the general duty.

This causes us also to view with concern the possibility that enforcement will in future be the function of the Commission for Equality and Human Rights alone.

Q44

What do you think should be the role of the public service inspectorates in assessing compliance with public sector equality duties?

The inspectorates, and regulatory bodies such as the Financial Services Authority and the Law Society, will themselves be subject to the public duties; they will therefore have to concern themselves with the performance in relation to equality of those they inspect and / or regulate. This will include the Legal Services Board, when established.

Q45

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?

Examples might be: a list of software tools, a cost / benefit assessment tool, reporting mechanisms, and advice about how contractors will be assessed.

Private sector

Q46

Do you think that an “Equality Standard” would be beneficial to businesses, employees and customers? Would you prefer an independently assessed accredited standard or a non-accredited good practice and compliance tool? Please give reasons for your answers.

We are sceptical about having a single equality standard. We doubt if a “one size fits all” approach is appropriate. The professions, for instance, may wish to develop their own equality standards, with or without accreditation.

In general, there may be a place for both accredited and non-accredited equality standards. Accreditation is unlikely to be pursued by SMEs because of the cost and time involved. SMEs therefore might benefit from a non-accredited standard.

In our response to the recent consultation document *Success At Work: Resolving disputes in the workplace* we expressed concern that tools such as the proposed Business Link employment law checklist with its “no-nonsense” guidance (paragraph 6.9) should not dilute the statutory guidance produced by Acas.

Q47

We would welcome your suggestions for other ways in which good equality practice could be encouraged and embedded in the private sector.

As stated in our reply to Question 36, we consider that the requirement for standardised employee monitoring should be extended to some of the private sector; for example, to those enterprises employing more than a specified number of workers.

Effective dispute resolution

Q48

Can you suggest ways in which Alternative Dispute Resolution could be used more effectively or widely to resolve discrimination disputes in the field of goods, facilities, services, premises and the exercise of public functions?

Most (but not all) claims in these areas are low value. The essential requirements for a dispute resolution service are that it must be accessible, free to the complainant, fast, and demonstrably fair. If a service provided by CEHR were to be properly branded and marketed, for instance in shopping centres, it might be very effective. It would have to be independently funded. The provision of a mediation service is not free, or even cheap, as mediators have to be trained and paid, and facilities must be provided for them and the administrators who must support them.

Q49

Can you suggest ways in which the role of Ombudsmen might be used more effectively to resolve discrimination disputes?

No.

Q50

Do you have any views on our proposals for enhancing discrimination expertise in the county and sheriff courts?

We agree with you that these cases should not be transferred to the employment tribunal system. We think it necessary to have specially trained judiciary and therefore support your proposal for designated judges and, possibly, courts; but in order to facilitate access to justice, it may be necessary for the designated judges to sit away from their home court. We think the use of assessors should be the same across grounds.

Q51

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

We are not aware of any.

Q52

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

No.

The grounds of discrimination

Q53

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

We consider that the list should be removed.

Q54

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

We agree with your approach.

Q55

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.

We consider this provision is still necessary. An employer may take the old-fashioned view that making the commitment of marriage, or civil partnership, will lessen the commitment of the employee (typically, a woman) to her employment. Such an employer may overlook a woman who is married or has entered into a civil partnership for additional responsibility or promotion. A remedy is still required even if – as must be hoped – such attitudes are becoming less common.

Q56

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

This is an issue of enormous significance. We consider a decision should be deferred until the CEHR has had an opportunity to consider it. We understand the ABI has proposed a review in 2008. We support the idea of a review. We ask that the Government give a firm commitment to take action if it becomes apparent that the situation has changed sufficiently to warrant it.

Age discrimination beyond the workplace**Q57**

What instances of unfair age discrimination outside the workplace, against people of any age, are you aware of?

The material produced by Age Concern, and referred to in your text, contains an abundance of examples.

Q58

Is legislation the most appropriate and proportionate way of tackling harmful age discrimination? What would be the likely costs of legislation?

We consider that introducing legislation is both proportionate and necessary. We must point out that exactly the same arguments were once deployed to justify failure to legislate on employment discrimination. The voluntary measures to end age discrimination in employment were a failure. There is no reason to believe voluntary measures outside the workplace will be any more successful.

Q59

Do you have any views on how, if we decide to legislate, we can target the legislation to avoid unintended consequences and disproportionate burdens on both public and private sectors?

A defence of justification of direct discrimination should be included in the legislation. Including a list of specific exemptions should also be considered.

Q60

Do you have any comments on any of the issues which would arise with a legislative approach to tackling age discrimination?

We disagree with the formulation in paragraph 9.26 of the basic principle of age discrimination legislation. You say the basic principle is that people should not be treated differently because of their age. We consider the basic principle to be that people must not be treated *less favourably* because of their age.

We cannot see any justification for permitting *less favourable* treatment of people under the age of 18.

Gender reassignment

Q61

Do you agree that we should prohibit discrimination on grounds of gender reassignment in the exercise of public functions?

Yes.

Q62

Do you agree that it is unnecessary to include school pupils and education in schools in any extension to protection on grounds of gender reassignment?

Cases may be rare, but when they do occur what possible justification can there be for denying a school-age person the same remedy as would be available to an adult?

Q63

Are there any circumstances in which you consider that it is necessary for organised religions to treat people differently on grounds of gender reassignment? Please explain what they are.

We are not aware of any such circumstances. It is for those who seek an exemption to justify it. Any such exemption should be very tightly drawn.

Q64

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

Yes. It is open to employers to apply a single regime to transsexual people and those exercising what you term a "lifestyle choice", and they may find it expedient to do so, but we do not think the law should extend to protecting those who have not got a diagnosable medical condition.

Pregnancy and maternity

Q65

Do you agree that we should make less favourable treatment of a woman on grounds of pregnancy and maternity unlawful in the exercise of public functions?

Yes.

Q66

Do you agree that it is neither necessary nor appropriate to extend protection on grounds of pregnancy and maternity to school pupils and education in schools?

We disagree. While many schools do respond excellently to teenage pregnancy, we consider that all school-age parents (fathers as well as mothers) should have enforceable rights to equal access to education.

Private clubs and associations

Q67

Do you agree it is a positive benefit to have clubs which are set up for the purpose of offering the benefits of membership to a particular group, including single sex clubs and clubs catering for particular religions or beliefs or age ranges, along with those currently permitted under race, disability and sexual orientation law?

Yes. However, in relation to gender, this must be drafted very tightly, so as not to permit men-only golf clubs and the like.

Q68

Do you agree that we should extend the law to make it unlawful for private clubs with 25 or more members (other than single sex clubs or those set up for members who are of a particular religion or belief) to discriminate on grounds of sex and religion or belief?

Yes.

Q69

Do you agree that private clubs with 25 or more members should not be permitted to discriminate against guests on the grounds of sex, race, sexual orientation and religion or belief, as is already the case on the ground of disability?

Yes.

Q70

Do you think that the law should address unjustified age discrimination by private clubs with 25 or more members (other than those set up to

cater for a particular age range) if age discrimination is made unlawful in the provision of goods, facilities and services?

Yes.

Access to and use of premises for disabled people

Q71

Do you agree with our proposal for requiring disability-related alterations to the common parts of let residential premises?

Yes.

Harassment

Q72

Can you provide examples of harassment you think is occurring or could occur on grounds of religion or belief, sexual orientation, age or disability which would fall outside the existing protections in discrimination and other law?

No.

Q73

Do you think that express statutory protection against harassment on grounds of:

- **religion or belief;**
- **sexual orientation;**
- **age;**
- **disability;**

should or should not be provided in any of the following:

- **the provision of goods, facilities and services;**
- **education in schools;**
- **the management or disposal of premises;**
- **the exercise of public functions?**

Please state your reasons why.

In principle, yes in all cases.

We have serious reservations about a prohibition of “harassment” on grounds of religion and belief in “open” environments. Perceptions are important, and the prospect of legislation may raise expectations that ought not to be met. For instance, in a shop or shared lodging house there may be a notice board on which is posted material (the Danish cartoons might be an example) that

some of those who see it will find offensive on religious grounds. In our view, *even if* they consider that the presence of the material violates their dignity or creates an offensive environment – which would amount to harassment under the existing legislation² - that ought *not* to amount to actionable harassment in relation to religion or belief. A very high threshold indeed should be set, probably involving an element of intimidation. We do not think that the observations in paragraph 14.24 come anywhere near meeting our concerns on this score.

Q74

Were statutory protection against harassment to be extended to one or more of the above grounds in one or more of the above areas, do you think that specific exceptions would be desirable? If so, please state your reasons why and the types of exceptions, if any, you would like to see in the legislation.

Yes. Please see our answer to Question 73 above.

Q75

Do you think that harassment on grounds of religion or belief should be treated differently from the other protected grounds and that a different definition of harassment would be appropriate in this case? If so, please state your reasons why.

Yes. Please see our answer to Question 73 above.

Q76

Do you think there is a valid distinction to be made between harassment in an “open” and in a “closed” environment and that the approach to its prohibition should be differentiated accordingly? Please state your reasons why.

Yes. It is not the existence of a special relationship that is key to a closed environment; it is the fact that the environment is one in which individuals are required to be in order to achieve an essential objective (or, in the case of a custodial establishment, by compulsion) and in which it is in the interests of all to limit the right to freedom of expression in order to minimise discomfort and friction.

Q77

Do you have any evidence of harassment by third parties in the workplace in relation to protected grounds other than sex? If so, do you consider that it should be dealt with in a similar way?

² Under existing legislation, a person subjects another to harassment where, on grounds of race, disability or sex, he or she engages in unwanted conduct that has the purpose or effect of: (i) violating that other person's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.

We believe harassment on all grounds is not uncommon; whenever it occurs, the employee or worker should be entitled to expect the employer to deal with it.

Implementing the EU Gender Directive

Q78

Do you agree with the proposals in Table 1? If not, please give details of those you disagree with and your reasons for doing so.

We agree.

Q79

Do you have any comments on the likely impact of the Gender Directive's insurance provisions on providers and/or customers of insurance and related financial products?

No.

Q80

Should the ban on differences due to maternity or pregnancy costs be implemented in December 2007 or deferred until December 2009?

December 2007.

Q81

Do you think maternity should be defined for the purposes of the Sex Discrimination Act provisions covering goods, facilities or services and premises, and if so how?

We see no need to define maternity.

Further issues

1. Paragraph 14.10 of the consultation document expresses a desire to rectify the fact that the free-standing statutory protection against harassment at work does not cover colour or nationality. We cannot find an express proposal to that effect nor a question on the subject.

We consider the protection should be extended to cover colour or nationality.

2. There are a number of other anomalies within the Race Relations Act 1976 that arise from the same fact that matters of race or ethnic or national origin are within the scope of the Race Directive 2000/43/EC whereas issues of colour or nationality are not; thus:

(i) Section 54A of the Act ('the reversal of the burden of proof') applies only to an alleged act of discrimination "on grounds of race or ethnic or national origins". It does not apply to, and there is therefore no reversal of the burden of proof in relation to, discrimination on grounds of colour or nationality.

(ii) There is an equivalent difference in the law and approach to the evidence with regard to the issue of indirect discrimination.

(iii) As to victimisation, the EAT has recently held - "with some degree of hesitation and disquiet" (*Oyarce v Cheshire County Council* UKEAT/0557/06) - that the reversal of the burden of proof does not apply to victimisation.

In our opinion, these anomalies are difficult to justify and should be removed.

3. A line of cases has established that subjecting someone to a detriment for refusal to obey an instruction to discriminate can be discrimination "on racial grounds"; it is unlikely, however, that it would be discrimination against a woman "on grounds of her sex". It is right and necessary that this anomaly be addressed, probably by including an express provision in the legislation that will apply across all the grounds. This issue is not mentioned in the consultation paper.