



The Leader of the House of Lords

Lord Goodlad  
Chairman  
Constitution Committee  
House of Lords  
London  
SW1A 0PW

18<sup>th</sup> January 2010

Dear Anwar

### **Equality Bill**

Thank you for your letter of 14 January and for the Committee's welcome for the Equality Bill.

You raised concerns regarding two matters and I thought it would be helpful to respond quickly.

#### ***The extent to which issues and agencies connected with national security are exempted from the Bill's provisions, with particular reference to clause 190***

As a general point, the Bill as a whole replicates (except, clearly, where new areas are being addressed) the position in existing legislation, which reflects the need to ensure that national security is not compromised. For this reason, bodies concerned with national security are not, for example, subject to the socio-economic duty or the public sector equality duty.

There are, of course, balances to be struck – I accept that national security cannot provide a blanket excuse for discrimination or other prohibited conduct, and that is the spirit by which the Bill has been produced. Clause 190, for example, replaces and harmonises the separate exceptions for national security in current discrimination legislation, narrowing those in section 52(1) of the Sex Discrimination Act 1975 and section 59(3) of the Disability Discrimination Act 1995. Consequently, protection in the Bill has in fact been enhanced as the exception in clause 190 is now worded so that an act done to protect national security is not automatically exempt but is subject to a test of proportionality.

In addition, if an individual believes that any of the intelligence and security agencies have discriminated against him/her in the exercise of their functions, he or she has a right of complaint to the Investigatory Powers Tribunal established under the Regulation of Investigatory Powers Act. Similarly, the provisions in clause 116 replicate powers to make rules of court in respect of proceedings involving national security, while harmonising the coverage so that they can apply also to cases involving sexual orientation and age. The provisions in clause 124 are intended to restrict the remedies available where a recommendation is made under the new power added by clause 123, in cases involving national security. I was not clear why you referred to Schedule 1 Part 5, paragraph 5 but I am happy to clarify any concerns you have in this regard.

***Scope of the “Henry VII Power”***

As far as clause 195 is concerned, I attach, for completeness, text which my colleague, the Solicitor General, is sending separately to the Delegated Powers and Regulatory Reform Committee as a supplement to the memorandum. These paragraphs were omitted in error from the memorandum as originally submitted.

The point you make about it being preferable for the relevant matters to be dealt with in the Bill rather than through rule-making is one which was debated during Committee last week. I think it fair to say that the Committee did not object to the power as such (though I accept that at the time of writing, it is open to it to do so when we reach clause 195). At the same time, the Government has been extremely open and transparent in its intentions for use of the power – we have already consulted on the general approach to exceptions and will be consulting further on a draft order.

I am happy to discuss or follow up any further questions you may have about the Bill.

I am placing a copy of this letter in the House Library.

A handwritten signature in black ink, appearing to read "Jan Royall". The signature is written in a cursive style with a large, sweeping flourish at the end.

**JAN ROYALL**

## Supplementary memorandum to the Delegated Powers and Regulatory Reform Committee

### Clause 195 – Age

Age is a protected characteristic under clause 5 of the Bill and discrimination is outlawed in the fields of services and public functions (except as regards young persons under the age of 18 (clause 27(1)(a)) and work in Parts 3 and 5 of the Bill). It is unique in that it is possible for direct age discrimination to be justified in the case of treatment that is a proportionate means of meeting a legitimate aim (see cl.13(2)). Clause 195 provides a power for a Minister of the Crown to make an order to amend the Act by making exceptions so that specified conduct relating to age or development of certain policies and arrangements by relation to age do not contravene the Act. The order may amend any part of the Act to which age discrimination applies except Part 5 (which relates to work) and Chapter 2 of Part 6 (which relates to further and higher education). Therefore, this exception-making power relates to fields other than work and further and higher education, such as the provision of goods, facilities and services and the performance of public functions. Under subsection (3), the power to make consequential amendments may apply to an enactment including the Equality Act 2006.

Subsection (3) enables the order to provide for a Minister of the Crown or the Treasury to issue guidance in respect of a requirement included in the exception. The actual requirement must be in the order, but matter filling out the detail of that requirement could be in guidance. It provides scope for a formal consultation in respect of the guidance and for consultation undertaken before commencement to qualify as consultation for the purposes of the power. Sub-section (4) enables guidance to be prepared and issued before the power is commenced and for that guidance to qualify as guidance required by the exception order. This is a common provision to facilitate a smooth introduction of new requirements.

This power to make exceptions is necessary because the application of the prohibition on age discrimination in non-employment fields is particularly complex and will require the careful delineation of exceptions that enable neutral or beneficial age discrimination, that is not covered by one of the general exceptions in Part 14 of the Bill, to continue. Examples of age-based differential treatment which it is anticipated will be covered by an exception are shown in the notes on clauses and include the reasonable use of age as a factor in financial services and age-based holidays. Detailed work on what these exceptions should be and how they should be framed is under way and emerging policy proposals were set out in the consultation paper *Equality Bill: Making it work ending age discrimination in services and public functions* issued in June 2009. A feedback statement on the responses to the Consultation is being prepared and will be issued shortly.

The power to supplement the substantive exceptions with statutory guidance is again necessary because of the difficulty of ensuring that “good” different treatment is permitted while the “bad” must cease. This is particularly the case in relation to the financial services exception and the use of age related factors and the same ability is likely to be necessary in relation to other specific exceptions to avoid the need to return with further affirmative orders to amend fine details particularly in relation to

procedural aspects of specification of acceptable age related treatment. The approach proposed here is similar to Schedule 3 paragraph 22 A as regards gender related factors. That replicates the approach used in the Sex Discrimination Act 1975 to give effect to the requirement in Article 5 of Gender Directive 2004/113/EC (implementing the principle of equal treatment between men and women in the access to and supply of goods and services) that where a Member State, as the UK has done, took up the option to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in assessment of risk based on actuarial and statistical data there had to be in place a system for the collection and publication of accurate data relevant to the use of such actuarial factors<sup>1</sup>. The guidance power is intended to be used for instance to deal with the detail of how a requirement that data be made public is actually satisfied. Sub-section (5) is intended to allow for methods of meeting a requirement provided for by private sector bodies such as the Association of British Insurers to be recognised as meeting that requirement. It is intended for exceptions to come into effect at the same time as the substantive prohibition in relation to age is commenced.

This Henry VIII power is subject to the affirmative procedure because it enables the amendment of primary legislation, is broad in nature and the potential impact of making exceptions in a particular area is likely to be significant.

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<sup>1</sup> See s.45 Sex Discrimination Act 1975 as amended by SI 2008/963