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The Equality Bill

Bill 72 of 2004-05

The Bill dissolves the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC) and replaces them with a single equality body: The Commission for Equality and Human Rights (CEHR).

Discrimination on the grounds of religion or belief in the provision of goods, facilities and services, premises, education, and the exercise of public functions will be made unlawful.

The Bill will create a public sector duty to promote gender equality. Sex discrimination in the exercise of public functions will also be prohibited.

The Bill does not extend to Northern Ireland, although some amendments are made to legislation applicable in Northern Ireland. There are special provisions affecting Scotland concerning the CEHR's role of promoting human rights, equality and diversity.

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Summary of main points

The *Equality Bill* will do four things:

- Establish the Commission for Equality and Human Rights (CEHR)
- Prohibit discrimination on grounds of religion or belief in the provision of goods, facilities or services
- Introduce a duty on public authorities to promote gender equality and work to eliminate sex discrimination
- Prohibit gender or religious discrimination in the exercise of public functions

The creation of the CEHR will not in itself change underlying equality law, but once established the body will be charged with examining the need for legislative change, in particular proposals for a Single Equality Act which would harmonise the law across the different groups (or “equality strands”).

There has been a long-running debate over whether it would be better to combine the existing Commissions into a single body, as has already happened in Northern Ireland. This debate has been brought to a head by the *EC Employment Directive (2000/78/EC)*. This required Member States to implement legislation banning discrimination in employment on grounds of religion or belief and sexual orientation by December 2003, and on grounds of disability and age by December 2006.

The *Employment Equality (Sexual Orientation) Regulations 2003* and the *Employment Equality (Religion or Belief) Regulations 2003* came into force in December 2003. Amendments to the *Disability Discrimination Act 1995* have been made with effect from October 2004 and new legislation outlawing discrimination on grounds of age is due in October 2006.

As a result, three new “strands” will be introduced into anti-discrimination legislation: religion or belief, sexual orientation and age. Few welcome the idea of three more Commissions to deal with these three new strands, but at the same time many have been concerned that the specific problems of the particular groups might be lost in a single, all-encompassing body.

The Bill allows the Secretary of State to dissolve the existing commissions by no later than 31 March 2009. Specified functions may also be removed allowing a gradual transition. It is anticipated that the CRE will not join the CEHR until 2009. There are specific provisions on disability and amongst other powers, the CEHR is given a remit to promote good relations in respect of the different ‘communities’ represented by the remaining strands.

The one-off establishment costs of the CEHR are estimated at around £24m, with annual operating costs when fully functioning of around £70m.

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I Equality Commissions

A. Existing Equality Commissions

At present there are three statutory bodies charged with promoting equality in Great Britain. They are:

- The Equal Opportunities Commission (EOC) which has various powers which cover discrimination on the grounds of sex under the *Sex Discrimination Act 1975* and the *Equal Pay Act 1970*;
- The Commission for Racial Equality (CRE) which covers discrimination on the grounds of colour, race, nationality, or ethnic or national origins under the provisions of the *Race Relations Act 1976*; and
- The Disability Rights Commission (DRC) which covers discrimination on the grounds of disability under the *Disability Rights Commission Act 1999* and the *Disability Discrimination Act 1995*. Before the 1999 Act there was a statutory National Disability Council which had powers to advise the Government but not to assist individuals in legal proceedings.

The single body in Northern Ireland is the Equality Commission for Northern Ireland, established under the *Northern Ireland Act 1998* to exercise the functions formerly carried out by the Fair Employment Commission, the Equal Opportunities Commission (NI), the Commission for Racial Equality (NI) and the Northern Ireland Disability Council. The Fair Employment Commission formerly covered discrimination on grounds of religious belief or political opinion in the employment field.

The Regulatory Impact Assessment which accompanies the Bill gives the annual budgets for current Commissions for 2003/04:¹

- CRE £19,852,000
- EOC £8,810,600
- DRC £14,696,000

The following details are also given about the work of the existing Commissions:

3. Promotion of equality and enforcement of legislation relating to discrimination is currently undertaken by three separate Commissions – the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC). Although the three Commissions receive

¹ DTI, *Full RIA, Establishment of the Commission for Equality and Human Rights*:
http://www.womenandequalityunit.gov.uk/publications/reg_impact_assessment_cehr.doc

different levels of funding their spending allocations to various major functions is roughly the same. The following provides a rough break down of the allocation of operational resources to major functions:²

Awareness-raising and Education	44%
Strategic Law Enforcement	22.5%
Policy and Research	19.5%
Scotland and Wales	14% ³

4. As can be seen a large proportion of the Commissions activities are focussed on communicating with their various stakeholders and wider society. These activities promote awareness of legislation and good practice amongst individuals, employers and service providers⁴, and support the mainstreaming of equality into public bodies policy and services.

5. As well as providing information and advice to these various audiences, and promoting good practice, the Commissions also provide casework support for individuals seeking advice on discrimination matters.

- The CRE receives around 11,000 enquiries on points relating to the law each year and its website received over 12,000 visitors each month. The organisation provided casework support to 1,300 requests for assistance and supported 155 tribunal and court cases in 2002.
- The DRC's website receives up to 42,000 visitors per month. Casework support was provided to 1781 individuals in 2002, of these around half had a positive outcome. Support was provided in 55 tribunal and court cases in 2002.
- The EOC website (which includes specialist legal pages) receives around 21,000 visitors per month. The EOC provides casework support to around 1,300 individuals per year and in 2003 supported 38 cases deemed to be in areas of strategic priority.

6. Casework support can involve a range of activities including, simple advice provision; assistance with legal administration; advising clients' legal representatives or advocacy on behalf of a client. The overall work of the Commissions provides substantial assistance to individuals and organisations in obtaining information or advice on discrimination matters.⁵ In total about 250

² Percentages of total operational cost devoted to major areas of activity. Does not include staff costs. Based on evidence provided by the DRC and EOC for 2003-04.

³ The activities of all functions are GB wide. This additional funding for Scotland and Wales is for the funding of activities tailored to these nations.

⁴ DRC reports an increased awareness of the Disability Discrimination Act among service providers and employers (by end 2004) of 60%; and furthermore a general increase in public awareness anti-discrimination legislation of 17% between 2002 and 2003.

⁵ Between them the Commissions provided casework support for around 4400 cases in 2002, and their websites combined receive around 75,000 visitors per month.

cases of strategic significance are supported in total by the three Commissions each year.

B. European requirements for equality bodies

There are requirements in EU law for equality institutions which Member States must meet. Article 13 of the *Race Directive* sets out the following requirements in respect of equality bodies for the promotion of equal treatment in respect of race:⁶

Article 13

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination.

Article 8a of the *Equal Treatment Directive relating to access to employment, vocational training, promotion and working conditions* (76/207/EEC) amended by (2002/73/EC) provides for equality bodies in identical terms to the Race Directive.

This Directive (known as the *Equal Treatment Directive*) is currently the subject of a proposal to amalgamate, simplify and extend European law relating to gender equality. Under these proposals the requirement and responsibility of the equality bodies prescribed in the directive will be extended to cover the areas of equal pay and occupational social security schemes that were previously covered by separate directives.⁷

⁶ Chapter III, Article 13 of *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*

⁷ *Proposal for a Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women, in matters of employment and occupation (recast version)* (COM (2004) 279 final)

II Equality Law

A. Hierarchy of Equality

There are a variety of ways in which legislative provisions can address the problem of discrimination. However, due to the historical process of development in equality legislation different groups have been left with less protection than others. This phenomenon has come to be described as the “hierarchy of equality”.

In examining this question, it should be noted that different measures may be appropriate for some groups but not others (eg the duty to make reasonable adjustments for disabled people or gender recognition certification for transsexual people). In addition, the extent, causes and particular impact of discrimination may be different for different groups. Awareness is also building that the overlap or intersection between the various groups or equality “strands” can often present complex problems.

There are a variety of ways in which legislative provisions can address the problem of discrimination. The main ones are as follows:

- **Equality Commissions** – the creation of non-departmental public bodies (NDPBs) with various powers directed at amplifying the impact of discrimination legislation and promoting equality
- **Employment** – prohibiting discrimination in employment and vocational training
- **Goods and Services** – prohibition on discrimination in the provision of goods, facilities and services
- **Duty on public bodies** – duty to promote equality
- **Public functions** – prohibiting discrimination in the exercise of public functions
- **Reasonable Adjustments** – duty to make reasonable adjustments to accommodate the needs of disabled people
- **Victimisation** – protecting those who take legal action and those who support them or appear as a witness in proceedings
- **Harassment** – further separate prohibition on actions which violate a person’s dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for them.

The following table gives a summary outline of the extent to which these measures are currently available to the different groups:

	Sex	Race	Disability	Age	Religion	Sex. Or.	Trans
NDPB	EOC	CRE	DRC	Bill	Bill	Bill	EOC
Employment	Yes	Yes	Yes	Proposed	Yes	Yes	Yes
Goods and Services	Yes	Yes	Yes; Bill	No	Bill	No	No
Duty on public bodies	Bill	Yes	Bill	No	No	No	Bill?
Public functions	Bill	Yes	Bill	No	Bill	No	Bill
Reasonable Adjust.	No	No	Yes	No	No	No	No
Victimisation	Yes	Yes	Yes	Proposed	Yes	Yes	Yes
Harassment	Proposed	Yes	Yes	Proposed	Yes	Yes	Proposed

It is possible from the above table to identify some of the remaining differences in the way the identified groups are protected:

- **Equality Commissions** - The current race, sex and disability commissions do not cover the age, religion or sexual orientation strands. This will be addressed by establishing the CEHR.
- **Employment** – When the age discrimination legislation comes into force all the main strands will be covered in the area of employment.
- **Goods and Services** – Protection in goods and services exists in relation to sex, race and disability, but not sexual orientation, age or transsexual people. The current *Disability Discrimination Bill* extends the existing protection in services to cover transport. The Equality Bill will introduce goods and services protection covering religion or belief. This derives in part from an anomaly which has arisen in case law on race discrimination whereby Muslims are not defined as a racial group, and so are not protected, whereas other groups such as Sikhs and Jews are protected. It should be noted the current *Serious Organised Crime and Police Bill* is seeking to extend law on incitement to racial hatred to include incitement to hatred of religious groups. Incitement to hatred has also recently emerged as a prominent concern affecting the Lesbian and Gay community, although there are no plans to legislate for this problem.⁸
- **Duty on public bodies** – At present a general public sector duty to promote equality exists for race only. The *Sex Discrimination Act 1975* contains a limited public sector duty in respect of education.⁹ The Bill will create a general public sector duty to promote gender equality. It is not clear whether this would cover transsexual people since, as drafted, the duty to promote equality is framed in terms of “equality of opportunity between men and women”. The *Disability*

⁸ The “Stop Murder Music” campaign has raised particular concerns in respect of homophobic reggae music seen as inciting the murder of homosexuals: <http://www.outrage.org.uk/pressrelease.asp?ID=211>

⁹ Section 25

Discrimination Bill will introduce a similar public sector duty in respect of disability.

- **Public functions** – The Bill will prohibit discrimination in the exercise of public functions in relation to sex and religion. Transsexual people would probably benefit from the provisions aimed at eliminating “unlawful discrimination”. There are no proposals to introduce provisions on discrimination in public functions in relation to age or sexual orientation. The *Disability Discrimination Bill* will prohibit discrimination in public functions on grounds of disability.
- **Reasonable Adjustments** – There are no plans to introduce in other areas mandatory type provisions similar to the duty to make reasonable adjustments for disabled people.
- **Victimisation** – When the age discrimination legislation comes into force all the main strands will be covered by victimisation provisions.
- **Harassment** – Most of the strands are covered by separate provisions which deal in specific terms with harassment. Of course such actions would already be covered by the general concept of discrimination. All the strands have or will receive specific provision for harassment. Existing legislation covering race, disability, religion and sexual orientation already contains such provisions. The *Sex Discrimination Act 1975* does not have separate provision for harassment, but amending regulations are due before October 2005.¹⁰ Transsexual people will also be covered under these provisions.¹¹ The proposals for age discrimination legislation due in October 2006 will also contain separate harassment provisions.

In addition, other kinds of measures which have been proposed or upon which different groups can currently rely include:

- **Questionnaire procedure** – enabling those who believe they have suffered discrimination to obtain more information from potential respondents before taking legal action against them.
- **Positive discrimination** – exemptions (mostly in relation to training) which allow discriminatory measures intended to help disadvantaged groups.
- **Automatic unfair dismissal** – making dismissal from employment automatically unfair if it was done for a given reason (eg maternity).

¹⁰ DTI consultation, *Equality and Diversity: Updating the Sex Discrimination Act*, 7 March 2005 (responses by 31 May 2005): <http://www.womenandequalityunit.gov.uk/publications/consultation.pdf>

¹¹ Ibid, paragraph 31

- **Third party liability** – imposing liability on those who assist or procure discriminatory actions.
- **Right of request** – providing a right to request certain things of employers which they must take seriously and follow a set procedure in answering, eg flexible working; or staying on beyond retirement age.
- **Non-binding codes of conduct** – guidance which can help employers understand regulation; or assist tribunals in deciding cases; or intended as a vehicle to promote equality by non-legislative means.

In comparing the protection given to different groups in equality legislation, it is also relevant to examine how defences are framed and the nature and extent of any exemptions. Differences have arisen in the way in which legislation has been drafted to cover the different groups, for example:

- As a result of amendments made to the *Race Relations Act* to implement the *Race Directive 2000/43/EC*, indirect race discrimination is more complex than indirect discrimination in other areas.
- Sex discrimination in pay is covered by separate legislation: *The Equal Pay Act 1970*. Litigation of *Equal Pay Act* cases can be very complex and some cases have taken many years to determine. One approach has been to encourage employers to undertake equal pay reviews to ensure that pay systems are fair. There have been calls for legislation which would make equal pay reviews compulsory. This proposal is currently being considered by the Women and Work Commission.¹²

B. A Single Equality Act

Many commentators believe that a Single Equality Body will not work without a Single Equality Act. These arguments are based on the absence of a principled justification for the fact that current equality legislation provides varying degrees of protection for the different groups. In addition to this, the accumulation of legislation has resulted in an extremely large and complex body of law which often requires great expertise to operate and interpret. This in turn places greater burdens on employers and tribunals leading to protracted and costly litigation without a corresponding level of social gain. For example, the TUC, in its response to a companion consultation document, *Equality and Diversity: The Way Ahead*, said:

¹² Women and Work Commission: *A Fair Deal For Women in the Workplace*, March 2005: http://www.womenandequalityunit.gov.uk/women_work_commission/fairdealforwomen_interim_statement.pdf

In the interests of social justice and fairness, a single equality act should establish high and consistent standards of protection across all equalities areas. A single equality body established without the full statutory backing of fair, comprehensive and transparent equality legislation would lack authority and have trouble dealing with the expectations of different interest groups.¹³

The Commission for Racial Equality put forward the following case for a Single Equality Act:

What is wrong with the current legislation?

- It is complex and inaccessible – there are 30 Acts, 38 Statutory Instruments, 11 Codes of Practice and 12 EC Directives and Recommendations, which makes it hard for employers to keep track of their responsibilities.
- It is unequal, giving more rights to some people than to others. In particular, it is still legal for suppliers of goods and services to discriminate against people on grounds of their religion, sexual orientation and age. So, for example, a Muslim family who are refused accommodation because they are Muslim have no redress, but a Jewish or Sikh family could take action because the law treats them as belonging to an ethnic group as well as a religious group. This is unfair, illogical and works against the principle of equality.
- It is confusing because it is inconsistent – key terms are still defined differently in different Acts, and the remedies victims get vary depending on the reason for the discrimination. This makes no sense to people facing discrimination and is confusing for employers.
- It is backward looking, relying on victims to challenge discrimination after the event instead of making sure institutions act to prevent discrimination happening. The only exception is the innovative and relatively new law that requires public sector bodies to take active steps to promote race equality.

What needs to change?

Ideally we need a single Act bringing everything together in a clear, straightforward way. But the key is getting the content of a new Act right. Our priorities are:

- Common, clear standards that employers and the public can understand, including consistent definitions of key terms and common and effective remedies
- A positive duty for all public bodies to promote equality for all, not just for race equality
- Protection from discrimination on grounds of sexual orientation, religion and belief and age to be extended to goods, facilities and services
- A general principle of equality: an over-riding principle of UK domestic law that no unjustified discrimination is permissible.¹⁴

¹³ January 2003, TUC response

¹⁴ Commission for Racial Equality, *Why Britain needs a single equality act*, July 2002: http://www.cre.gov.uk/pdfs/EDF_Why.pdf

Lord Lester of Herne Hill introduced an *Equality Bill* in the Lords on 14 January 2003. This comprehensive Bill, drawn up on the basis of extensive research under the auspices of the Odysseus Trust, proposed a single *Equality Act*, enforced by a single *Equality Commission*, which would cover all the “strands” of discrimination and all the areas in which discrimination might be outlawed. Speaking on Second Reading of the Bill, Lord Lester said:

The approach of successive governments to the increasingly complex, opaque and anomalous state of the legislation has been piecemeal and minimalist. It has involved adding new layers of legislation in bits and pieces, be they to implement European Community law, to introduce half measures on disability discrimination, or, now, to give effect to the new but restricted EU equality directives. (...)

The regulations will forbid religious discrimination, sexual orientation discrimination, disability discrimination and age discrimination, but only in employment. That is not because it is right in principle to fail to tackle unjustifiable discrimination on those grounds in education, housing and the provision of services and facilities; it is simply because the framework equality directive is confined to the employment field. Without primary legislation, Parliament cannot cover these wider areas, as they are covered in the Sex Discrimination Act and the Race Relations Act. What the Government describe as their full agenda of action on equality matters, including what they call “targeted legislation” misses the important target. Without primary legislation, women will continue to face a heavier burden of proof in discrimination cases outside the employment field; a homosexual or a Muslim denied a service because of sexuality or religion will still be unable to obtain legal redress; and an elderly person, denied essential services by a health authority or local council on the ground of age, will be denied legal redress. Except in the field of race relations, there will be no positive duty on public authorities or large employers to make progress towards equality of opportunity, even though, as long ago as November 1999, the Government promised legislation to create one. To adapt the words of George Orwell, all animals will be equal, but some animals will be more equal than others.¹⁵

Lord McIntosh of Haringey explained the Government’s opposition to this “big bang” approach in his response:

I wish to say a few more words about the “big bang” theory. The noble Lord, Lord Lester, claims that there is something terribly wrong with the current law due to its inconsistencies. Of course we aim to remove unwarranted inconsistencies, but the law is different in some cases. For example, disability law is different, as has become clear this afternoon, because it is designed to tackle

¹⁵ HL Deb 28 February 2003 cc 526-527

specific issues relevant to a particular group. The noble Lord, Lord Goodhart, made that very clear. He said that disability legislation was different because it sought to remove obstacles that exist, whereas other forms of discrimination are the other way round, so to speak.

To implement the race and employment directives, we are working hard to make the legislation coherent and easy to use. We are using the same wording for key discrimination concepts where appropriate. We will always seek to simplify the law by reducing exceptions.

The other problem with the big bang theory is that it is, in a sense, a moving target. Not only is the law in this country evolving, but so are European directives. Almost always, they evolve in a helpful direction. There have been three directives since 2000. One was on race, and another on employment deals with sex orientation, religion, disability and age. We talked yesterday about the amendment to the equal treatment directive, which deals with sex discrimination. (...)

As all those directives become law, they have to be incorporated into UK law. That means a constant succession of legislation, both primary and secondary. The noble Lord, Lord Addington, thought that the Bill would provide some sort of final solution for discrimination and that we would not be troubled with it in Parliament if the Bill were passed. I am afraid that that is not the case. The process is, will be and ought to be a continuing one. That is why we take the view that we do about the big bang theory.¹⁶

The joint DTI and Cabinet Office press release which announced a review of discrimination legislation suggested that one of the first tasks of the CEHR would be to look at the creation of a Single Equality Act.¹⁷ Similar indications from the Government were also reported in the press in October 2004.¹⁸

In the Government response to consultation on the CEHR, the following was said concerning a single equality Act:

Equality legislation: a single equality act

76. Although the White Paper made no proposals in relation to the harmonisation of equality legislation or the introduction of a single equality act, the great majority of respondents highlighted concerns about the disparate protection provided by the existing legislative framework.

¹⁶ Ibid, cc 585-586

¹⁷ Joint DTI and Cabinet Office Release, *Review of causes of discrimination announced*, 25 February 2005:
<http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=148053&NewsAreaID=2&NavigatedFromDepartment=False>

¹⁸ Alan Travis, "Legislation soon for new rights body", *Guardian*, 12 October 2004

77. Many respondents commented on the inconsistency between the Government's vision of a fairer society, and the differences in scope of legislation that underpins this, and the risks this presents to the CEHR's mission. Most pressed for the Government to introduce a consistent and harmonised framework for equality.

78. Concerns were expressed however by most private sector respondents that this would distract the CEHR and Government from the important task of working with business to ensure compliance and bedding down of significant new areas of employment discrimination law.

The Government has taken a large number of steps to improve equality and combat discrimination in recent years. These include the recent introduction of regulations relating to sexual orientation and religion and belief; the forthcoming regulations on age; the widening of protection for disabled people and the forthcoming introduction of a public sector duty to promote disability equality; the Race Relations Amendment Act which introduced a public sector duty on promoting race equality and good relations; and the recent announcements of plans to introduce a public sector gender duty and legislation making it unlawful to discriminate in the provision of goods, facilities and services on the grounds of religion and belief. These will all aid the development of a fairer society.

We are beginning to consider the best mechanisms for reviewing the current discrimination legislation framework, taking into account the interests of the many different stakeholders who would be affected by any changes to the current position. The CEHR will clearly have an important role to play in this review and will separately be empowered to recommend changes to discrimination legislation as it sees fit.¹⁹

C. The Burden of Regulation

The largest and most litigated body of discrimination law is in the area of employment. Protection in the provision of goods services and facilities is also clearly very significant. This means that discrimination law inevitably impacts on enterprise, in particular small firms, since small enterprises currently account for 99% of all enterprises.²⁰ A recurring complaint of the business community has been the burden placed on them by regulations and the disproportionate impact of some regulations on small firms.

Successive governments have developed regulatory policies and principles to reform or repeal outdated provisions and guide the preparation of new regulations. Among these is the requirement that part of the development of all regulation should include an assessment of their impact, in particular on small firms.

¹⁹ DTI, *Commission for Equality and Human Rights: Government response to the consultation*, November 2004: http://164.36.38.98/equality/project/consultation_govtresponse_nov2004.doc

²⁰ *National Statistics* data for firms employing between 0 and 49 employees; <http://www.sbs.gov.uk>

Previous Conservative Governments focussed on deregulation. Under the current Government this focus changed to “better regulation”. Various institutions are involved in the process of regulatory quality and reform. The Regulatory Impact Unit in the Cabinet Office provides scrutiny and advice; the Better Regulation Task Force concentrates on advocacy; and the Panel for Regulatory Accountability are responsible for accountability and awareness at the political centre of Government. In addition, Departmental Regulatory Impact Units have been established in each Government department to carry out the day to day work of co-ordinating regulatory activities and advising regulators. The Small Business Service (SBS) provides a voice for small firms within Government and is given a consultative position in the regulatory process.

A considerable amount of new regulation emanates from the European Union. The way in which these obligations are framed in domestic law can lead to over implementation or “gold plating”. This European dimension to the problem has been taken up in a variety of initiatives including the “think small first” policy embodied in the European Charter for Small Enterprises.

Considerable emphasis has been placed on the development of Regulatory Impact Assessments (RIAs). The current policy was established in August 1998 and requires that new legislation or regulation, which has a non-negligible effect on business, charities or the voluntary sector, has to be accompanied by a RIA. Guidance has been created for regulators and policy-makers on how to prepare RIAs. In the regulatory process special attention is paid to any burden placed on small businesses.

In view of the fact that regulations can place burdens on small business which may be difficult for them to meet, there are a number of instances where exemptions have been made for small firms. For example:

- The *Disability Discrimination Act 1995* (DDA) originally excluded from its employment provisions “an employer who has fewer than 20 employees”.²¹ However, the Act required the Secretary of State to review the threshold within four years and gave him the power to lower (though not to raise) the threshold by order. The Labour Government reduced the threshold to 15 with effect from 15 December 1998, following the statutory review.²² The threshold was finally abolished under the *Disability Discrimination Act 1995 (Amendment) Regulations 2003 SI No.1673* which came into force on 1 October 2004.

²¹ section 7

²² The *Disability Discrimination (Exemption for Small Employers) Order 1998*, SI No 2618

- The *Sex Discrimination Act 1975* originally excluded employment in private households and in firms employing fewer than six people.²³ This was repealed by the *Sex Discrimination Act 1986* following a European Court ruling.
- The *Race Relations Act 1976* exempted employment in private households.²⁴ This exemption was partially repealed to comply with the *EC Directive establishing a general framework for equal treatment in employment and occupation*.²⁵ As from 19 July 2003 the exemption only applies in respect of discrimination on grounds of colour or nationality and no longer applies to discrimination on grounds of race or ethnic or national origins.²⁶

In general the complexity of discrimination law can make it hard for employers to keep track of their responsibilities. This has obvious implications from the point of view of legislative compliance.

The Regulatory Impact Assessment for the Bill estimates an overall cost-saving to employers of between £2.7 and £3.4 million per year in terms of the costs associated with accessing newly formatted guidance from a single source, relative to three separate sources.

D. European Law

The following list, which is not intended to be comprehensive, sets out some of the key European legal provisions covering discrimination:

- *Article 141 (ex119) Treaty of Rome, 1957* provides that men and women should receive equal pay for equal work or work of equal value.
- The *Equal Pay Directive* - Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.
- The *Equal Treatment Directive* - Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (amended in 2002 by Directive 2002/73/EC).

²³ section 6(3)

²⁴ section 4 (3)

²⁵ Council Directive 2000/78/EC of 27 November 2000 and Explanatory notes on the *Draft Race Relations Act 1976 (Amendment) Regulations 2002*, published for consultation in October 2002, <http://www.dti.gov.uk/er/equality/racexplanatory.pdf>.

²⁶ *Race Relations Act 1976 (Amendment) Regulations 2003* SI 2003/1626

- The *Social Security Directive 79/7/EEC* requiring equal treatment of men and women workers in statutory schemes providing protection against sickness, invalidity, old age, accidents at work and occupational diseases and unemployment.
- The *Pregnant Workers Directive* - Council Directive 92/85/EEC of 19 October 1992 concerning the implementation of measures to encourage improvements in the safety and health of pregnant workers, women workers who have recently given birth and women who are breastfeeding.
- The *Burden of Proof Directive* - Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex to ensure more effective implementation of the principle of equal treatment.
- The *Race Directive* - Council Directive 2000/43/EC of 29 June 2000 to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in Member States the principle of equal treatment.
- The *Employment Directive* - Council Directive 2000/78/EC of 27 November 2000 prohibits discrimination on the grounds of sexual orientation, religion or belief, disability and age.
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

The following directives make up the “Common Framework” for equality in the EU intended to tackle unfair discrimination on six grounds, namely sex, race, disability, sexual orientation, religion and age:

- The *Employment Directive 2000/78/EC*
- The *Race Directive 2000/43/EC*
- The *Equal Treatment Directive 76/207/EEC*

This package of proposals was brought forward under the new Article 13 added to the Treaty establishing the European Community by the Treaty of Amsterdam agreed in June 1997.²⁷ Article 13 provides:

²⁷ COM(1999) 565 final

Article 13 (ex Article 6a)

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The European Commission issued a press release explaining that the November 1999 package contained a Communication and:

- (i) a Directive prohibiting discrimination in employment. This proposal outlaws discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation ;
- (ii) a Directive prohibiting discrimination on the grounds of racial or ethnic origin in a wider range of areas - employment, education, the provision of goods and services, social protection ;²⁸
- (iii) an action programme designed to support and complement implementation of the Directives through the exchange of information and experience and the dissemination of best practices in both legislative and non-legislative areas.²⁹

Anna Diamantopoulou, the EU Commissioner for Employment and Social Affairs, launched the package with the following words:

Today is a milestone in the construction of a Social Europe. Discrimination blights the lives of so many of our citizens. We want to see a common level of protection against discrimination right across the European Union. We want to cooperate with and support the efforts of Member States, NGOs and the social partners. These proposals will ensure that a real difference is made to people's lives by providing victims with a clear remedy against discrimination.³⁰

The Government's proposals for implementing these measures were set out in the 2002 consultation document: *Equality and Diversity: The way ahead*.³¹

²⁸ Political agreement on the "race directive" was reached on 6 June 2000, Home Office press release, 6 June 2000, *UK spearheads EU anti racism pledge*. It was adopted on 29 June 2000 - Council Directive 2000/43/EC

²⁹ European Commission press release, 25 November 1999, *Commission: a step forward for the EU – empowering victims of discrimination*, http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/99/895|0|AGED&lg=EN

³⁰ Ibid

³¹ DTI website: <http://www.dti.gov.uk/er/equality/wayahead.htm>

The provisions covering religion or belief and sexual orientation are included in separate regulations (*The Employment Equality (Religion or Belief) Regulations 2003* SI No.1660 and the *Employment Equality (Sexual Orientation) Regulations 2003* SI No.1661).

The provisions on race discrimination were eventually included in a separate directive.³² They were implemented with effect from 19 July 2003 by the *Race Relations Act 1976 (Amendment) Regulations 2003*. The provisions on disability were implemented with effect from 1 October 2004 by the *Disability Discrimination Act 1995 (Amendment) Regulations 2003*. The provisions on age discrimination are the last which remain to be implemented.

III The Commission for Equality and Human Rights

A. Background to the Proposals

1. Government Consultations

In December 2001, the Government issued a preliminary consultation document on the implementation of the *EC Employment Directive* and the related *EC Race Directive* (2000/43/EC) – the so-called “Article 13 Directives”. This document, *Towards Equality and Diversity*, set out the Government’s view that there were “in the longer term” arguments in favour of a single equality body:

7.3 We believe that, in the longer term, there are arguments in favour of a single, statutory commission offering integrated advice, guidance and support on equality matters. That would be in the interests of businesses and individuals, particularly those who are the subject of multiple discrimination. It would also help to ensure a coherent approach to equality issues across the board.

7.4 We are, however, clear that a major change of this nature cannot be achieved effectively in the short term. In particular, the Disability Rights Commission is a young organisation, established as recently as April 2000. It needs time to establish its services to support the continuing implementation of the DDA. We also want to learn from the experience in Northern Ireland where a single commission was established in the same year.

7.5 We therefore propose to develop transitional arrangements that will enable us to move towards a single commission in the longer term. Meanwhile, chapter 8 sets out how advice, guidance and support might be provided on the new grounds of discrimination.³³

³² Council Directive 2000/43/EC of 29 June 2000

³³ Cabinet Office, DTI, Home Office, DWP, *Towards Equality and Diversity: Implementing the Employment and Race Directives*, December 2001, paras 7.3-7.5, <http://www.dti.gov.uk/er/equality/consult.pdf>

In a speech to an Institute of Public Policy Research (IPPR) Conference on *Equality in the 21st Century* on 15 May 2002, Barbara Roche, the Minister responsible for equality co-ordination across Government, announced that she would be leading a Cabinet Office project “to consider in detail possible models for a single equality body”.³⁴ The results of this review were published in October 2002 in a further consultation document, *Equality and Diversity: Making it Happen*. This reported the views of a seminar attended by over 180 people from 120 organisations in July 2002:

The overall view of those attending was that a single equality body would have many benefits to offer, provided that it was established on an effective basis. It could champion equality overall; provide integrated advice both to individuals and organisations; and provide more effective means to address multiple discrimination. It would be a real force in tackling institutionalised discrimination. It needed however to be grounded in a powerful vision of equality; have robust powers and be properly resourced; and there needed to be a clear timetable and sufficient time for planning. Many emphasised the need for harmonisation of equality legislation to enable a single body to deliver fully; and that there must be no diminution of focus on the needs of individual strands, the diversity of which need to be respected.³⁵

It put forward three options for future structures: a single equality body and two options built on co-operation among the existing commissions – a single gateway and an overarching Commission. Although the Government did not come down definitely in favour of any one of these options, the text of the consultation document lends more support to the single equality body concept than to the other two approaches. Specifically, it points out that approaches based on the existing Commissions would have difficulty in meeting the needs of the new equality strands.

On 30 October 2003 in response to the *Making it Happen* consultation, the Government announced that it would take forward the single equality body to take responsibility for new laws on age, religion or belief and sexual orientation, and for the first time provide institutional support for human rights. The name of the proposed body – the Commission for Equality and Human Rights – was announced at this stage. It was proposed that the CEHR would promote an inclusive agenda, tackling barriers to participation and underlining the importance of equality for all in society as well as working to combat discrimination affecting specific groups.

2. Task Force

At the same time, the Government also announced the establishment of a task force to advise on developing the detail of the new body. The Task Force was made up of experts

³⁴ Cabinet Office press release, 15 May 2002, *Government to carry out biggest review of equality in 25 years*

³⁵ Ibid, para 5.3

from current equality commissions and organisations, communities who will be covered by the CEHR, human rights, trade unions, business and academia. It was charged with exploring and developing options for the new body including its role, functions, priorities, governance arrangements and structure. The Task Force was chaired by Jacqui Smith, the Deputy Minister for Women and Equality.³⁶

3. White Paper: Fairness for All

The Government published the White Paper, *Fairness for all*, concerning the proposed CEHR on 12 May 2004.³⁷ The White Paper described the vision, role, functions and powers of the proposed new Commission.³⁸ The DTI news release summarised the contents of the White Paper as follows:

The new CEHR will bring together work on all the different strands of equality and promote human rights. A single organisation will deliver an improved service, as it will:

- Be a stronger champion for diversity by bringing together equality experts with a range of different experiences to make policy making more inclusive;
- deal with the fact that individuals have different identities and will tackle discrimination on multiple levels. For example, an Asian woman may face more than one type of discrimination;
- promote a cohesive society, by building good relations amongst community groups, creating greater trust and understanding across society;
- be a more effective partner for individuals, public bodies, employers and communities by acting as a single, consistent source of information and advice;
- help businesses by
 - working to prevent costly tribunal cases by helping tackle the causes of discrimination and promoting awareness of equality issues; and
 - allowing employers go to one organisation for advice rather than many, saving them time and money;
- provide institutional support for human rights for the first time through its duty to promote human rights and its power to intervene as a third party. This will give the CEHR a real opportunity to drive a human rights culture throughout the public sector;

³⁶ Full details of the task force and relevant documents are available at:
http://www.womenandequalityunit.gov.uk/equality/project/task_force.htm

³⁷ <http://www.dti.gov.uk/access/equalitywhitepaper.doc>

³⁸ DTI *Fairness for all: A new commission for equality and human rights*, May 2004 (Cm 6185)
<http://www.dti.gov.uk/access/equalitywhitepaper.pdf>

- propose a new duty to consult stakeholders on its strategic plan to ensure the Commission’s work fully reflect the concerns of the communities it serves; and
- have a regional presence among communities and be more responsive to local concerns rather than maintain a single distant HQ.

The White Paper also announces the start of concrete work to implement the Government’s commitment to a public sector duty to promote equality of opportunity between women and men.³⁹

4. Responses

The Commission for Racial Equality “unequivocally rejected” the proposals in the White Paper on the grounds that it failed the following tests:

- Is it right in principle?
- Will it work in practice?
- Is it better than what we have now?

The CRE response outlines the following specific concerns, which are detailed in the response document:⁴⁰

- 10 instances of downgrading powers or direct legal detriment; and
- 18 instances of clear detriment to equality, including unclear or unworkable proposals.

The DRC broadly welcomed the proposals, whilst raising a number of outstanding “critical concerns”.⁴¹ These can be summarised as:

- The need for harmonised anti-discrimination legislation with a common framework of rights covering all strands.
- The need to define clearly the role and remit of the designated disabled commissioner and of the Disability Committee.
- The need to achieve an effective balance between promotion and effective enforcement.
- The need for adequate resources to meet the CEHR’s ambitious remit.

³⁹ DTI News Release P/2004/187, *Hewitt and Falconer publish White Paper on the new Commission for Equality and Human Rights*, 12 May 2004:

http://www.womenandequalityunit.gov.uk/equality/project/cehr_pressrelease.doc

⁴⁰ CRE response to the White Paper, August 2004:

http://www.cre.gov.uk/downloads/docs/ffa_cre_response_scr.doc

⁴¹ DRC response, August 2004:

http://www.drc-gb.org/uploaded_files/documents/20_703_FINALDRCResponsetoCEHRWPAugust604.doc

The EOC response to the White Paper was supportive of the proposals, which were seen as important to properly address issues arising out of the diversity of discrimination concerns.⁴² At the same time the EOC summarised the key matters to be addressed and said that the new body needs to be:

- grounded in an equality and human rights philosophy that celebrates Britain's diversity;
- backed up by a consistent legal framework;
- able to fulfil a full range of roles;
- organised and resourced to work effectively in Scotland and Wales as well as in England and GB wide;
- able to deal effectively with each of the equality strands, with human rights and multiple discrimination issues, without creating a hierarchy;
- inclusive in its governance approach and have the support of key stakeholders;
- properly resourced.

Age Concern has also published a report as well as initiating a campaign to support the proposals which are seen as an important advance for the rights of older people.⁴³

The Government response set out the main points arising from the consultation exercise as follows:⁴⁴

- Clearly defined fundamental duties integrating its three 'pillars' of equality and diversity, human rights, and good relations between communities;
- A full suite of enforcement powers, fully matching those of the existing Commissions, following some broadening of the inquiry powers outlined in the White Paper;
- Powers and duties to make it a real force encouraging public bodies' compliance with their human rights obligations and promoting human rights generally;
- Enhancement of its independence through complete freedom in its decisions on case support, a key part of its legal strategy;
- More effective means to work with public bodies to secure improved performance of public duties through specific powers to conduct assessments;

⁴² EOC response, August 2004:

<http://www.eoc.org.uk/cseng/policyandcampaigns/eoc%20cehr%20response%20final.pdf>

⁴³ Age Concern Reports, *Public Involvement and the Commission for Equality and Human Rights*: http://www.ageconcern.org.uk/AgeConcern/news_2956.htm

⁴⁴ DTI, *Commission for Equality and Human Rights: Government response to the consultation*, November 2004: http://164.36.38.98/equality/project/consultation_govtresponse_nov2004.doc

- New tools for its good relations work, in particular powers to combat prejudice and crimes affecting communities; and a focus on race and faith communities within a wider good relations remit, assuring continuity of the vital work of the Commission for Racial Equality;
- A new duty to monitor progress on equality and human rights throughout society, set out in a periodic “state of the nation” report – so ensuring a strong evidence base for the CEHR’s work;
- Well-defined powers for the Disability Committee to ensure that disabled people can steer the CEHR’s disability-specific work; and
- Clear, extensive powers for the Scotland and Wales Committees to set priorities for the CEHR’s work in the devolved nations.

The DTI press release announcing publication of the Bill gave the latest positions of the existing Commissions and other interest groups as follows:⁴⁵

Commission for Racial Equality

Trevor Phillips, Chair

"We welcome the publication of this much improved Bill and recognise the changes that have been made which will bolster the new Commission for Equality and Human Rights.

"Our concern that the timing for merging the CRE into a single equality body was not appropriate has been addressed and we are pleased to have been given an assurance that we will not be joining the CEHR until 2009.

"The CRE also welcomes the Government's recent announcement of an Equalities Review which will look at the causes of persistent discrimination and inequality, and their commitment to develop a simpler, fairer legal framework towards a single equality act. Both strands of work will inform the development of the CEHR.

"We intend to work wholeheartedly with the Equalities Review, our sister Commissions and new strands as we move towards a unified legal and institutional framework that can contribute to greater equality across Britain."

Disability Rights Commission

Bert Massie, Chairman

"The Disability Rights Commission (DRC) especially welcomes the recognition in the Bill that disabled people should have a clear and distinctive voice within the CEHR, backed up by a properly resourced Disability Committee with an effective range of delegated powers.

⁴⁵ DTI Press Release P/2005/72, *Powerful equality and human rights body to operate from October 2007*, 3 March 2005:
<http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=150061&NewsAreaID=2&NavigatedFromDepartment=False>

"The combination of a Disability Committee with executive powers and a guaranteed place on the CEHR Board for a disabled person enshrines the principle that disabled people must have a decisive role in developing and leading future work on disability rights. The inclusion of these measures in the Bill is very welcome. In areas such as transport, education and the receipt of services disabled people's experience and the circumstances giving rise to discrimination are distinctive. That distinctive experience needs to be articulated by a distinctive disability voice. The Bill creates the conditions in which the voice of disabled people can be heard.

"The review of equalities legislation announced last week complements the Bill by tackling the acute need for legislative harmonisation identified by the DRC and by many other of the CEHR's potential stakeholders. There must be rapid progress if the CEHR is to benefit fully from this important initiative."

Equal Opportunities Commission

Julie Mellor, Chair

"The EOC strongly supports the Equality Bill. We have been arguing for a single champion of equality and human rights issues for several years. Not only does it make sense for individuals, employers and service providers, but from our experience we know that achieving equality for men and women requires solutions that take account of more than their gender. For example, we know from our research on poverty that Pakistani and Bangladeshi women, older women and disabled women are more likely to be poor and excluded than Pakistani & Bangladeshi, older or disabled men. Bringing together expertise on all equality issues will help deliver sex equality for all women and men.

"We also particularly welcome plans to give public bodies a duty to promote sex equality. Only by making sure our public services reflect the real needs of men and women can we make Britain a fairer place."

Age Concern

Gordon Lishman, Director General

"Age Concern has long campaigned for the Commission for Equality and Human Rights and we strongly welcome this announcement. This body has the potential to transform older people's lives and beat ageism."

Liberty

Shami Chakrabarti, Director

"There has never been a more important moment for a Commission for Equality and Human Rights in this country. This Bill is a beacon of hope for many of us and I hope that the Government will put real political will behind it."

Muslim Council of Britain

Iqbal Sacranie, Secretary General

"The Muslim Council of Britain welcomes the Equality Bill. This is a timely and necessary piece of legislation to provide institutional support for the promotion and protection of equality and human rights in Britain for all its citizens.

"We are particularly pleased that the legislation will also include new provisions on religious discrimination in the delivery of goods and services, and in public functions. This has been long overdue not just for Muslims, but for all religions and beliefs."

Stonewall

Ben Summerskill, Chief Executive

"Stonewall hugely welcomes the introduction of the Commission for Equality and Human Rights which will offer statutory protection to lesbians and gays across Britain. All of Stonewall's work addresses difference across British society and we are delighted that the new Commission will do the same."

The 1990 Trust

Karen Chouhan, Director

"The improvements in the CEHR Bill demonstrate that the voices of Black and minority communities make a difference. We will work to continue to ensure that the government listens to the voices of Black communities."

CBI

John Cridland, Deputy Director-General

"In the past, employers have been confused about who to turn to for advice on equality and diversity. Creating one point of contact for all diversity issues makes good sense for businesses and individuals. It promises to simplify the process and save time. Business has embraced diversity and the CEHR must give firms the guidance they require from day one."

TUC

Brendan Barber, General Secretary

"Too many in Britain still suffer unfair discrimination at work. They need simpler laws and effective enforcement. These must be the watchwords of the new Commission if it is to build on the work of the equality bodies it will replace and effectively tackle its new duties on age, sexuality, religion and belief."

Geoffrey Bindman

Visiting Professor of Law, University College

"I welcome the introduction of the Bill to establish a new Commission for Equality and Human Rights. I am glad that the opportunity has been taken to streamline the body's investigation procedures, eliminating some of the obstacles that the existing Commissions have faced. I hope that further improvements to anti-discrimination law will result from the Government's recently announced Discrimination Law Review."

5. The Equalities Review and the Discrimination Law Review

The Government have recently set up the Equalities Review and the Discrimination Law Review. The announcement came in a Ministerial Statement of 25 February 2005.⁴⁶ The Equalities Review was described in the press release as follows:

The Equalities Review, which will be chaired by Trevor Phillips and report to the Prime Minister by the summer of 2006, will:

- * investigate the social, economic, cultural and other factors that limit or deny people the opportunity to make the best of their abilities;

- * provide an understanding of the long term and underlying causes of disadvantage that need to be addressed by public policy;

- * make practical recommendations on key policy priorities for: the Government and public sector; employers and trade unions; civic society and the voluntary sector; and

- * inform both the modernisation of equality legislation, towards a Single Equality Act; and the development of the new Commission for Equality and Human Rights.⁴⁷

The Discrimination Law Review was described in the same press release as follows:

Working in parallel to the Equalities Review, the Department of Trade and Industry will begin new work informed by the Equalities Review on the development of a simpler, fairer legal framework. Involving several government departments, the Discrimination Law Review will assess how our anti-discrimination legislation can be modernised to fit the needs of Britain in the 21st Century. This work will consider the approaches that are effective in eradicating remaining discrimination but avoid imposing unnecessary, bureaucratic burdens on business and public services.⁴⁸

B. The Bill: Duties and Powers of the CEHR

1. The Commission

The three key functions of the CEHR will be

⁴⁶ HC Deb 25 February 2005 cc68-70WS

⁴⁷ Joint DTI and Cabinet Office Release, *Review of causes of discrimination announced*, 25 February 2005:

<http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=148053&NewsAreaID=2&NavigatedFromDepartment=False>

⁴⁸ Ibid.

- Equality
- Human Rights
- Good relations between communities

Part 1 of the Bill deals with the formation, duties and powers of the CEHR and the dissolution of the existing Commissions. The Constitution of the CEHR is set out in a Schedule to the Bill. Some of the main points can be summarised as follows:

- Details of the activities of the CEHR will be set out and published in a strategic plan which must be reviewed, and if necessary revised, at least every three years.
- There will be between 10 and 15 Commissioners plus the chief executive who will be a commissioner *ex officio*.
- There will be at least one Commissioner who is or has been a disabled person.
- The Secretary of State will appoint one Commissioner who knows about conditions in Scotland and one who knows about conditions in Wales.
- There are separate provisions for the appointment of Investigating Commissioners who will be charged solely with carrying out inquiries and investigations and associated enforcement. They will be appointed by the Commission.
- Advisory Committees may be established to advise the Commission or an Investigating Commissioner.
- Decision-making Committees will be established to perform delegated functions. Specific and detailed provisions are made for a Scotland Committee; a Wales Committee; and a Disability Committee.

2. Scotland

The position in respect of devolution is set out in the explanatory notes to the Bill:

335. Equal opportunities are in principle reserved to the Westminster Parliament, but the encouragement of equal opportunities is an exception to this rule and falls within the devolved competence of the Scottish Parliament. Some clauses of this Bill fall partly within the competence of the Scottish Parliament. These include clauses relating to promotion of equality and diversity in Part 1, the promotion of equal opportunities in the gender duty and duties imposing functions on Scottish Ministers in Part 3. The Scottish Parliament will be invited to agree that it is content for Parliament to legislate for Scotland in this devolved area. Human rights as a topic is neither reserved nor devolved - a human rights issue falls

within the competence of the Scottish Parliament if the underlying subject matter is not reserved. The CEHR's human rights role in Scotland is intended to be limited in practice to human rights issues on reserved topics.⁴⁹

3. Duties

The CEHR is given a fundamental duty directed at creating social change set out in the following terms:

The Commission shall exercise its functions under this Part with a view to the creation of a society in which -

- (a) people's ability to achieve their potential is not limited by prejudice or discrimination,
- (b) there is respect for and protection of each individual's human rights,
- (c) there is respect for the dignity and worth of each individual,
- (d) each individual has an equal opportunity to participate in society, and
- (e) there is mutual respect between communities based on understanding and valuing of diversity and on shared respect for equality and human rights.

Commentators on equality and human rights have often pointed to the need to do more than create rights enforceable only in litigious terms. Litigation can provide only limited scope for addressing the underlying problems which give rise to inequalities or breaches of human rights. Many people are put off by the idea of legal action and find litigation to be an unpleasant experience. This can leave problems unaddressed. At the same time small firms are finding that the costs of insuring themselves against employer's liabilities are increasing at an alarming rate.⁵⁰ Measures such as the creation of public sector duties, promotional campaigns and the work of enforcement agencies are all directed at broader social change and a reduction in the many personal, economic and social costs associated with litigation.

The duties of the CEHR which are set out in Part 1 of the Bill cover:

- Equality and diversity
- Human rights
- Disability
- Communities

⁴⁹ <http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmbills/072/en/05072x-e.htm>

These duties come with powers to undertake research, publish ideas or information and conduct inquiries and concern:

- Promoting understanding, awareness and good practice
- Enforcing equality legislation
- Working towards eliminating unlawful discrimination and harassment
- Encouraging good relations between communities

“Communities” are defined as “a group or class of persons (irrespective of whether they regard themselves as a community) who share a common attribute in respect of” age; gender; race; gender reassignment; religion or belief; or sexual orientation. Disability is absent from this list of attributes.

Separate clauses cover the relationship between disabled people and the rest of society in terms of eliminating prejudice, hatred or hostility toward them; and the elimination of “the involuntary isolation of disabled persons.”

In addition, there are two further duties which do not attract the same set of powers:

- Monitoring the law; and
- Monitoring progress.

These duties concern respectively:

- Advice and recommendations to government on the law; and
- Identifying changes, goals and factors concerning progress toward social change.

4. General Powers

The general powers given to the CEHR broadly reflect the powers of the existing Commissions although they are framed in slightly wider terms and powers which were previously available only to one equality strand will now be available to all of them.⁵¹

⁵⁰ See: Department for Work and Pensions, *Review of employers' liability compulsory insurance*, Second stage report, 4 December 2003: http://www.dwp.gov.uk/publications/dwp/2003/elci/dwp_employers_review04-12-2003.pdf

⁵¹ For example financial assistance under RRA section 44; or powers to keep certain legislation under review in SDA section 55

A general power is given to the CEHR to undertake research and publish in these areas and to give advice and guidance on the law (other than legal advice in support of litigation).

The CEHR may also issue Codes of Practice in respect of specified legislative provisions after a process of published consultation. The issue of Codes of Practice will be subject to approval by the Secretary of State and Parliament; and in some cases the Scottish Ministers and the National Assembly for Wales.

The power is given to conduct inquiries similar those available to the existing Commissions. The Secretary of State may direct the CEHR to conduct an inquiry or the CEHR can itself decide to conduct an inquiry. However, unlike the existing structures it will become possible to examine more than one strand of equality concern in the same inquiry.

5. Enforcement Powers

In the course of an inquiry, suspicions may develop that someone has done something unlawful. In these cases separate provisions may be invoked to investigate the person concerned. The investigation will then proceed separately and the inquiry will be precluded from pursuing the question of whether or not an unlawful act has been committed by that person. Backing up these processes are provisions criminalising unauthorised disclosures about inquiries or investigations. Investigations may also commence on the direction of the Secretary of State.

If the Commission finds that an unlawful act has been committed it may issue an “unlawful act notice” setting out the breach and requiring steps to be taken to avoid its continuation or repetition. This could include a requirement that the person prepare an “action plan” to be agreed with the Commission. In the event that a person disputes that they have committed an unlawful act, they may appeal to the appropriate court or tribunal which may affirm or annul any notice or requirement which the Commission has made.

The Commission may also enter into an agreement with the person who is thought to have committed an unlawful act as to what should be done to remedy the matter. A person may agree to the course of action proposed without admission of liability. The Commission will then undertake not to pursue the matter unless there is a failure to comply with what has been agreed.

IV Human Rights

A. Background

The *Human Rights Act 1998* came into force on 2 October 2000, and section 6 places a legal obligation on all public authorities not to breach anyone’s rights under those aspects of the *European Convention on Human Rights*, which were annexed to the Act. In addition, UK courts are obliged to interpret the law in light of Convention law and are

empowered to make declarations which state that a particular UK law is incompatible with human rights. Anyone who feels that their Convention rights have been breached can now assert them in any court or tribunal in the UK, rather than having to go to European Court of Human Rights in Strasbourg, as was previously the case. The Department for Constitutional Affairs has responsibility for human rights within Government.⁵²

When the *Human Rights Act* came into force the Government was considering the idea of a Human Rights Commission. The Joint Parliamentary Committee on Human Rights was set up in 2001 and began by inquiring into the case for such a commission. In March 2003 it recommended that the Government create an integrated Commission for Equality and Human Rights.⁵³

The case for a Human Rights Commission was summarised as follows:

In this report we consider the signs which indicate whether that culture of respect for human rights has begun to flourish in the UK since the passing of the Human Rights Act, and the evidence of whether a human rights commission could help it do so.

In the case of a measure such as the Human Rights Act, which is both new and intended to be far-reaching, the legal process does not have a reality unless people know what it is and know how to use it. Spreading knowledge and awareness of the law is an essential part of building a culture. But if it is left only to the courts, the original vision that the Human Rights Act should bring about a cultural change will not be realised. Litigation is an essential last resort in protecting the rights of the individual or groups, but it is not the most effective means of developing a culture of human rights.

Government cannot be the sole advocate of a culture of rights and responsibilities. Rights essentially mediate the relationship between the citizens and the state. A Government cannot be an impartial champion of human rights. In the course of our inquiry we found very broad support for an organisation which stands aside from government, and engages with civil society in a debate about the practical expression of the values embodied in human rights.

Parliament must defend human rights and must stand at the centre of a culture of respect for human rights, but it cannot itself do the work of educating, informing, encouraging and promoting that is needed to establish this culture more widely.

The Paris Principles, as agreed by the General Assembly of the United Nations, exhort all states to establish independent bodies which will raise public awareness of human rights, promote good practice, monitor policy developments and their impact, provide independent advice to Parliament and Government, and help

⁵² www.humanrights.gov.uk

⁵³ Joint Committee On Human Rights - Sixth Report, 3 March 2003:
<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/67/6702.htm>

those who feel that their rights have been breached or are threatened with violation. Many countries have already established independent national human rights institutions.

It is insufficient, however, to assert the case for an independent human rights commission in principle alone. It is necessary also to assess whether a commission could have the potential to make a real difference to people's lives.

We have not found evidence of the rapid development of awareness of a culture of respect for human rights and its implications throughout society, and what awareness there is often appears partial or ill-informed. We fear that the highwater mark has been passed, and that awareness of human rights is ebbing, both within public authorities and within the public at large.

We took evidence from a wide range of bodies concerned in the monitoring and regulation of public authorities, and examined more directly the extent to which the growth of a culture of human rights showed itself in the practices and policies of local authorities and NHS bodies.

It is clear to us that, by and large, public authorities, and those who inspect, advise and audit them, do not give a high priority to placing respect for human rights at the heart of their policies and practices. Insufficient energy is being given to communicating a vision to public authorities to help them understand how a culture of respect for human rights might look or how it could be delivered.

There is a need for the active promotion of the understanding that Convention rights impose positive duties on public authorities. In our public services the climate of legal compliance and risk avoidance too often inhibits the development of a human rights culture. Too often human rights are looked upon as something from which the state needs to defend itself, rather than to promote as its core ethical values. There is a failure to recognise the part that they could play in promoting social justice and social inclusion and in the drive to improve public services.

The enthusiasm to make the Human Rights Act come alive as a measure which places positive duties on public authorities, and which should promote a culture of respect for human rights in every aspect of public life, needs to be rekindled. A human rights commission probing, questioning and encouraging public bodies could have a real impact in driving forward the development of that culture by guiding, advising and assisting those involved in the work of public authorities. Such a body could assist the public services by consolidating advice on compliance with rights and complement the courts by preventing breaches of rights occurring through the spread of best practice and greater awareness. Governments should be able to look on a commission as a critical friend which can help them achieve some of their more fundamental goals, including improved delivery of better public services.

Working through regulatory and representative bodies for different sectors of public activity, a commission should be able to give human rights a focus,

resources and a degree of institutional stability not found recently in central government. Human rights need a home. This could provide a base from which there would be a realistic chance of devising and disseminating a more credible culture of respect for human rights.

There is evidence of an unmet need for citizens to be assisted in understanding what their rights are, how these rights must be balanced with those of others, and how to assert their rights without necessarily having recourse to litigation.

We have found widespread evidence of a lack of respect for the rights of those who use public services, especially the rights of those who are most vulnerable and in need of protection. Human rights should provide a framework within which people who need to can negotiate with public authorities for better conditions and treatment, both in individual cases and in wider contexts. But the message about what human rights can do for individuals and groups in their relations with the state is at present being only faintly heard. Much of the cause for this state of affairs can be ascribed to the absence of an independent voice able energetically to promote and help to protect human rights in the UK. There is very widespread support for the establishment of a human rights commission which would be able to promote the principles that underlie the idea of a culture of human rights in a way that everyone can understand.

Sufficient unmet needs have been identified to establish that there is essential work for a commission to do. The development of a culture of respect for human rights is in danger of stalling, and there is an urgent need for the momentum to be revived and the project driven forward. Since the Government is committed to developing a culture of respect for human rights it has a duty of leadership. If it wills the end, it must also will the means. The resources devoted to this task are insufficient to achieve the goal that the Government desires. Precious time has already been wasted. The decision to establish an independent body for the promotion and protection of human rights must be taken now.⁵⁴

The Joint Committee on Human Rights also published its Eleventh Report of 2003/04 on the *Structure, Functions and Powers of the Commission for Equality and Human Rights*.⁵⁵ The Committee's recommendations were summarised as follows:

In March 2003 the Joint Committee on Human Rights published a report recommending the establishment of an integrated commission charged with the promotion of all the various "strands" of equality and the promotion and protection of human rights. In October 2003 the government announced its intention to proceed with the establishment of a "Commission for Equality and Human Rights". It is hoped that legislation will be passed in time to allow it to begin operating in 2006.

⁵⁴ <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/67/6703.htm#a1>

⁵⁵ The report can be found at:
<http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/78/7802.htm>

The JCHR warmly welcomes this decision. This report considers in more detail the functions, powers and structure of the proposed commission so far as they relate to human rights, and in it the Committee makes recommendations which it expects the government to take into account in formulating the White Paper prefiguring the legislation. They are directed at ensuring that the new body can discharge its role effectively.

Functions

The Committee recommends that the new body should have a widely drawn remit in respect of the promotion of a culture of respect for human rights, going beyond the Convention rights incorporated into UK law by the Human Rights Act. It recommends that the commission should have a role in reporting on the UK's discharge of its international human rights obligations.

The commission's role should be focused on achieving strategic change through promotion, advice, the spreading of best practice and the raising of public awareness. It should not, for the most part, be directly involved in the resolution of individual cases.

The key role of the new commission will be working with the public sector to give practical effect to a culture of respect for human rights in the policy and practice of providers of public services. The Committee recommends that this should be achieved through close co-operation with the bodies charged with regulating, auditing and inspecting the quality of public services. It proposes a general statutory duty on public authorities to promote human rights.

The commission should also be able to guide and advise the private sector on the development of a culture of respect for human rights.

The Committee recommends that the commission should have a duty to build the capacity of the private and voluntary sectors to advise and assist individuals in understanding and asserting their rights.

It recommends that the commission should promote alternative dispute resolution as a way of avoiding litigation and pre-empting violations of rights.

The commission should have a general duty to promote good relations between communities and groups within Great Britain based on respect for the values of human rights so as to encourage the peaceful resolution of disputes.

Powers

The Committee recommends that the commission should be able to conduct public inquiries into matters of public policy relating to human rights. It recommends ancillary powers needed to make these inquiries effective.

It proposes that the commission, in addition to the power to assist as a friend of the court or to intervene as a third party in significant cases raising questions of

public interest relating to human rights, should have an exceptional power to seek judicial review on compliance by public authorities with their duties under the Human Rights Act.

Structure

The commissioners should be appointed with the involvement of Parliament, and should not be chosen as "champions" of particular strands of the commission's responsibilities.

The Committee recommends special arrangements to guarantee the independence of the commission as a constitutional watchdog, while also securing its democratic accountability. These include a special relationship between the commission and Parliament.

The future

The Committee concludes that the arrangements which are now to be put in place should be regarded as transitional, until Parliament enacts a single, comprehensive Equality Act. It recommends that the enactment of such legislation should be given a high priority.

The Government response to the *Fairness for all* consultation set out the conclusion on the human rights remit of the CEHR as follows:

V Human rights

23. Respondents warmly welcomed the White Paper proposals that the CEHR's human rights functions should be central to its work. They recognised the important role it will play in promoting respect for human rights, both through underpinning CEHR's work for the equality strands, and by providing advice and guidance about human rights standards and values.

24. Some respondents argued that the CEHR should be able to seek judicial review on human rights matters in its own name. At present, section 7(1) of the Human Rights Act limits the ability to bring human rights proceedings to those who are (or would be) a victim of the alleged unlawful act. Many argued strongly that the CEHR should be able to intervene in cases as a third party. Views among respondents were mixed on whether the CEHR should support free-standing human rights cases.

25. Other points raised by respondents included proposals for a public sector duty to promote human rights, and that the CEHR should have a role in monitoring compliance with the UK's international human rights obligations.

The Government believes that the Commission's resources for its human rights activities should be focussed on promoting human rights values and standards and encouraging compliance by public authorities with the Human Rights Act, especially when other sources of support are available for human rights cases.

It is also the Government's strong belief that human rights proceedings should be brought only by those affected by the actions in question in line with the Human Rights Act s7.

However, we intend that the CEHR should have a full, strong suite of promotional powers and duties, to include:

- promoting the protection, awareness and understanding of human rights
- encouraging good practice in human rights
- encouraging public authorities to comply with their obligations under the Human Rights Act
- undertaking inquiries into the protection or understanding of human rights by public authorities
- the ability to seek leave to intervene in cases in which human rights are being argued.

The Government is not persuaded that positive statutory duties in relation to human rights, going beyond those in the Human Rights Act, are needed. The Government is currently considering the extent to which the CEHR should be explicitly empowered to contribute to reports on the UK's performance against its international human rights obligations.⁵⁶

B. The Bill

The Bill will give the CEHR a broad remit to promote human rights. It will not be able to support individual human rights cases in the same way that discrimination cases are supported. According to the Government response (quoted above) the CEHR will have "the ability to seek leave to intervene in cases in which human rights are being argued".

This power is not set out on the face of the Bill. Under the various powers to promote human rights the CEHR will be able to appear as *amicus curiae* (or "friend of the court") in judicial review and other cases which concern human rights. This means that the CEHR will be able to apply to the court for permission to provide an expert view on a case brought by a third party, in order to assist the court in reaching a conclusion.

The *Fairness for All* consultation explained this as follows:

Third party interventions

⁵⁶ DTI, *Commission for Equality and Human Rights: Government response to the consultation*, November 2004: http://164.36.38.98/equality/project/consultation_govtresponse_nov2004.doc

4.11. The existing equality Commissions have occasionally intervened in court cases to provide expert knowledge and understanding which can assist courts in making a decision. Although in principle, it is open for anyone with an interest to seek the court's permission to intervene in cases, the Government intends that the CEHR should be explicitly enabled to act in this way.

4.12. Although courts would not be obliged to accept interventions by the CEHR, this approach is intended to put beyond doubt the body's capacity in this area. It will also give a positive signal to the courts about the potential value of the CEHR's involvement. The CEHR will be able to seek leave to intervene in support of the full breadth of its remit, covering both equality and human rights.

4.13. The Government intends that these interventions should be of a strategic nature and should be closely tied to the CEHR's core aims. Intervention in human rights cases would be intended to support the development of a flourishing human rights culture in the public sector.⁵⁷

The definition of "human rights" which can be promoted is an extended definition. The *Human Rights Act 1998* (HRA) enacted human rights law in domestic UK law by incorporating various articles of the European Convention on Human Rights within the text of the Act. However, not all the human rights which are available under the Convention were incorporated. The following are currently included:⁵⁸

- (a) Articles 2 to 12 and 14 of the Convention,
- (b) Articles 1 to 3 of the First Protocol, and
- (c) Article 1 of the Thirteenth Protocol.

The definition of "human rights" in the Bill goes beyond the Convention rights which were selected for inclusion to "other human rights". Presumably, this would include provisions of the Convention which have been omitted from the HRA, such as the remaining protocols of the Convention and Article 13 which grants individuals the right to an effective remedy for the breach of any of their Convention rights.

V Religious Discrimination in Goods and Services

A. The Bill

The provisions on religious discrimination will do two things:

- Prohibit discrimination in the provision of goods facilities, services and premises.

⁵⁷ White Paper, *Fairness for All*, May 2004: http://164.36.38.98/equality/project/CEHR_WP_final.doc

⁵⁸ Section 1, *Human Rights Act 1998*

- Prohibit religious discrimination in the exercise of public functions.

A Home Office press release announced the proposals on 28 September 2004:⁵⁹

New laws to combat discrimination on the grounds of religion will be introduced by the Government, the Prime Minister announced today.

The measures will put an end to religious discrimination in the provision of goods, facilities, services and premises. They will close a loophole that currently means that while people are protected against discrimination on the basis of colour, race, nationality or national or ethnic origin, they are not protected against discrimination on the basis of religion. The measures will address an imbalance which has emerged from case law where Jews and Sikhs are afforded protection while members of other religions are not.

The Home Secretary, David Blunkett, said:

"Faith plays a vital role in people's lives – even for those who are not overtly religious. It is a strength of our society that peoples of many faiths respect each other and are able to flourish and play a valuable role in our communities. We need to protect that strength against discrimination and intolerance.

"We have already taken action to implement EU regulations against religious discrimination in employment and training, which came into force last year. We have introduced tougher penalties for racial and religious hate crime and the Crown Prosecution Service has reaffirmed its policy of prosecuting these crimes vigorously. And I have announced that we intend to look again at legislating against incitement to religious hatred when an opportunity arises.

"But we believe there is also a need to ensure that people are not disadvantaged because of their religion. While some religious groups may be afforded a higher degree of protection from discrimination because they can also be defined by ethnic origin, this is not true for others. These measures will ensure fair and equal protection for all faiths."

Notes for Editors:

1. The provisions would ban:

- direct discrimination where a person, on grounds of religion or belief, is treated less favourably than another;
- indirect discrimination where a provision, criterion or practice has the effect of putting people of a particular religious belief at a disadvantage which cannot be justified; and

⁵⁹ Home Office Press Release reference: 302/2004, *Strengthening protection against religious discrimination*, 28 Sep 2004: http://www.homeoffice.gov.uk/pageprint.asp?item_id=1084

- victimisation where someone is treated less favourably than others because, for example, they have complained of discrimination or have assisted someone else in a complaint.
2. There would be exemptions, for example, for:
- faith-based schools to allow them to continue to discriminate in favour of that faith in selection policy;
 - charities (this would for example allow faith-based charities to discriminate in favour of that faith in the provision of services on the grounds of religion or belief); and
 - acts safeguarding national security.
3. At present the Race Relations Act and case law afford protection to some religious groups (Sikhs and Jews) from discrimination in the provision of goods and services on the grounds of race. But multi-ethnic religions (including Muslims) are not protected.
4. Both in the Government's Strength in Diversity consultation exercise on a community cohesion and race equality strategy, and in the consultation on the recent White Paper, Fairness for All (on the proposals for the creation of the Commission for Equality and Human Rights), there were calls for the extension of protection against religious discrimination.
5. The new measures would ensure that providers of goods, facilities, services or premises, would not be able to refuse to provide their goods, facilities, services etc. to someone because of their religion or belief. For example a shopkeeper would be unable to refuse to serve someone on the grounds of his or her religion or belief. However providers would not normally be regarded as being discriminatory if they refused requests to provide a wider range of goods or services in order to meet a customer's religious needs.
6. Since December 2003 it has been unlawful under the Employment Equality (Religion or Belief) Regulations to discriminate against a person on the grounds of their religion or belief in the area of employment and vocational training.

The details about way in which the Bill achieves these objectives is set out in the explanatory notes, pages 21 to 36.

B. Background

The *Race Relations Act 1976* (RRA) contains provisions which prohibit discrimination in the provision of goods facilities or services and the disposal or management of premises.⁶⁰

⁶⁰ Sections 20 and 21 RRA

There have been a number of cases which have ruled on whether or not particular groups count as “racial groups” for the purposes of the legislation. For example Sikhs⁶¹, Gypsies⁶² and Jews⁶³ have been held to be directly covered by the race discrimination legislation, whereas Rastafarians⁶⁴ have been held in case law not to constitute a distinct racial group and so are not covered by the provisions.

Important guidance on this issue was given in the judgement of Lord Fraser in *Mandla v Dowell Lee* [1983] IRLR 209; [1983] 2 AC 548. In this case, the House of Lords determined that Sikhs did constitute a racial group. It was held that, while the word ‘ethnic’ conveyed a flavour of race it could not, within the meaning of the Act, be defined in a strictly racial or biological sense, but that it had an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin. Lord Fraser defined these characteristics in detail:

For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more will be commonly found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these:—(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which keeps it alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to these two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.⁶⁵

This would include those who joined the group (for example by marriage) provided that “a person who joins the group feels himself or herself to be a member of it, and is accepted by other members”.

It is generally thought that Muslims who are united only in their religious beliefs have not been covered by the Act.⁶⁶ Within the guidance given in *Mandla* it would appear that

⁶¹ *Mandla v Dowell Lee* [1983] IRLR 209; [1983] 2 AC 548

⁶² *Commission for Racial Equality v Dutton* [1989] All ER 306; [1989] IRLR 8, CA

⁶³ *Seide v Gillette Industries Ltd.* [1980] IRLR 427, EAT

⁶⁴ *Crown Suppliers (PSA) Ltd v Dawkins* [1993] ICR 517, CA

⁶⁵ Reproduced from *Tolley's Discrimination Law handbook*, second edition, p 230

⁶⁶ *Harvey on Industrial Relations and Employment Law*, Issue 167, April 2004 [848.01]

Muslims do not constitute an “ethnic group” so that direct discrimination against Muslims would not contravene the RRA.⁶⁷

It is important to bear in mind that the RRA is a civil statute concerning unlawful discrimination rather than criminal sanctions. These are now contained separately in the *Public Order Act 1986* and concern incitement to racial hatred.⁶⁸ The *Anti-terrorism Crime and Security Bill 2001-02* included new provisions to make incitement to *religious* hatred a criminal offence, but these did not become law.

VI Gender Equality: Public Sector Duty

A. The Bill

The public sector provisions on gender do two things:

- Prohibit discrimination in the exercise of public functions
- Create a general duty to promote equality

This will be achieved by amending the *Sex Discrimination Act 1975* (SDA). A general public sector duty already exists (and will remain) in respect of education, under section 25 of the SDA in the following terms:

25 General duty in public sector of education

(1) Without prejudice to its obligation to comply with any other provision of this Act, a body to which this subsection applies shall be under a general duty to secure that facilities for education provided by it, and any ancillary benefits or services, are provided without sex discrimination.

At present there are public sector provisions covering race discrimination only. The prohibition of sex discrimination in public functions will bring the SDA into line with section 19B of the RRA which was inserted by the *Race Relations (Amendment) Act 2000*. The current *Disability Discrimination Bill* also extends the DDA by inserting a new section 21B into the DDA.⁶⁹

The duty on public authorities to promote equality of opportunity will be achieved by inserting a new section 76A into the SDA. The effect of this provision is similar to the duty imposed by section 71 of the RRA (as substituted by section 2 of the *Race Relations*

⁶⁷ IDS Employment Law Handbook, *Race Discrimination*, April 1999, p 5

⁶⁸ Incitement to Racial Hatred was originally contained in section 6 of the *Race Relations Act 1965*. Section 5A of the *Public Order Act 1986* was inserted by the RRA

⁶⁹ See Library Research Paper RP 05/25 *The Disability Discrimination Bill*, 16 March 2005

(*Amendment Act 2000*) and the duty to be imposed by clause 3 of the *Disability Discrimination Bill* which will insert new section 49A into the DDA.

B. Background

The creation of a Women and Work Commission to examine the problem of the gender pay gap and other issues affecting women's employment was announced on 24 July 2004. The Commission is chaired by Baroness Prosser and will report by Autumn 2005.

The Women and Work Commission is looking at:

- How men's and women's education and skills affect which jobs they can get;
- Promotion and career progression - the "glass ceiling";
- Women's experiences in the job market before and after having children; and
- The different experiences of women working full-time and part-time.

The Commission published an interim statement on 8 March 2005.⁷⁰ It set out how it had broken down its work, highlighted as follows:

- Labour market experience

We will tackle the different labour market factors which act as barriers to women's chances of entering and progressing through work, in particular to ensure employers make best use of the skills and potential of women returning to the labour market, particularly after the birth of a child.

We welcome the high-profile discussion of both work-life balance and childcare and look to see specific consideration given to the impact on women's pay, opportunity and skills over the lifetime in these debates, alongside other relevant impacts, not least that on the child.

- Education, careers guidance and skills

We are concerned about girls' access to information and support to make informed choices about educational subjects, training, jobs and careers. The evidence we have heard so far tells us that young people, their parents and employers want change. We have a particular role to play in examining Government thinking outlined in the reports and ensure that current developments

⁷⁰ Women and Work Commission: *A Fair Deal For Women in the Workplace*, March 2005: http://www.womenandequalityunit.gov.uk/women_work_commission/fairdealforwomen_interim_statement.pdf

incorporate and address some of our concerns around constraints to girls' and women's choices in order that their horizons are broadened and aspirations raised.

We are also concerned with skills shortages and access to lifelong learning, whether in or out of work, and in particular solutions for part-time workers and women returning to the labour market after childbirth.

- Occupational segregation

As our investigation progresses, we will examine the reasons why men and women do different jobs, female access to "male" jobs and what happens to women in "male" jobs. We will investigate "glass ceilings" and "sticky floors".

We will investigate how caring is valued at present and whether and how our society might value caring jobs more highly.

- Organisational practice

We will examine minimum standards (the legal framework) and how to spread best practice, including the case for equality representatives. We will review the experience of equal pay reviews in both public and private sectors and consider the case for mandatory pay reviews.

The Women and Work Commission interim statement made the following comment on the public sector duty to promote gender equality:⁷¹

33 The Women and Work Commission has been charged with paying particular attention to the public sector as a major employer of women – 64 per cent of public sector workers are women compared to just 41 per cent in the private sector. The full-time gender pay gap (based on the median) is just 10.1 per cent in the public sector compared to 21.3 per cent in the private sector. But there are still fewer women in senior management positions in the public sector and a significant degree of clustering of women into a relatively small number of occupations, with women dominating teaching, nursing and social work. And whilst the full-time gender pay gap is smaller in the public sector than the economy as a whole, of great concern to us is the fact that the part-time pay gap is just as large.

34 We welcome the Government's commitment to a public sector duty to promote gender equality. This positive step forward will lead public authorities to take proactive steps, in their roles as employers and service providers, to positively promote equality between men and women rather than solely take steps

⁷¹ Women and Work Commission: *A Fair Deal For Women in the Workplace*, March 2005: http://www.womenandequalityunit.gov.uk/women_work_commission/fairdealforwomen_interim_statement.pdf

to prevent discrimination. We also welcome the explicit reference to the Equal Pay Act in the legislation which will ensure the duty covers contraventions to the Equal Pay Act and encourage public authorities to take steps to review pay systems to prevent equal pay cases from ever having to reach the courts.

We agree that in developing the specific duties, efforts must be geared towards producing a duty which is outcome focused, proportionate and non-bureaucratic. The Government's current thinking is that implementation is scheduled for December 2006. We will take a continuing interest in the development of the specifics of the gender duty which we see as key to actively enhancing opportunities and fair pay for women across the public sector within the foreseeable future and on a continuing basis.

We will investigate issues related to contracting out and procurement and the extent to which relevant equality issues can be considered during the process.

Angela Eagle MP introduced a Ten Minute Rule Bill on *Sex Equality (Duties of Public Authorities)* in November 2004:⁷²

Sex Equality (Duties of Public Authorities)

Angela Eagle (Wallasey) (Lab): I beg to move,

That leave be given to bring in a Bill to make provision in relation to public authorities for the further prevention of sex discrimination and for the promotion of equality of opportunity for men and women.

Such a duty to promote equality was introduced for race discrimination in the Race Relations (Amendment) Act 2000. The Audit Commission has since described that as the key driver for change to combat the discrimination that still exists against our black and ethnic minority communities. Likewise, the draft Disability Discrimination Bill also contains a positive duty on the public sector to promote equality—and rightly so. It is now time for the same advance to be made for women and men, and my Bill would accomplish that.

In response to this Bill Eric Forth MP said:

The worrying thing is that the hon. Lady and her Government would be the first to say that, in the context of historically low unemployment in this country, which I applaud, and the fact that this country has one of the highest proportions of women in work in the western world, any measure that even risks diminishing those conditions could be highly counter-productive. There is always a risk that, if well-intentioned measures such as the Bill are carried too far and reach too far into the workplace, they could start to have a counter-productive effect. That danger cannot be over-stated.

⁷² HC Deb 3 Nov 2004 cc310-314

VII Equality Strands

A. Overview

Discrimination law currently covers the following main areas:

- Sex
- Race
- Disability
- Age
- Religion
- Sexual Orientation
- Transsexual People

Other strands which have been identified are not specifically protected but may in some cases be covered under existing legislation.⁷³

Discrimination legislation in the UK has emerged over an extended period of time and has been derived both legally and conceptually from diverse sources. For example, race discrimination law in the UK owes something to US civil rights law. More recent strands have emanated from European directives.

The result is a large and complex body of law of uneven texture which often requires specialist legal expertise to understand. Much of it has been driven by an underlying need for social change. However, the most common legislative response to this need has been to create rights for individuals to sue for compensation as victims of discrimination. The extent to which this has been an effective response to the underlying problem has been questioned.⁷⁴ Discrimination claims have comparatively the lowest success rates at employment tribunals.⁷⁵ In light of survey results on matters such as the gender pay gap and the social and economic position of ethnic minorities, many commentators have expressed disappointment at the progress made so far toward an equal society.

There is also recognition that the categories outlined above can intersect in complex ways, creating particular problems which need to be addressed. One example of this is the intersection between gender and race. A recent report published by the Fawcett Society outlined the racial dimension to gender pay gap.⁷⁶ Another area which has attracted recent

⁷³ For example: Carers; Parents; Children; Gypsies and travellers; Height and Weight

⁷⁴ Bob Hepple, *Have twenty five years of the Race Relations Acts in Britain been a failure?* Chapter in *Discrimination: The Limits of the Law*, UCL 1992

⁷⁵ Employment Tribunals Service, *Annual Report and Accounts 2003-2004*, page 23: <http://www.ets.gov.uk/frame.htm>

⁷⁶ Kate Bellamy; Dr. Katherine Rake, *An audit of women's economic welfare in Britain today*, Fawcett Society, March 2005, page 29: <http://www.fawcettsociety.org.uk/documents/Auditfullreport.pdf>

attention is the intersection between race and religion. Due to developments in the case law on race discrimination it has emerged that Muslims have very limited protection under race discrimination law because they are not defined as a racial group. This has also had implications for criminal law on incitement to racial hatred.

B. Race

The *Race Relations Act 1976* (RRA), as amended, makes it unlawful to discriminate against anyone on grounds of race, colour, nationality (including citizenship), or ethnic or national origin. The *Race Relations (Amendment) Act 2000*, imposed general duties on many public authorities to promote equality of opportunity and good race relations. The *Race Relations Act 1976 (Amendment) Regulations 2003* implemented the *Race Directive 2000/43/EC* and provided a new definition of indirect race discrimination as well as specifically covering racial harassment. They set out new rules on the burden of proof in discrimination cases and removed the previous exemption covering racial discrimination in employment in a private household.

The RRA applies to employment, training, housing, education and the provision of goods, facilities and services. It is also unlawful for public bodies to discriminate while carrying out any of their functions.

It is important to note that racial harassment and abuse are offences under the criminal law, particularly if they involve physical violence. Inciting racial hatred is also a criminal offence. It is a criminal offence to publish and disseminate materials such as leaflets and newspapers which may incite racial hatred. Such matters should be reported to the police.

The Commission for Racial Equality give the following useful definition of race discrimination:

The Race Relations Act is concerned with people's actions and the effects of their actions, not their opinions or beliefs. Racial discrimination is not the same as racial prejudice or 'racism'.

Prejudice literally means 'pre-judging' someone - knowing next to nothing about them but jumping to conclusions because of some characteristic, like their appearance.

Racism is the belief that some 'races' are superior to others - based on the false idea that different physical characteristics (like skin colour) or ethnic background make some people better than others.

Discrimination occurs when someone is treated less favourably on grounds of their colour, race, nationality or national or ethnic origin. It is not necessary to prove that someone intended to discriminate against you: it is sufficient only to

show that the outcome of their action was that you received less favourable treatment.⁷⁷

Racial discrimination takes three different forms. It may be direct, indirect or “victimisation” of a person who has made or supported a legal claim of race discrimination.

Under section 3(1) RRA, racial discrimination is defined as discrimination on grounds of “colour, race, nationality or ethnic or national origins”. Separate provisions cover religious discrimination in employment which does not specifically come under the Act in England, Scotland and Wales, although it may sometimes amount to indirect discrimination against a racial group.⁷⁸

Direct discrimination is less favourable treatment of a person on discriminatory grounds. Indirect racial discrimination may fall into one of two categories. The first is on grounds of *colour or nationality*; the second is based on *race, ethnic or national origin*. There is a subtle difference between the two arising from the way in which the European *Race Directive* was phrased and accordingly implemented in UK law.

There are some exceptions to the provisions. The most substantial of these relate to training and positive action to redress a pre-existing inequality.

A report in 2003 on the participation of people from ethnic minorities in the labour market revealed 10-15% higher unemployment rates for ethnic minorities.⁷⁹ A separate report showed that 67% of people from ethnic minority communities live in the 88 most deprived districts in England compared to 37% of the white population.⁸⁰

C. Sex

Women still earn less than men. Current estimates for the gender pay gap stand at 18% (percentage difference between average hourly earnings of men and women working full-time). Women represent a higher proportion of those in lower-skilled occupations and part-time employment. There is currently significant concern about discrimination against women on grounds of pregnancy.⁸¹

The *Sex Discrimination Act 1975* (SDA) prohibits sex discrimination against individuals in the areas of employment, education, and the provision of goods, facilities and services and in the disposal or management of premises. The *Equal Pay Act 1970* gives the right

⁷⁷ http://www.cre.gov.uk/legaladv/rra_discrim.html

⁷⁸ See *Employment Equality (Religion or Belief) Regulations 2003 SI No. 1660*

⁷⁹ Prime Ministers Strategy Unit, Cabinet Office, *Ethnic Minorities and the Labour Market*, 2003

⁸⁰ *Strength in Diversity: Towards a Community Cohesion and Race Equality Strategy*, 2004.

⁸¹ EOC Research, *Pregnant and Productive* 2005

to the same contractual pay and benefits as a person of the opposite sex in the same employment. Both of these Acts came into force in 1975.

The *Sex Discrimination (Election Candidates) Act 2002* enables political parties, if they wish, to adopt positive measures to reduce inequality in the numbers of men and women elected as representatives of their party. UK political parties have adopted various kinds of quota schemes to address the fact that women are still poorly represented in UK politics. Currently 18% of MPs are women. The proportion is higher in the Scottish Parliament, Welsh Assembly and European Parliament, but lower in the Northern Ireland Assembly, Local Authorities and the House of Lords.

The Sex Discrimination Act 1975 (Amendment) Regulations 2003 provided for Chief Constables to be liable in the same way as ordinary employers for sex discriminatory acts committed by officers in their force in the course of their employment and extended the law to cover sex discrimination committed after the termination of employment.

The DTI have published a consultation paper on draft regulations which will implement the amended *Equal Treatment Directive (2002/73/EC)*; clarify the law on indirect discrimination; insert definitions of harassment on grounds of sex, harassment on grounds of gender reassignment, and sexual harassment into the SDA; and clarify that pregnancy and maternity, paternity and adoption leave are covered under SDA. The consultation period ends on 31 May 2005.⁸²

Statistical analysis based on spring 2002 Labour Force Survey found that 82 per cent of part-time employees were women.⁸³ A November 2003 Labour Force Survey showed that women working part-time account for 42 per cent of the entire labour force, as opposed to a corresponding figure of 9 per cent for men.⁸⁴

The *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000* gave part-time workers the right to the same rates of pay (pro rata) and conditions of employment as full time employees doing the same work. The regulations implemented the European *Part-Time Work Directive 97/81/EC*. A part-time worker has the right to request a written statement from the employer explaining any treatment which the worker thinks is less favourable than full time employees. Complaints can be made to an employment tribunal.

Recent surveys publicised by the Equal Opportunities Commission (EOC) found that there is still a significant pay gap affecting working women. The current average pay gap in the UK according to an Equal Opportunities Commission (EOC) campaign is 18%:

⁸² DTI, *Equality and Diversity: Updating the Sex Discrimination Act*, 7 March 2005

⁸³ http://www.eoc-law.org.uk/cseng/statistics/statistics_on_fulltime_and_parttime_employees.asp?PrintIt=yes

⁸⁴ http://www.womenandequalityunit.gov.uk/research/gender_briefing/grb_nov_2003.doc

The most common way of describing the gender pay gap is as a percentage difference between average hourly earnings of men and women working full-time. Using this definition, the gender pay gap in Great Britain is 18%.

The gap between hourly earnings of women working part-time and men working full-time is 40%.⁸⁵

Some of the causes of the gender pay gap were also outlined:

Why is there still a gender pay gap?

In 1991, the EOC's Equal Pay Taskforce identified three main causes of the gender pay gap:

Discrimination in pay systems: Women being paid less than men for doing the same job as a man or a job requiring the same level of skill, effort and responsibility as a job done by a man

Occupational segregation: large groups of women are concentrated in a narrow range of low paid jobs such as cleaning, catering and caring

Caring responsibilities: the responsibility for looking after children and other relatives falls on women more than men, which affects their progression at work.⁸⁶

The Fawcett society has taken up the issue of women's pensions and in collaboration with Age Concern has launched a campaign on this issue:

Pensions

Older women today are facing a considerable pensions gap: for every pound of income received by men in a pensioner couple, women receive less than 32 pence. Female single pensioners are one of the poorest groups of the older population, and currently nearly a quarter live in poverty. More than twice as many older women as men are reliant on the means-tested Minimum Income Guarantee (MIG).

The issue of pension provision is of major concern for both women and men, but too often pensions have been designed without taking into account the differences between women's and men's lives.

The Fawcett Society and Age Concern have joined forces to run a campaign on women and pensions. We share the view that the levels of hardship currently experienced by older women in the UK are intolerable. And, unless the

⁸⁵ EOC campaign statistics: <http://www.eoc.org.uk/cseng/policyandcampaigns/timetogeteven.asp>

⁸⁶ EOC campaign statistics: <http://www.eoc.org.uk/cseng/policyandcampaigns/timetogeteven.asp>

Government acts now, many younger women will face an old age in poverty just as their mothers and grandmothers did.⁸⁷

The *Employment Act 2002* introduced various measures aimed at helping parents maintain access to employment and achieve a better balance between their work and home lives. It is hoped that this will have a positive impact on the pay gap by helping women return to the labour market. The Act also introduced an equal pay questionnaire with the intention of making it easier to tackle pay discrimination in the workplace.⁸⁸ The EOC encourages employers to undertake equal pay reviews to highlight inequalities and hopefully address them without the need for enforcement or litigation.

Although the *Sex Discrimination Act 1975* (SDA) outlaws most forms of sex discrimination in the provision of goods, services and facilities, it is still legal for genuinely private clubs to make different facilities available for men and women. Various Bills have been introduced intended to outlaw sex discrimination in private clubs. Robert Walter MP introduced the *Sex Discrimination (Amendment) Bill 2001-02* under the Ten-Minute Rule on 11 December 2001.⁸⁹ Lord Faulkner of Worcester's *Sex Discrimination (Amendment) (No 2) Bill [HL] 2001-02* received a Second Reading in the Lords on 13 March 2002 and was passed by the Lords on 17 June 2002. Although introduced in the Commons on the same day, it made no further progress and fell at the end of the session. The Government supported the Bill "in principle". However, despite press reports suggesting otherwise, it did not give a commitment to make Parliamentary time available for the Bill and it failed to make further progress.

The *Sex Discrimination (Clubs and Other Private Associations) Bill 2003-04* was originally a Handout Bill available to MPs successful in the ballot for Private Members' Bills, but was not picked up by any of them. However, it was presented by David Wright MP as a Ten Minute Rule Bill on 9 March 2004, and it subsequently succeeded in getting a Second Reading on 14 May. This was because the Government supported it at that stage. A Regulatory Impact Assessment was accordingly published. The Bill did not progress beyond Committee stage in the Commons.

D. Disability

The *Disability Discrimination Act 1995* (DDA) prohibits discrimination against disabled people in the areas of employment; the provision of goods, facilities and services; premises and education; and provides for regulations to improve access to public transport. The *Disability Discrimination Act 1995 (Amendment) Regulations 2003* and the *Disability Discrimination Act 1995 (Pensions) Regulations 2003* both implement the EC *Employment Directive* (or "general framework" Directive) 2000/78/EC.

⁸⁷ Fawcett Society: http://www.fawcettsociety.org.uk/Campaign_Pay.htm

⁸⁸ HC Deb 6 October 2003 c995W

⁸⁹ MP for North Dorset

Based on the Family Resource Survey 2002/03 it is estimated that there are in region of 10 million disabled adults, amounting to 22% of the adult population who are likely to be covered by the DDA. Disabled people face numerous barriers in employment and in accessing goods and services. In many ways this equality strand is different from others and has required different legislative measures. In terms of employers and providers of goods and services, other kinds of discrimination law are structured around prohibitions. Disability legislation is unique in that it places mandatory requirements on employers and service providers to make adjustments to accommodate the needs of disabled people. There are also differences in how the prohibitions operate in terms of the way in which comparisons should be drawn.⁹⁰

The current *Disability Discrimination Bill 2004/05* seeks to amend and extend the *Disability Discrimination Act 1995* in response to the 2001 *Towards Inclusion* consultation document. The Bill will deliver the remainder of the Government's response to the recommendations of the Disability Rights Task Force. It introduces new rights in the areas of transport and the functions carried out by public authorities. It will also strengthen and extend the DDA by introducing or extending provisions on letting premises, private clubs and local councillors. The definition of disability in the DDA will be extended to bring more people within its coverage. The Bill was first published as a draft *Disability Discrimination Bill* in December 2003, this draft Bill was subject to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament.⁹¹

E. Age

There are currently no legislative provisions in force covering age discrimination. Regulations are due to come into effect in October 2006. The Government published a consultation paper on age discrimination in the workplace in July 2003.⁹² This arose out of the need to implement the *EC Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC)* which was adopted on 27 November 2000. The purpose of this Directive, commonly called the "Employment Directive", is to prohibit discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation. The age discrimination strand of the directive must be implemented by December 2006.

In the meantime the Government have initiated a campaign called "Age Positive" to encourage employers to adopt non-ageist employment practises. This was accompanied by the publication in 1998 of a voluntary Code of Practice: *Age Diversity at Work, A Practical Guide For Business*. This code was updated in 2002.

⁹⁰ See *Clark v. Novacold Ltd* [1999] ICR 951, CA

⁹¹ See Library Research Paper RP 05/25 *The Disability Discrimination Bill*, 16 March 2005

⁹² DTI consultation, *Age Matters*, July 2003: http://www.dti.gov.uk/er/equality/age_consultation.pdf

A prominent concern that has arisen relates to retirement age. It is important to stress that the “retirement age” and the “pension age” are not synonymous. The retirement age is the age at which one can be required to leave work. The pension age is that age at which one can start to draw an unreduced pension. At present, employers are within their rights to lay down mandatory retirement ages in contracts of employment. The full details of the way in which this will be affected by the age discrimination legislation are still under discussion. However, the Government have confirmed that compulsory retirement ages will become unlawful unless they can be objectively justified. A Ministerial Statement on 14 December 2004 by Patricia Hewitt confirmed the Government’s final decision in favour of a national default retirement age of 65 together with a right for employees to request working beyond the set retirement age. The decision to have a national default retirement age will be reviewed after five years. Mandatory retirement will be outlawed below 65 unless the employer can objectively justify their action:⁹³

Another area of concern has been the upper and lower age limits on statutory protection for unfair dismissal and entitlement to statutory redundancy pay. A challenge was launched against the legality of upper age limits in the case of *Harvest Town Circle Ltd v Rutherford*, where a man dismissed at the age of 67 argued that there was no objective justification for the rule prohibiting people over the normal retiring age from claiming unfair dismissal and that it affected more men than women (in other words it amounted to indirect sex discrimination). The case was appealed to the Court of Appeal who gave judgement on this case on 3 September 2004 dismissing the appeal.⁹⁴ It is possible that reference may yet be made to the European Court of Justice.⁹⁵ The House of Lords have accepted an appeal in this case.

There has been much discussion about the “ageing workforce”. Many developed countries, most notably Japan, are facing a demographic increase in the proportion of older people in their societies. Much of this can be attributed to the so called “baby boomer” generation following the surge in birth rates after the Second World War. This has prompted concerns ranging from pension provision to labour supply. A frequent question that arises is whether people should be encouraged to work longer. At the same time there is a perception that younger workers face a degree of economic exclusion and negative perceptions about their abilities at work. By 2006 there will be more people aged 55-64 than people aged 16-24. By 2006, the 45-59 age group will form the largest group in the labour force.⁹⁶ The Government estimates that the costs of age discrimination to Gross Domestic Product could be billions of pounds per year.⁹⁷

⁹³ HC Deb 14 December 2004 cc127 - 130WS

⁹⁴ *Rutherford & Another v. Secretary of State for Trade and Industry* [2004] EWCA Civ 1186; Full text of judgement: <http://www.bailii.org/ew/cases/EWCA/Civ/2004/1186.html>

⁹⁵ “Ruling gives over-65s new work rights”, *Financial Times*, 24 August 2002

⁹⁶ The Employers’ Forum on Age website: <http://www.efa.org.uk>

⁹⁷ DTI, *Partial Regulatory Impact Assessment for Age Discrimination Legislation*, 2003
www.dti.gsi.gov.uk/er/equality/agediscrim_RIA.pdf

F. Religion

The *Employment Equality (Religion or Belief) Regulations 2003* came into force in December 2003 and prohibit discrimination in employment and vocational training on the grounds of religion, religious belief or similar philosophical belief.

Prior to December 2003 there was no law against discrimination on religious grounds in Great Britain except the *Fair Employment and Treatment (Northern Ireland) Order 1998* which outlaws both direct and indirect discrimination “on the ground of religious belief or political opinion” in employment in Northern Ireland.

The *Race Relations Act 1976* (RRA) prohibits discrimination on racial grounds and this has been used to protect certain religious groups that also constitute a distinct ethnic group. The RRA applies in employment as well as in other fields.

Indirect discrimination occurs when people from a particular racial group are less likely to be able to comply with a requirement or condition and that requirement cannot be justified on non-racial grounds. The provision, criterion or practice could be applied to everyone, but may put people of the same race or national or ethnic origin at a particular disadvantage. For example, action taken by an employer which causes detriment to Muslims as a class may amount to indirect discrimination against a particular racial group, if the majority of the Muslims affected are from a defined ethnic group.⁹⁸ For example, a regulation (such as a prohibition on women wearing headscarves or trousers) which adversely affects Muslims might well constitute indirect discrimination because of the ethnic make up of the Muslim community in Great Britain or the particular geographical region in question.

According to the last census the majority of the UK population, just over three quarters, report having a religion with over 70% identifying themselves as Christian. More than 15% have no religious affiliation.

G. Sexual Orientation

On 13 December 2001 the Government issued a consultation document seeking views on the implementation of the *Employment Directive*.⁹⁹ On 22 October 2002, draft implementing regulations were published. The *Employment Equality (Sexual Orientation) Regulations 2003* came into force in December 2003 and prohibit discrimination in employment and vocational training on the grounds of sexual orientation.

⁹⁸ *JH Walker Ltd. v Hussain* [1996] IRLR 11, EAT. See also *Hussain v Midland Cosmetic Sales plc* (9 May unreported) EAT.

⁹⁹ Cabinet office, DTI, Home Office, DWP, *Towards Equality and Diversity: implementing the employment and race directives*, 13 December 2001, available on the DTI website at: <http://www.dti.gov.uk/er/equality/consult.pdf>

There was formerly a ban in the armed forces on the employment of gays and lesbians, but this was lifted on 12 January 2000, following the European Court of Human Rights (ECHR) judgment of 27 September 1999 in the cases of *Lustig-Prean & Beckett v The United Kingdom* and *Smith & Grady v The United Kingdom*.¹⁰⁰ The ECHR ruled that the British armed forces' ban was a breach of Article 8 of the European Convention on Human Rights (right to respect for private and family life). The Article provides that:

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Some people who have suffered discrimination on grounds of their sexual orientation have tried to bring cases under the *Sex Discrimination Act 1975* (SDA) more recently quoting the *Human Rights Act* (HRA) in support. However, these cases were not successful.

Baroness Turner of Camden tried on three occasions to introduce *Sexual Orientation Discrimination Bills* which would have extended the scope of the *Sex Discrimination Act* to cover sexual orientation.¹⁰¹

There were also a number of unsuccessful attempts by Liberal Democrats to amend the *Employment Relations Bill 1998-99* during its passage through Parliament to outlaw discrimination on grounds of sexual orientation in employment.

H. Transsexual people

The *Sex Discrimination (Gender Reassignment) Regulations 1999* extend the provisions of the *Sex Discrimination Act 1975* on employment and vocational training to include discrimination on gender reassignment grounds.

The *Gender Recognition Act 2004* provides for the legal recognition of transsexual people in their acquired gender for the purposes of registration and marriage.

¹⁰⁰ Statement by Geoffrey Hoon, Secretary of State for Defence, HC Deb 12 January 2000, cc 287-288

¹⁰¹ *Sexual Orientation Discrimination Bill [HL] 1994/95*, second reading debate, 14 July 1995; *Sexual Orientation Discrimination Bill [HL] 1995/96*, second reading debate, 6 March 1996; *Sexual Orientation Discrimination Bill [HL] 1997/98*, second reading debate, 5 June 1998, HL Deb 639-660

Transsexual people first gained protection from discrimination in employment under the SDA in the case of *Chessington World of Adventure v X*.¹⁰² This case applied the decision of the European Court of Justice in the case of *P v S and Cornwall County Council* which held that discrimination for reason related to a gender reassignment breaches the *Equal Treatment Directive*.¹⁰³ The ECJ judgement in *P v S* was as follows:

In view of the objective pursued by Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 5(1) of the Directive precludes dismissal of a transsexual for a reason related to a gender reassignment.

The Joint Committee on Human Rights examined the draft *Gender Recognition Bill* during pre-legislative scrutiny of the Bill. The Gender Trust submission to the Joint Committee highlighted the absence of protection for transsexuals in the provision of goods and services in the following terms:

2.18 Members of the trans community have no protection under English law against discrimination in respect of the provision of goods and services. It is apparently legal, for example:

- (a) to have a “no transsexuals” policy at a shop or restaurant (as regards customers)
- (b) to refuse an elderly trans person a place at a care home as a resident
- (c) to decline private medical services to a transsexual person because they are transsexual
- (d) to require a trans person to pay more for goods or services or to refuse services altogether
- (e) to refuse to let premises to a transsexual person (including in principle also erecting a “no transsexuals” sign at the door).¹⁰⁴

¹⁰² *Chessington World of Adventure v X* [1997] IRLR 556

¹⁰³ *P v S and Cornwall County Council* Case C-13/94; *Sex Discrimination Act 1975* sections: 1(1)a, 5; *EEC Equal Treatment Directive 76/207*: Articles 1(1), 2(1), 3, 5(1)

¹⁰⁴ Gender Trust Submission to the Joint Committee on Human Rights:
<http://www.gendertrust.org.uk/jchr.php>

Appendix 1: Organisations and Contacts

The following is a list of organisations which can provide help and further information on various discrimination issues:

GENERAL

Equal Opportunities Commission

Arndale House
Arndale Centre
Manchester M4 3EQ
Tel.:0845 601 5901
Fax: 0161 838 1733
E-mail: info@eoc.org.uk
<http://www.eoc.org.uk/index.asp>

European Union – anti-discrimination campaign

<http://www.stop-discrimination.info/index.php?english>

Liberty

21 Tabard Street
London
SE1 4LA
Tel: 020 7403 3888
Fax: 020 7407 5354
Email:info@liberty-human-rights.org.uk
www.liberty-human-rights.org.uk

Confederation of British Industry

Centre Point,
103 New Oxford Street,
London WC1A 1DU
Tel: 020 7379 7400
<http://www.cbi.org.uk/>

Discrimination Law Association

PO BOX 6715,
Rushden,
Northamptonshire
NN10 9WL
Tel: 01933 228742
Email: info@discrimination-law.org.uk
<http://www.discrimination-law.org.uk/>

International Labour Organisation

4 Route des Morillons

CH-1211

Geneva 22

Switzerland

<http://www.ilo.org/>

Department for Trade and Industry

1 Victoria Street

London

Equality and Diversity website: <http://www.dti.gov.uk/er/equality/index.htm>

The DTI employment relations website also has a list of useful links:

<http://www.dti.gov.uk/er/links.htm>

Trade Union Congress – Equality information

Congress House,

Great Russell Street,

London,

WC1B 3LS

Tel: 020 7636 4030

Fax: 020 7636 0632

Email: info@tuc.org.uk

<http://www.tuc.org.uk/equality/index.cfm>

RACE

Commission for Racial Equality

St Dunstan's House
201-211 Borough High Street
London SE1 1GZ
Tel. 0207 939 0000
Fax 0207 939 0001
E-mail: info@cre.gov.uk
<http://www.cre.gov.uk/index.html>

Business in the Community/Race for Opportunity

137 Shepherdess Walk
London N1 7RQ
Tel: 0870 600 2482
Email: information@bitc.org.uk
http://www.bitc.org.uk/programmes/programme_directory/race_for_opportunity/index.html

Centre for Research in Ethnic Relations

University of Warwick
Coventry CV4 7AL
Tel.: 024 7652 4869
Tel. 024 7652 4324
http://www.warwick.ac.uk/fac/soc/CRER_RC/index.html

Ethnic Minority Foundation

Boardman House
64 Broadway
Stratford
London
E15 9NG
Tel.: 020 8432 0300
Fax.:020 8432 0318
<http://ethnicminorityfund.org.uk/html/index.asp>

Home Office – Race, Equality & Diversity website

<http://www.homeoffice.gov.uk/comrace/race/index.html>

Institute of Race Relations

2-6 Leeke Street

London WC1X 9HS

Tel.:020 7837 0041

Fax.:020 7278 0623

Email: info@irr.org.uk

<http://www.irr.org.uk/about/index.html>

Runnymede Trust

Suite 106

London Fruit & Wool Exchange

Brushfield Street

London E1 6EP

Tel.:020 7377 9222

Fax.:020 7377 6622

Email: info@runnymedetrust.org

<http://www.runnymedetrust.org/>

DISABILITY

Disability Rights Commission

DRC Helpline

Freepost MID 02164

Stratford-upon-Avon

CV37 9BR

Telephone 08457 622 633

<http://www.drc-gb.org/>

Employers' Forum on Disability

Nutmeg House

60 Gainsford Street

London, SE1 2NY

Tel: 0207 403 3020

Fax: 0207 403 0404

<http://www.employers-forum.co.uk/www/index.htm>

European Disability Forum

Rue due Commerce 39-41

B-1000 Brussels

Belgium

Tel.: (+32) 2 282 4600

Fax: (+32) 2 282 4609

<http://www.edf-feph.org/en/welcome.htm>

AGE

Age Concern

Age Concern England
Astral House
1268 London Road
London SW16 4ER
Tel: 020 8765 7200
Fax: 020 8765 7211
Email: InfoDep@ace.org.uk.
<http://www.ace.org.uk/>

Age Positive

Department for Work and Pensions
Room W8d
Moorfoot
Sheffield
S1 4PQ
Email: agepositive@dwp.gsi.gov.uk
<http://www.agepositive.gov.uk/index.cfm>

Campaign Against Age Discrimination in Employment (CAADE)

395 Barlow Road
Broadheath
Altrincham
Cheshire
UK WA14 5HW
Tel.:0161 941 2902
Email: caade@caade.net
<http://www.caade.net/>

Employers Forum on Age

Floor 3, Downstream
1 London Bridge
London
SE1 9BG
Tel: 0845 456 2495
Fax: 0207 785 6536
Email: efa@efa.org.uk
<http://www.efa.org.uk/>

Help the Aged

207-221 Pentonville Rd

London N1 9UZ

Tel.: 020 7278 1114

Fax.: 020 7278 1116

Email: info@helptheaged.org.uk

http://www.helptheaged.org.uk/CampaignsNews/_default.htm#age

SEXUAL ORIENTATION

Outrage!

PO Box 17816

London

SW14 8WT

Tel.: 020 8240 0222

<http://outrage.nabumedia.com/>

Stonewall

46 Grosvenor Gardens

London, SW1W 0EB

Tel: 020 7881 9440

Fax :020 7881 9444

Email: info@stonewall.org.uk

<http://www.stonewall.org.uk/>

Lesbian and Gay Employment Rights (LAGER)

Unit1G,

Leroy House,

436 Essex Road,

London N1 3QP

Tel: 020-7704 2205

Fax: 020-7704 6067

MEN/WOMEN

Council of Europe – Equality between Men and Women

http://www.coe.int/T/e/human_rights/equality/

DTI – Women and Equality Unit

35 Great Smith Street

London

SW1P 3BQ

United Kingdom

Tel.: 0845 001 0029

Email: <mailto:info-womenandequalityunit@dti.gsi.gov.uk>

<http://www.womenandequalityunit.gov.uk/>

Equal Opportunities Commission

Arndale House

Arndale Centre

Manchester M4 3EQ

Tel.:0845 601 5901

Fax: 0161 838 1733

E-mail: info@eoc.org.uk

<http://www.eoc.org.uk/index.asp>

European Union – information on gender equality

http://europa.eu.int/comm/employment_social/equ_opp/index_en.htm

European Women's Lobby

18 Rue Hydraulique

B-1210

Brussels

Email: ewl@womenlobby.org

<http://www.womenlobby.org/DocList.asp?SectionID=7&LangName=english>

Fawcett Society

1-3 Berry Street

London

EC1V 0AA

Tel.:020 7253 2598

Fax.:020 7253 2599

Email: <mailto:info@fawcettsociety.org.uk>

<http://www.fawcettsociety.org.uk/>

Kingsmill Review of Women's Pay and Employment (reported to Govt in 2003)

<http://www.kingsmillreview.gov.uk/>

ManKind Initiative (rights for men)

Municipal Building

Corporation Street

Taunton

TA1 4AQ

Tel.:0870 794 4124

<http://www.mankind.org.uk/>

Parity: Equal rights for UK men and women

David Yarwood, Hon Secretary

'Constables'

Windsor Road

Ascot

SL5 7LF

<http://www.parity-uk.org/>

Soroptimist International of Great Britain and Ireland (Women's issues)

127 Wellington Road South

Stockport

Cheshire

SK1 3TS

Tel.:0161 480 7686

Fax.:0161 477 6152

<http://www.soroptimistinternational.org/index.html>

Women's National Commission

1 Victoria Street

London SW1HP 0ET

Tel.:020 7215 6933

Fax.:020 7215 2840

Email: wnc@dti.gsi.gov.uk

<http://www.thewnc.org.uk/>

Appendix 2: Discrimination Legislation

Sex Discrimination

Sex Discrimination Act 1975 (SDA)

Prohibits sex discrimination against individuals in the areas of employment, education, and the provision of goods, facilities and services and in the disposal or management of premises

Equal Pay Act 1970

The right to the same contractual pay and benefits as a person of the opposite sex in the same employment

Sex Discrimination (Election Candidates) Act 2002

Enables political parties, if they wish, to adopt positive measures to reduce inequality in the numbers of men and women elected as representatives of their party

The Sex Discrimination Act 1975 (Amendment) Regulations 2003

Provides for Chief Constables to be liable in the same way as ordinary employers for sex discriminatory acts committed by officers in their force in the course of their employment and extends the law to cover sex discrimination committed after the termination of employment

Equality and Diversity: Updating the Sex Discrimination Act, 7 March 2005

DTI consultation paper on draft regulations which will implement the amended *Equal Treatment Directive* (2002/73/EC); clarify the law on indirect discrimination; insert definitions of harassment on grounds of sex, harassment on grounds of gender reassignment, and sexual harassment into the SDA; clarify that pregnancy and maternity, paternity and adoption leave are covered under SDA-consultation period ends on 31 May 2005

Race Discrimination

Race Relations Act 1976

Makes it unlawful to treat a person less favourably than another on racial grounds

Race Relations (Amendment) Act 2000

Covering public authority functions not previously covered by the RRA, plus a general duty on specified public authorities to promote race equality

The Race Relations Act 1976 (Amendment) Regulations 2003

Implements the Race Directive 2000/43/EC

Disability Discrimination

Disability Discrimination Act 1995

Prohibits discrimination against disabled people in the areas of employment, the provision of goods, facilities, services and premises, education; and provides for regulations to improve access to public transport to be made

The Disability Discrimination Act 1995 (Amendment) Regulations 2003

The Disability Discrimination Act 1995 (Pensions) Regulations 2003

Both above sets of regulations implement the EC *Employment Directive* (or “general framework” Directive) 2000/78/EC

Disability Discrimination Bill 2004/05

Amends and extends the *Disability Discrimination Act 1995* in response to the 2001 *Towards Inclusion* consultation document

Age Discrimination

*Age Matters*¹⁰⁵

There are currently no legislative provisions in force. Regulations implementing the age discrimination strands of the *Employment Directive 2000/78/EC* are due in October 2006 prior to the December 2006 deadline for national implementation of the directive.

Religion

Employment Equality (Religion or Belief) Regulations 2003

Prohibit discrimination in employment and vocational training on the grounds of religion, religious belief or similar philosophical belief

Sexual Orientation

Employment Equality (Sexual Orientation) Regulations 2003

Prohibit discrimination in employment and vocational training on the grounds of sexual orientation

Transsexual People

Sex Discrimination (Gender Reassignment) Regulations 1999

Extends the provisions of the *Sex Discrimination Act 1975* on employment and vocational training to include discrimination on gender reassignment grounds

The Gender Recognition Act 2004

Provides for the legal recognition of transsexuals in their acquired gender for the purposes of registration and marriage

¹⁰⁵ http://www.dti.gov.uk/er/equality/age_consultation.pdf

Appendix 3: Abbreviations

CEHR – Commission for Equality and Human Rights

EOC – Equal Opportunities Commission

CRE – Commission for Racial Equality

DRC – Disability Rights Commission

RRA – *Race Relations Act 1976*

DDA – *Disability Discrimination Act 1995*

SDA – *Sex Discrimination Act 1975*

HRA – *Human Rights Act 1998*