



# *Discrimination Law Review*

*A Framework for Fairness: Proposals for a  
Single Equality Bill for Great Britain*

---

A consultation paper



# *Discrimination Law Review*

## *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*

A consultation paper

June 2007  
Department for Education and Skills  
Department of Trade and Industry  
Department for Work and Pensions  
Ministry of Justice  
Department for Communities and Local Government: London

Department for Communities and Local Government  
Eland House  
Bressenden Place  
London  
SW1E 5DU  
Telephone: 020 7944 4400  
Website: [www.communities.gov.uk](http://www.communities.gov.uk)

The consultation document has been put together with input in particular from the Department for Education and Skills, the Department of Trade and Industry, the Department for Work and Pensions, the Ministry of Justice, the Scottish Executive and the Welsh Assembly Government.

© *Crown Copyright, 2007*

*Copyright in the typographical arrangement rests with the Crown.*

*This publication, excluding logos, may be reproduced free of charge in any format or medium for research, private study or for internal circulation within an organisation. This is subject to it being reproduced accurately and not used in a misleading context. The material must be acknowledged as Crown copyright and the title of the publication specified.*

Any other use of the contents of this publication would require a copyright licence. Please apply for a Click-Use Licence for core material at [www.opsi.gov.uk/click-use/system/online/pLogin.asp](http://www.opsi.gov.uk/click-use/system/online/pLogin.asp) or by writing to the Office of Public Sector Information, Information Policy Team, St Clements House, 2-16 Colegate, Norwich, NR3 1BQ.  
Fax: 01603 723000 or email: [HMSOlicensing@cabinet-office.x.gsi.gov.uk](mailto:HMSOlicensing@cabinet-office.x.gsi.gov.uk)

Further printed copies can be obtained from:  
Communities and Local Government Publications  
PO Box 236  
Wetherby  
West Yorkshire  
LS23 7NB  
Tel: 08701 226 236  
Fax: 08701 226 237  
Text phone: 08701 207 405  
Email: [communities@twoten.com](mailto:communities@twoten.com)

If you require this publication in an alternative format please email [alternativeformats@communities.gsi.gov.uk](mailto:alternativeformats@communities.gsi.gov.uk)

English, Welsh and Easy Read versions of this document are also available online through our website:  
[www.communities.gov.uk](http://www.communities.gov.uk)

**75% recycled**  
This is printed on  
75% recycled paper

June 2007

Product Code: 07EL04410/a

## The context of the consultation and what it seeks to achieve

This consultation paper sets out the Government's proposals for a Single Equality Bill for Great Britain. The proposals have been developed as a result of the Discrimination Law Review, launched in February 2005 to consider the opportunities for creating a clearer and more streamlined discrimination legislative framework which produces better outcomes for those who currently experience disadvantage. This consultation seeks your views on various specific proposals for achieving this.

In parallel with the Discrimination Law Review, the Equalities Review chaired by Trevor Phillips looked at the broader issues leading to an unequal society. The Equalities Review issued an interim report in March 2006 and presented its final report to the Prime Minister on 28 February 2007.

The Government will consider the outcome of these initiatives in preparing a Single Equality Bill, bringing together the whole of discrimination law in a more consistent and coherent way. It is committed under its manifesto to introducing a Single Equality Bill during this Parliament.

**Issued: 12 June 2007**

**Respond by: 4 September 2007**

## How to respond

When responding, please state whether you are responding as an individual or representing the views of an organisation.

If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.

Should you wish to use it, a preformatted response form containing the questions on which we are seeking views is available at [[www.communities.gov.uk](http://www.communities.gov.uk)]

Responses can also be submitted by letter, fax or email to:

Kate Hepher

Discrimination Law Review Team

Women and Equality Unit

Department for Communities and Local Government

Ashdown House

123 Victoria Street

London SW1E 6DE

[Kate.Hepher@communities.gsi.gov.uk](mailto:Kate.Hepher@communities.gsi.gov.uk)

Fax: 020 7944 0602

Tel: 020 7944 8330

We would welcome your suggestions about which additional organisations and individuals may wish to be consulted.

## Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want certain information which you provide to be treated as confidential, please be aware that, under the Freedom of Information, there is a statutory code of practice with which public authorities must comply and which deals, among other things, with obligations of confidence.

In view of this, it would be helpful if in providing information you regard as confidential you could explain to us why. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the Data Protection Act and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

## Consultation process

The Government wants to take forward these proposals on a participative basis with the full involvement of all those who have an interest in this area and comments from all are welcome.

Contact with stakeholders will continue during and after the consultation period as the proposals are further developed and refined.

There will be special arrangements to ensure that the Single Equality Bill is tailored to the needs of Scotland and Wales. Insofar as the consultation involves devolved matters, this consultation should be viewed as being carried out jointly by the Department for Communities and Local Government and the Scottish Executive or the Welsh Assembly Government.

# Contents

<b>Foreword</b>	6
<b>Overview</b>	8
<b>A short guide to the consultation document</b>	16
<b>PART 1 – HARMONISING AND SIMPLIFYING THE LAW</b>	26
Introduction to Part 1: The need to simplify the law	26
Chapter 1: Promoting compliance and good practice, simplifying definitions, tests and exceptions	30
Chapter 2: Goods, facilities and services and public functions	50
Chapter 3: Equal pay	53
<b>PART 2 – MORE EFFECTIVE LAW</b>	60
Introduction to Part 2: The vision for a Single Equality Act	60
Chapter 4: Balancing measures	64
Chapter 5: Public sector equality duties	79
Chapter 6: Promoting good equality practice in the private sector	110
Chapter 7: Effective dispute resolution	115
<b>PART 3 – MODERNISING THE LAW</b>	124
Introduction to Part 3: The need for modernisation	124
Chapter 8: The grounds of discrimination	127
Chapter 9: Age discrimination beyond the workplace	135
Chapter 10: Gender reassignment	146
Chapter 11: Pregnancy and maternity	151
Chapter 12: Private clubs and associations	154
Chapter 13: Improving access to and use of premises for disabled people	158
Chapter 14: Harassment	161
<b>Annex A: Simplifying exceptions</b>	171
<b>Annex B: Implementing the EU Gender Directive</b>	175
<b>Annex C: Glossary</b>	188

## Foreword



There is a lot to celebrate about Britain’s attitude to equality. Through the legislation we have brought in over the last 40 or so years, we have developed a pioneering approach, and often led the way in tackling discrimination.

Forty years ago, society was very different. Far fewer women worked, especially after marriage; some employers actually banned married women from their workplaces. Women working side by side with men and doing identical work were paid much less and there was no law against this. There were signs preventing black people from entering premises or renting rooms; these were a symptom of widespread acceptance of race discrimination. There was no attempt to adapt the way we do things to ensure that disabled people could participate as full citizens. People who had retired were often dismissed as being “past it”, and life expectancy was shorter, so there was little expectation of a full and active life in older age. The law in England and Wales had only just stopped criminalising men for homosexual acts.

In the last ten years, we have built on the historic equalities legislation of previous Labour governments to remove remaining unfairness and promote equality of opportunity. Some of this has been through laws designed to address discrimination, such as improving access to the workplace and to public transport for disabled people, legislation to prevent harmful discrimination in the workplace because of irrelevant factors such as age, sexual orientation and religion or belief, and duties on public sector authorities to remove discrimination and promote equality. But promoting equality goes wider than preventing discrimination, and we have also introduced the biggest ever package of support for working families, including a doubling of paid maternity leave and pay, paid paternity leave for new fathers, and the right to request flexible working for parents of young and disabled children and for carers of adults. Moreover, although the law is important, there are other ways of tackling inequality and disadvantage, such as our action to end child poverty by 2020 and the steps we are taking across government to tackle the gap between women’s and men’s earnings.

I believe we should celebrate how far we have come to reach today’s fairer society. We now recognise not just that it is right to treat people fairly, but also how discrimination creates personal misery and undermines cohesion within and between our communities. We know it makes sound economic and business sense to draw on the talents of all, and to make sure people can fulfil their potential free from unfair or unnecessary disadvantage. And we have a better understanding of the many different factors that influence how

we see ourselves, as well as how others see us. We have reached a situation where we want our institutions to work in a way which prevents unfairness happening in the first place, rather than addressing it after the event through litigation by individuals – though without removing any rights to seek redress where any discrimination has occurred. Getting it right in the first place is better for individuals, for business and for public administration.

But simply because the law *has* grown up and developed over such a long period, it is necessary to review where we have got to and whether there is room for simplification and modernisation. We have to ask if we can legislate with greater clarity and more consistency.

In doing so, we need to make sure that we take an appropriate and proportionate approach to removing unfair discrimination and promoting equality; one that makes it clear that this is not about some people having better rights than others, but about putting in place a framework to ensure everyone gets a better deal, within a country comfortable with its diversity. Equality law is not about some abstract concept. It is about how every one of us is treated at work, as a customer and consumer, and by our public services. It is about our sons and daughters, our parents and grandparents, our friends and neighbours, and the basic values of decency and respect we want for ourselves and for them, embedded in our democratic society. It is also about businesses and other organisations operating fairly, but also effectively and efficiently, in an environment of better regulation.

Together with the establishment of the Commission for Equality and Human Rights and the Equalities Review led by Trevor Phillips, the Discrimination Law Review which has led to this consultation document is key to taking forward the Government's equality agenda. We hope it will command widespread consensus and help us fulfil our 2005 manifesto commitment to bring in a Single Equality Act which takes a modern, clear and coherent approach, encourages compliance and balances legitimate rights against the regulatory burdens imposed. Please take this opportunity to tell us what you think.



Ruth Kelly MP  
Secretary of State for Communities and Local Government

## Overview

Our vision is of a society where there is opportunity for all and responsibility from all, regardless of age, disability, gender, race, religion or belief or sexual orientation; as well as background. Everyone should have an equal chance to make the most of natural ability; equitable access to public provision; equal status as a citizen; and equal responsibility back to society.

Our aim is for every single individual to have the chance to realise their potential – to be able to bridge the gap between what they are and what they have it in themselves to become. Equality is a fundamental part of a fair society in which everyone can have the best possible chance to succeed in life. There is a clear moral imperative for this – there is no place in twenty-first century Britain for homophobia, racism and other aspects of discrimination which can destroy lives, poison communities and weaken the fabric of our national life. We all want to live in a society where everyone’s rights are properly respected. These are basic decent values in our democratic society.

But there is also a clear business case for equality. In a rapidly changing world we cannot as a nation afford to waste potential talent and skills of all individuals in our increasingly diverse society. We want a flourishing economy in which all have equal opportunities to thrive and contribute. The Confederation of British Industry has argued:

“Employers recognise the benefits of effective diversity and inclusion policies, and the business community supports positive action. The one resource that in today’s knowledge economy gives sustainable competitive advantage is the skills, understanding and experience of people. Discrimination in employment, wherever it exists, squanders effort, ideas and, ultimately, business sales. It leads to wasted potential, wasted labour and wasted revenues”.<sup>1</sup>

In this document, we set out for consultation our proposals for simplifying, modernising and making more effective our framework of discrimination law. Discrimination law is one of the foundation stones of a fairer society, but the law alone cannot deliver equality. The law needs to work alongside effective social policy measures and strong institutions to promote a culture of fairness, participation for all and respect for each other’s rights.

## What we have achieved

Britain has a strong record of delivering on equality to create a fairer and more successful society. Over the last 40 and more years, we have put in

<sup>1</sup> CBI preliminary submission to Discrimination Law Review, February 2006.

place strong protections against race, sex and disability discrimination, and provided for men and women to be paid equally. Over the last 10 years, increasing equality has been at the heart of this Government's policy. For example:

- 600,000 children have been lifted out of relative poverty and there are 400,000 fewer children in households where no one works than in 1997.
- The National Minimum Wage has contributed to a 2% drop in the pay gap since 1997.
- Over 2 million more people are in work than in 1997, with lone parent employment at a record high.
- Nearly 2 million pensioners have been lifted out of absolute poverty, and we are spending £11bn extra each year in real terms on pensioners.
- We have put in place the biggest ever package of support for working families, including a doubling of paid maternity leave and pay, paid paternity leave for new fathers, and the right to request flexible working for parents of young and disabled children and for carers of adults.
- We have joined up action across government on key issues such as equality for ethnic minorities, disability equality, domestic violence, and the pay gap between women and men.

One of the tests we have set ourselves when considering new policy is to identify – along with the need to ensure that it is proportionate and complies with better regulation principles – where equality of opportunity can be advanced<sup>2</sup>. We will continue to promote fairness and social justice throughout our approach as a Government.

In addition, we have strengthened protection from unfair discrimination and unequal treatment and extended it to new groups and new areas of life. We have also begun to think in terms not just of prohibiting unfair discrimination, but also of promoting equality and cohesion in more positive ways, especially in how we design and deliver our public services.

We have:

- Established a clear legal statement of people's basic rights and

<sup>2</sup> Policy undergoes a Regulatory Impact Assessment and where relevant is assessed for equality impact.

fundamental freedoms by passing the Human Rights Act (1998).

- Equalised the age of consent at 16 (1998).
- Prohibited discrimination against transsexual people in employment and vocational training (1999).
- Placed a duty upon public authorities to promote equality of opportunity and good relations between racial groups (2000).
- Introduced protection against discrimination in employment and vocational training on grounds of sexual orientation and religion or belief and extended protection for disabled people (2003).
- Repealed section 28 of the Local Government Act 1988 (2003) (and the Scottish equivalent in 2000).
- Created civil partnerships to provide legal status for same-sex couples (2004).
- Enabled transsexual people to obtain legal recognition in the gender in which they wish to live (2004).
- Significantly extended civil rights for disabled people (2005).
- Prohibited age discrimination in employment and vocational training (October 2006).
- Placed new duties on public authorities to promote equality of opportunity for disabled people (December 2006).

We implemented a package of further changes in April 2007:

- Placing new duties on public authorities to promote equality of opportunity between men and women.
- Prohibiting discrimination on grounds of sexual orientation and on grounds of religion or belief in the provision of goods, facilities and services, premises, education in schools and the work of public authorities.

Last year we legislated for the establishment of the Commission for Equality and Human Rights, which will become operational in October this year. Together, these changes to the law are significant advances in giving individuals the right to fair treatment, bringing equality into the heart of policy making and public service delivery and changing social attitudes.

## The next steps

This Government has set in motion the most extensive review of equality in Britain for over 30 years. In February 2005, the Prime Minister commissioned a wide-ranging independent Equalities Review, chaired by Trevor Phillips, to examine those inequalities which have persisted over generations. Its interim report<sup>3</sup> highlighted the progress we have made but also the socio-economic penalties still faced by many people in our society. The Equalities Review's final report to the Prime Minister was published in February 2007<sup>4</sup> and the Government will respond to it in full later this year.

The new Commission for Equality and Human Rights will formally begin its work in October. Replacing the existing Equal Opportunities Commission, Commission for Racial Equality and Disability Rights Commission, the Commission for tackling Equality and Human Rights will also for the first time provide institutional support for tackling discrimination on grounds of sexual orientation, religion or belief and age. It will lead in promoting human rights and equal opportunity for every individual to participate in society, and fostering good relations between different groups of people.

Bringing together equality and human rights in the new Commission marks an important shift in the way we think about equality. It places equality firmly in the context of people's fundamental rights and freedoms. It recognises that we are all a complex mixture of the different characteristics that influence how we see the world and how the world sees us. These issues matter to all of us, not just those facing discrimination. They are about how people deal with and respect each other in 21st century Britain; how we ensure that our communities are strong and cohesive and allow people to flourish. The Chair of the Commission, Trevor Phillips, and his Commissioners will play an important role in ensuring that every individual has the chance to achieve their potential.

## A Single Equality Bill – a framework for fairness

During the development of proposals for the Commission for Equality and Human Rights, strong support emerged for a Single Equality Bill to provide a coherent legislative framework for the new Commission's work. In February 2005, we established the Discrimination Law Review to consider "the opportunities for creating a clearer and more streamlined equality legislation framework which produces better outcomes for those who experience disadvantage ...while reflecting better regulation principles." In our 2005 general election manifesto we committed to introduce a Single Equality Bill during this Parliament.

<sup>3</sup> <http://www.theequalitiesreview.org.uk/upload/assets/www.theequalitiesreview.org.uk/equality-review.pdf>

<sup>4</sup> <http://www.theequalitiesreview.org.uk/publications.aspx>

Since the 1960s and 1970s when the first laws outlawing race and sex discrimination were passed, social attitudes and behaviour have been transformed. There have been fundamental changes in the role of women in the workplace, wide acceptance that racial prejudice can form no part of a decent society, and increased opportunities for disabled people, both in the workplace and in wider society. It is widely recognised that discrimination law has played a key role in both driving and responding to change.

The Discrimination Law Review has been informed by extensive research and discussions with key stakeholders. This document sets out for consultation our proposals for building on the advances we have already made towards a fairer society, by creating a clearer and more streamlined legal framework for equality. In developing our proposals, we have balanced a desire for consistency with the recognition that approaches need to be appropriate to the particular experiences of those facing discrimination, and proportionate to the size of the problem. Our aim is to achieve a Single Equality Bill which is simpler, more effective at tackling disadvantage and fit for 21st century Britain: a framework for fairness.

### *Simplifying the law*

Because the law has developed over more than 40 years, different approaches have been taken at different times, and the law is set out in many different places, in Acts of Parliament, regulations and orders. There is widespread agreement that everyone who needs to understand discrimination law will benefit from having it in a Single Equality Act which simplifies the law as far as this can be done.

Rather than just consolidating the current legislation, we want to take this opportunity to review it, and decide whether we can improve it, to make it fit for the 21st century. At the same time, we want to make sure that it provides the necessary protection against real unfairness while taking a proportionate approach to the regulatory burdens this necessarily imposes on private, public and voluntary sector businesses, authorities and organisations.

We want discrimination law which:

- recognises that every person has characteristics that may influence how he or she is treated at work and as a consumer of services provided by the public, private and voluntary sectors;
- makes it clear where it is acceptable to treat someone differently on the basis of those characteristics in 21st century Britain; and where it is not acceptable;
- promotes respect by everyone towards others;

- is seen to serve the whole community by helping to produce a fair outcome for everyone in our society, and to address real problems in a common sense way;
- can be understood by everyone and easily applied in everyday situations – for example, by small businesses who do not have a separate human resources department.

The current law prohibits less favourable treatment of people on a number of protected grounds:

- race (including ethnic and national origins, colour and nationality),
- sex (including gender reassignment),
- disability,
- religion or belief (including lack of religion or belief),
- sexual orientation, and
- age

in areas of activity such as employment and vocational training, education, the provision of goods, facilities and services, premises and the exercise of public functions – though not consistently across all of these areas of activity on all the protected grounds.

In simplifying the law, we want to make sure that:

- we do not erode existing levels of protection against discrimination;
- we adopt a common approach wherever we can;
- we have practical law which takes account of the realities of people's everyday lives and the way businesses and other organisations operate;
- we address real problems in a common sense way; and
- British discrimination law meets the requirements of European law.

### *More effective law*

Despite the significant progress we have made in tackling discrimination, there remain areas of deep-rooted inequality and disadvantage in our society which need to be addressed. We see educational under-performance among

some groups – some boys, many disabled people and some ethnic minority communities. Violence against women continues. Levels of representation levels of women and ethnic minorities – in politics, public services and business – do not reflect the talent we believe exists in all groups within society: there are only 15 ethnic minority MPs (2.3% compared to 7.9% in the population), only 121 women Directors in FTSE100<sup>5</sup> companies (10.5%), of whom only four are from ethnic minority communities, and only 13% of editors of national newspapers are women. Disabled people are still two and a half times more likely to be out of work than non-disabled people.

We need to consider what is causing this absence of certain groups from these areas of society, and whether we need to do more to address persistent disadvantages. We have put in place major public programmes such as the New Deal, Sure Start and Neighbourhood Renewal, which have had a profound impact on the lives of many of the most disadvantaged. We have introduced other targeted measures such as employment legislation, which provides protection for workers in respect of matters such as the minimum wage, maternity and paternity leave and the right to request flexible working.

But we believe that discrimination law also has an important role to play in tackling the disadvantage experienced by people from some groups. British discrimination law already recognises the need in certain cases for balancing measures to prevent or compensate for disadvantage. For example, existing “positive action” provisions allow some measures to be taken to provide a level playing field for people from disadvantaged groups to compete for jobs. And disability discrimination law requires reasonable adjustments to be made in certain circumstances to overcome barriers faced by disabled people.

Discrimination law also increasingly recognises the need to address systemic discrimination which can lead to disadvantage. Following the racist murder of Stephen Lawrence, the recommendations of the Macpherson Inquiry<sup>6</sup> into how the Metropolitan Police handled the case resulted in the Race Relations (Amendment) Act 2000 which introduced a positive duty on public authorities to promote race equality. This was an important and innovative approach to dealing with disadvantage, ensuring that public bodies proactively consider equality issues. Similar positive duties have been introduced in relation to disability in December 2006 and for gender in April 2007. They can help to deliver personalised public services which cater better for individual needs.

We propose to build on these features of the law to make it a more effective tool to tackle disadvantage.

<sup>5</sup> Financial Times Stock Exchange

<sup>6</sup> *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*. (1999) Cmnd 4262-I. London: HMSO.

*Modernising the law*

Our society has changed dramatically over the last decades. Social class barriers have shifted, and educational and employment opportunities have opened up. People are healthier and live longer. Falling birth rates across Europe have led to the prospect of a serious decline in the size of the available workforce. Older people are the fastest growing segment of the population – by 2021, 40% of the population will be 50 and over. The movement of people between countries is increasing, resulting in a greater diversity of races and religions within communities. New global markets and the communications revolution are changing the values placed on certain skills in the labour market. Family structures have changed over time.

Discrimination law needs to keep pace with and reflect the changes in our society. We therefore wish to consult on whether we need to change our approach to protecting individuals and groups against harmful discrimination.

## A short guide to the consultation document

This consultation document is in 3 parts, with 3 annexes:

- Part 1, on harmonising and simplifying the law;
- Part 2, on making the law more effective;
- Part 3, on modernising the law;
- Annex A, containing detailed tables on which specific exceptions to discrimination law we want to keep and which we want to remove;
- Annex B, containing our proposals for implementing the EU Gender Directive; and
- Annex C, a glossary of terms and abbreviations.

All of the proposals set out in this paper will, of course, be considered further in the light of responses received during the consultation period.

### **PART 1 – HARMONISING AND SIMPLIFYING THE LAW**

Part 1 of this paper asks for views on proposals to promote a culture of compliance with the law; to simplify and standardise definitions and tests in discrimination law; to simplify and harmonise exceptions; to simplify and harmonise the way the law treats public functions and public services; and to bring the law of equal pay into the Single Equality Bill and update it in line with case law.

#### **Chapter 1: promoting compliance and good practice, simplifying definitions, tests and exceptions**

In this chapter we seek views on the following issues and proposals:

##### *Promoting compliance and good practice*

We want to make sure that businesses and other organisations have comprehensive, authoritative and practical guidance to support them in meeting the requirements of discrimination law. We propose that the Commission for Equality and Human Rights will have primary responsibility for issuing guidance and codes of practice, working in partnership with other bodies in the private, public and voluntary sectors.

## *Definitions and tests*

We ask whether (and in some cases how) we should:

- keep the existing requirement for a comparator in direct discrimination claims;
- introduce a single definition of disability discrimination;
- extend protection against discrimination on the basis of association to gender reassignment, but otherwise keep the existing approach to perception and association protections;
- extend indirect discrimination protection to transsexual people, but not to introduce it as an explicit concept in disability discrimination;
- harmonise the definition of indirect discrimination;
- adopt the same objective justification test for all existing indirect discrimination provisions, and for direct discrimination on grounds of age;
- replace the different justification tests in disability discrimination law with a single objective justification test;
- establish a single threshold for the point at which the duty to make reasonable adjustments for disabled people is triggered; and
- have the same approach to victimisation in discrimination law as in employment law.

## *Simplifying exceptions*

We ask:

- whether we should introduce a genuine occupational requirement test for all the grounds of discrimination, with the exception of disability where it is not necessary;
- if we still need to list any specific genuine occupational qualification exceptions;
- what the advantages or disadvantages might be to the introduction of a genuine service requirement test to allow service providers to discriminate on particular grounds where this is legitimate and proportionate;

- whether we can take a unified approach to specific exceptions that apply to more than one protected ground; retain the specific exceptions listed in Table 1 in Annex A, and remove the exceptions listed in Table 2; and
- whether we need the exception that allows insurers to treat people differently on grounds of sexual orientation.

## Chapter 2: goods, facilities and services, and public functions

In this chapter we seek views on the following issues and proposals:

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

## Chapter 3: equal pay

In this chapter we seek views on the following issues and proposals:

- that we should bring equal pay provision within a Single Equality Act but retain the current differences between claims relating to contractual and non-contractual issues;
- whether the legislation should include settled principles of equal pay law which have come out of judgments in legal cases;
- how else we can simplify equal pay legislation or make it easier for it to work in practice; and
- that we should continue with the current approach to comparators, which requires an actual comparator.

## PART 2 – MORE EFFECTIVE LAW

Part 2 asks for views on proposals to allow a wider range of balancing measures to effectively address entrenched discrimination and disadvantage; to simplify the public sector equality duties in a single duty to tackle disadvantage more effectively; to consider extending the coverage of public sector equality duties; to explore how public authorities can actively take account of equality issues in procurement; ways to improve equality practice in the private sector; and to improve the resolution of discrimination disputes outside the workplace<sup>7</sup>.

### Chapter 4: balancing measures

In this chapter we seek views on the following issues and proposals:

- that we should confine the concept of “reasonable adjustment” to disability discrimination law as at present, and not broaden it to other protected groups;
- whether to adopt provisions to allow for wider balancing measures to allow more rapid progress to be made towards redressing under-representation and disadvantage;
- whether to allow all protected groups to benefit from measures to meet particular needs in relation to education, training and welfare or other benefits;
- to give the Commission for Equality and Human Rights a role in issuing clear practical guidance and Codes of Practice, but not in approving positive action programmes; and
- to continue if necessary, and broaden the scope of, permitted voluntary positive action in the selection of candidates by political parties.

### Chapter 5: public sector equality duties

This chapter is in 5 sections:

- A. The current duties;
- B. A single equality duty;
- C. Extending coverage of the duty across all the protected grounds;

<sup>7</sup> Workplace discrimination claims dealt with in employment tribunals have been considered separately by the Gibbons review of employment dispute resolution (DTI, March 2007).

D. Implementation of a public sector duty;

E. Public sector procurement.

We seek views on the following issues and proposals:

- that we should replace the race, disability and gender equality duties with a single duty on public authorities to promote race, disability and gender equality;
- if it would be helpful to provide a clear statement of the purpose of a single public sector duty which public authorities should use as a foundation for taking action to promote equality and good relations;
- whether to require public authorities to identify priority race, disability and gender equality objectives and take proportionate action towards their achievement, and to review them at least every 3 years;
- if it would be helpful for strategic equality outcomes to be set by the appropriate national Government;
- how to support effective performance of a single public sector equality duty by requiring proportionate action towards the achievement of priority equality objectives, using four key principles of consultation and involvement; use of evidence; transparency; and capability;
- whether the proposed single public sector equality duty should apply to all public authorities or, if not, how it should be targeted;
- whether a single public sector equality duty should be extended to cover age, sexual orientation, and/or religion or belief;
- over what timescale a single public sector duty and any extensions to it should be introduced, and whether public authorities should be given the option to implement any new approach in advance of its becoming a legal requirement;
- whether there should be a single enforcement mechanism for the proposed single equality duty;
- what the role of the public service inspectorates should be in assessing compliance with public sector equality duties; and
- what issues should be included in practical guidance for public authorities on procurement and public sector equality duties.

## Chapter 6: promoting good equality practice in the private sector

In this chapter we seek views on the following issues and proposals:

- the development of a light touch “equality check tool” for employers to use and consider introducing a voluntary equality standard scheme for businesses, which could be an independently assessed accredited standard or a non-accredited good practice and compliance tool; and
- ways in which good equality practice could be encouraged and embedded in the private sector, without introducing additional legislation specifically aimed at private sector businesses.

## Chapter 7: effective dispute resolution

In this chapter we seek views on the following issues and proposals:

- how to encourage the use of Alternative Dispute Resolution to resolve discrimination disputes in the non-employment field, and how the role of Ombudsmen might be used more effectively to resolve discrimination disputes;
- how to provide for more efficient and effective handling of cases relating to the provision of goods, facilities, services, premises and the exercise of public functions including by enhancing discrimination expertise in the courts;
- whether the Additional Support Needs Tribunals in Scotland should have the power to hear disability discrimination school education cases, mirroring the situation in England and Wales;
- retention of the current approach on representative or class actions for discrimination cases outside the workplace; and
- whether more needs to be done to improve the treatment of multiple discrimination claims when resolving disputes.

## **PART 3 – MODERNISING THE LAW**

Part 3 asks for views on whether changes should be made to the statutory protected grounds; the case for prohibiting age discrimination in areas outside employment; whether to strengthen the protection on grounds of gender reassignment outside employment; whether to strengthen the protection on grounds of pregnancy and maternity outside employment; whether to strengthen prohibitions on discrimination by private clubs; how to improve access to, and use of, let residential premises for disabled people; and whether express statutory protection from harassment should be extended outside the employment area for the different grounds of discrimination.

### **Chapter 8: the grounds of discrimination**

In this chapter we seek views on the following issues and proposals:

- whether to simplify how the definition of disability operates in relation to “normal day-to-day activities” by removing the list of capacities;
- that we should continue to deal with issues relating to parents and carers through targeted provisions and specific measures rather than a broad anti-discrimination provision;
- whether specific protection for married people and civil partners is still needed in the absence of a “marriage bar” in employment; and
- that we should continue with the current non-legislative approach to genetic predisposition.

### **Chapter 9: age discrimination beyond the workplace**

In this chapter we call for evidence of unfair discrimination outside the workplace, and seek views on the following issues and proposals:

- whether legislation is the most appropriate and proportionate way of addressing the needs of older people and preventing harmful age discrimination outside the workplace against adults of all ages;
- how, if we do legislate, we can avoid unintended consequences and disproportionate burdens; and

- If we do decide to legislate we would propose to:
  - exclude children (i.e. people under 18) from the scope of any protection;
  - allow objective justification of age discrimination;
  - include positive action provisions; and
  - specifically exclude a significant number of beneficial or justifiable activities which differentiate on age grounds.

## Chapter 10: gender reassignment

In this chapter we seek views on the following issues and proposals:

- whether we should prohibit discrimination on grounds of gender reassignment in the exercise of public functions, but excluding education in schools from the scope of any strengthened protection;
- whether organised religion should be allowed to treat people differently on the grounds of gender reassignment; and
- that we should keep the existing definition of gender reassignment.

## Chapter 11: pregnancy and maternity

In this chapter we seek views on our proposal to prohibit less favourable treatment of a woman on grounds of pregnancy and maternity in the exercise of public functions, but to exclude education in schools from the scope of any strengthened protection.

## Chapter 12: private clubs and associations

In this chapter we seek views on the following issues and proposals:

- that private clubs whose purpose is to bring together people who share a protected characteristic can continue to do so;
- to extend the protection against discrimination that disabled people already have as guests in private clubs to race and sexual orientation;
- to make it unlawful for clubs with 25 or more members which have both men and women as members to discriminate on grounds of sex;

- whether to prohibit discrimination by clubs on the grounds of religion or belief, except for clubs set up specifically for members who belong to a particular religion or hold a particular belief; and
- if there is a case for outlawing age discrimination by private clubs, other than those set up to cater for a particular age range, such as pensioners' associations.

## Chapter 13: improving access to and use of premises for disabled people

In this chapter we propose that where a disabled person finds it impossible or unreasonably difficult to use the common parts of their let residential premises, the landlord should be under a duty to make a disability-related alteration to the common parts, where reasonable, and at the disabled person's expense (including any reasonable maintenance costs).

## Chapter 14: harassment

In this chapter we seek views on whether there are groups who currently have no specific statutory protection against harassment in situations outside the workplace and, if so, who should be protected; and if specific exceptions should be made to the protection to make it clear what would not be regarded as harassment. We will only legislate if we consider that this is a proportionate response to a real problem; and we are sure we can avoid unintended consequences, such as limiting the right to express a legitimate view or hold a particular belief.

## Annex A

This annex contains two tables of exceptions in current and forthcoming discrimination law:

**Table 1** sets out exceptions that the Government considers should be retained in relation to employment and vocational training; goods, facilities and services; premises; general exceptions; education in schools; public authorities exercising public functions/services; and the public duty to have due regard to eliminate unlawful discrimination.

**Table 2** sets out exceptions that the Government considers should be removed in relation to employment and vocational training; goods, facilities and services; premises; and general exceptions.

## Annex B

This annex contains our proposals for implementing the EU Gender Directive through the Sex Discrimination Act 1975 (Amendment) Regulations 2007.

This implements the principle of equal treatment between women and men in the access to and the supply of goods and services. The deadline for implementation is 21 December 2007.

In order to implement the Gender Directive we propose to:

- extend the Directive-based definition of indirect discrimination, as it currently applies in employment and vocational training, to goods, facilities or services and premises;
- introduce an express prohibition on harassment and sexual harassment in the field of goods, facilities or services and premises;
- apply the Directive's burden of proof provisions to goods, facilities or services and premises, in line with that for employment and vocational training;
- amend some of the exceptions which currently exist in the Sex Discrimination Act, to ensure that they are compatible with the Directive;
- extend protection against direct discrimination on grounds of a person's gender reassignment to goods, facilities or services and premises;
- extend protection against discrimination on grounds of pregnancy and provide protection on grounds of maternity in the field of goods, facilities or services and premises; and
- amend the Sex Discrimination Act exception relating to insurance to specify the circumstances under which insurance companies may charge different premiums or offer different benefits to men and women.

## Annex C

Annex C contains a glossary of terms, definitions and abbreviations.

# **PART 1 – HARMONISING AND SIMPLIFYING THE LAW**

## **Introduction to Part 1 – The need to simplify the law**

### **What we want from our discrimination law**

1. We want discrimination law which:
  - recognises that every person has characteristics that may influence how he or she is treated as a citizen, at work and as a consumer of services provided by the public, private and voluntary sectors;
  - makes it clear where it is acceptable to treat someone differently on the basis of those characteristics in 21st century Britain; and where it is not acceptable;
  - promotes respect by everyone towards others;
  - is seen to serve the whole community by helping to produce a fair outcome for everyone in our society, and to address real problems in a common sense way;
  - can be understood by everyone and easily applied in everyday situations – for example, by small businesses who do not have a separate human resources department.

### **What a harmonised and simplified law should look like**

2. In harmonising and simplifying, we intend to keep broadly the same level of protection from discrimination as we have in the current law, which has generally worked well in addressing inequality for individuals without placing unnecessary burdens on those who have to comply with it. We want the law to put right situations where there is clear unfairness, and to address real problems, as well as help to promote good practice as a way of avoiding discrimination.
3. As far as possible, our discrimination law should:
  - be set out in one piece of legislation (a Single Equality Act), supplemented by clear, practical, common sense guidance and codes of practice;

- use language that can be understood by everyone who is affected by it, whether it gives them rights or places responsibilities on them;
- have one set of definitions and standards for similar situations;
- be very clear about the circumstances in which differences and exceptions may apply;
- set clear standards to underpin good practice;
- help prevent discrimination occurring in the first place by making it easier for people to comply with the law;
- ensure that people can resolve their disputes in ways which are accessible, proportionate and effective.

## Where we are now

4. Our discrimination law has developed over more than 40 years. We are very proud that the party in government today has been responsible for almost all the beneficial changes in the law which have been made. But this organic process has inevitably meant that different approaches have been taken to drafting the law, with different definitions and exceptions. It also means that the law is set out in a lot of different places, in Acts of Parliament, regulations and orders.
5. The current law prohibits less favourable treatment of people on a number of protected grounds:
  - race (including ethnic and national origins, colour and nationality),
  - sex (including gender reassignment),
  - disability,
  - religion or belief (including lack of religion or belief)
  - sexual orientation, and
  - age

in areas of activity such as employment and vocational training, education, the provision of goods, facilities and services, premises and the exercise of public functions – though not consistently across all of these areas of activity on all the protected grounds.

6. The law is now mainly contained in:
  - the Equal Pay Act 1970;
  - the Sex Discrimination Act 1975;
  - the Race Relations Act 1976;
  - the Disability Discrimination Act 1995 ;
  - the Employment Equality (Religion or Belief) Regulations 2003;
  - the Employment Equality (Sexual Orientation) Regulations 2003;
  - the Employment Equality (Age) Regulations 2006;
  - the Equality Act 2006 (Part 2 introduced protection against discrimination on grounds of religion or belief in the provision of goods, facilities or services, etc.);
  - the Equality Act (Sexual Orientation) Regulations 2007.
7. Our membership of the European Union means that some of our law reflects common standards across Europe, contained in among others, the following Directives:
  - the Equal Pay Directive (75/117/EEC);
  - the Equal Treatment Directive (76/207/EEC) as amended by the Equal Treatment Amendment Directive (2002/73/EC) (gender);
  - the Race Directive (2000/43/EC) (racial or ethnic origin);
  - the Framework Directive (2000/78/EC) (disability, religion or belief, sexual orientation and age).
8. We will now be implementing the Gender Directive (2004/113/EC). Because it will take some time to bring the law together in a Single Equality Act, this will be done by amending the Sex Discrimination Act, so that we can meet the implementation date of the end of 2007. In Annex B, we ask for your views on how best to do this.
9. It is clear from this list of legislation that there is a good case for bringing the law together in one place. Where possible, we want to simplify and standardise the way the law works, to make it as easy as possible for everyone to understand.

## What we want your views on

10. In Part 1 of this paper, we want to know your views on proposals to:

- promote a culture of compliance with the law;
- simplify and standardise definitions and tests in discrimination law;
- simplify and harmonise exceptions;
- simplify non-discrimination in the exercise of public functions and public services; and
- bring the law of equal pay into the Single Equality Act and update it in line with case law.

# Chapter 1 – Promoting compliance and good practice, simplifying definitions, tests and exceptions

## What simplification means

1.1 In simplifying the law, we want to make sure:

- we do not erode existing levels of protection against discrimination;
- we adopt a common approach wherever we can;
- we have practical definitions, tests and exceptions which take account of the realities of people’s everyday lives and the way business operates;
- we address real problems in a common sense way; and
- British discrimination law meets the requirements of European law.

## *Summary of proposals*

### Promoting compliance

1.2 We want to make sure that businesses and other organisations have comprehensive, authoritative and practical guidance to support them in meeting the requirements of discrimination law. Subject to the views expressed in response to this consultation, we propose that the Commission for Equality and Human Rights will have primary responsibility for issuing guidance and codes of practice. In doing this, we expect the Commission to work in close partnership with businesses and other bodies in the private, public and voluntary sectors (paragraphs 1.5 to 1.8).

### Definitions and tests

1.3 Subject to the views expressed in response to this consultation, we propose to:

- (a) keep the existing requirement for a comparator in direct discrimination claims (paragraphs 1.9 to 1.16);
- (b) introduce a single definition of disability discrimination (paragraphs 1.17 to 1.18);

- (c) extend protection against discrimination on the basis of association to gender reassignment, but otherwise keep the existing approach to perception and association protections (paragraphs 1.19 to 1.25);
- (d) extend indirect discrimination protection to transsexual people, but not to introduce it as an explicit concept in disability discrimination (paragraphs 1.26 to 1.35);
- (e) harmonise the definition of indirect discrimination (paragraphs 1.36 to 1.39);
- (f) adopt the same objective justification test for all indirect discrimination provisions, and for direct discrimination on grounds of age (paragraphs 1.40 to 1.45);
- (g) replace the different justification tests in disability discrimination law with a single objective justification test (paragraphs 1.46 to 1.53);
- (h) establish a single threshold for the point at which the duty to make reasonable adjustments for disabled people is triggered (paragraphs 1.54 to 1.59);
- (i) have the same approach to victimisation in discrimination law as in employment law (paragraphs 1.60 to 1.62).

## Simplifying exceptions

- 1.4 Subject to the views expressed in response to this consultation, we propose to:
- (a) introduce a genuine occupational requirement test for all the grounds of discrimination, with the exception of disability where it is not necessary (paragraphs 1.64 to 1.70);
  - (b) consider whether we still need to list any specific genuine occupational qualification exceptions (paragraphs 1.64 to 1.70);
  - (c) consider whether there are advantages or disadvantages to the introduction of a genuine service requirement test to allow service providers to discriminate on particular grounds where this is legitimate and proportionate (paragraphs 1.71 to 1.76);
  - (d) take a unified approach wherever we can to specific exceptions that apply to more than one protected ground; retain the specific exceptions listed in Table 1 in Annex A, and remove the exceptions listed in Table 2 (paragraphs 1.77 to 1.81 and Annex A);

- (e) review the insurance exception that allows insurers to treat people differently on grounds of sexual orientation (paragraphs 1.82 to 1.85).

## ***Promoting compliance with the law***

- 1.5 Our proposals for a Single Equality Bill are designed to deliver a simpler, clearer and more streamlined legislative framework. Simplifying and consolidating the law will of itself clarify rights and responsibilities. This should make it more straightforward for those with responsibilities under the law to understand and meet them.
- 1.6 However, it will also be necessary to make sure that employers, employees, service providers and consumers have practical help in understanding how the law operates and how it applies to them. Businesses and other organisations will need comprehensive, authoritative and practical guidance to support them in meeting the requirements of the law, including clear examples and sensible advice.
- 1.7 We believe this will be a key priority for the new Commission for Equality and Human Rights when it opens for business in October 2007. We expect that the Commission will work in partnership with other bodies in the public, voluntary and private sectors to promote awareness, spread good practice and encourage compliance with discrimination law. The Commission will be able to issue Codes of Practice clarifying how organisations can achieve compliance with the law.
- 1.8 The Commission for Equality and Human Rights will also have powers to conduct inquiries. As with the current equality commissions, it may conduct investigations where there is reason to believe discrimination is occurring. If the Commission believes unlawful discrimination has taken place, it will have powers to agree a co-operative approach with the organisation concerned, using an action plan to bring about change.

## ***Definitions and tests***

### **Direct discrimination**

#### **What is direct discrimination?**

- 1.9 Direct discrimination happens when a person is treated less favourably on any of the grounds of discrimination covered by the law than another person (who does not possess the same protected characteristic) is, or would be, treated in the same circumstances.

- 1.10 Examples of direct discrimination would be if someone is turned down for a job just because of their sex, or if they are refused service in a hotel or shop just because of their race or sexual orientation. At the moment, the person claiming direct discrimination would have to show that someone of a different age, or sex, or race was (or would have been) treated better.

## Who is “another person” (the “comparator”)?

- 1.11 Because direct discrimination is “less favourable treatment”, at present this requires a comparison to be made<sup>8</sup>. Otherwise, how can we tell if someone has been treated less favourably? So a comparison must be made between the person claiming to have been treated less favourably and another person in the same circumstances. The difference between the two will be that the first has a particular characteristic which is a ground protected by discrimination law, and the second does not. The second person is known as the “comparator”.
- 1.12 The comparator may be real – an actual identified person – or hypothetical. A hypothetical comparator is used where there is no actual person but it is put forward that a person without the particular characteristic would have been treated better. The use of a “hypothetical comparator” is standard across discrimination law, except in cases of equal pay<sup>9</sup>.
- 1.13 So for a gay man bringing a claim of sexual orientation discrimination at work, his real comparator would be a heterosexual man in a similar grade, type of work, and so on, with the same employer. If he could not find a heterosexual man to compare himself to, the employment tribunal would consider evidence about how the employer would have treated a heterosexual man.

## Requiring a comparator

- 1.14 Concerns have been expressed that whether a direct discrimination claim succeeds or fails depends too much on choosing the right comparator. It is sometimes difficult to identify a suitable comparator.
- 1.15 We have considered whether it would be better for the legislation not to state a requirement for a comparator, removing the requirement to show “less favourable treatment”. This would mean that people could bring claims of discrimination on the basis that they have simply been

<sup>8</sup> However, the requirement for a comparator where discrimination has taken place because a woman is pregnant or on maternity leave is being considered following *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin).

<sup>9</sup> The use of comparators in equal pay cases is considered in chapter 3.

treated badly rather than having to prove they have been treated worse than someone in the same situation who does not share their protected characteristic.

- 1.16 However, we believe it is better to keep the essentially comparative nature of British discrimination law, which reflects the fact that discrimination law is by its nature generally about equal treatment rather than fair treatment, and is consistent with European discrimination law. Courts and tribunals have considerable flexibility when considering comparators under the existing system. We therefore propose to keep the existing requirement for a comparator in direct discrimination claims.

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

## The definition of disability discrimination

### Separate definitions

- 1.17 Part 3 of the Disability Discrimination Act has separate definitions of discrimination in relation to:
- goods, facilities and services;
  - premises;
  - public authorities, and
  - private clubs<sup>10</sup>.

### A single definition

- 1.18 We want to ensure full and seamless coverage of disability discrimination for all those areas of life presently covered in Part 3 of the Disability Discrimination Act. We believe a single definition of disability discrimination can be used to make the legislation easier to understand and to apply, without diminishing in any way the protection available to disabled people.

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

<sup>10</sup>Chapter 12 considers issues relating to private clubs more generally.

## Perception and association

- 1.19 Direct discrimination may occur in some instances when someone is treated less favourably because:
- the discriminator thinks or perceives that the person has a protected characteristic (whether the perception is right or wrong), or
  - they associate with a person with a protected characteristic.
  - Clearly, protection on the basis of perception and association broadens the range of people protected.
- 1.20 European law defines direct discrimination as less favourable treatment on grounds of race, sex, etc. Rather than using one definition when legislating to bring European law into effect here, consideration has been given to the nature and circumstances of the discrimination which may take place in relation to different protected grounds. As a result, different approaches have been taken in different areas.

### *Where perception and association should be protected*

- 1.21 **Race, religion or belief and sexual orientation:** in relation to discrimination on these grounds, our legislation covers both perception and association. We believe this is the right approach in relation to these grounds so propose this should remain the same.
- 1.22 **Disability discrimination:** here the current British legislation takes a narrower approach, limiting protection against discrimination to the actual person who is disabled. Extending protection to people who are perceived to be disabled, but are not disabled, or who associate with disabled people, would potentially extend coverage of the disability legislation to several million extra people who are not themselves disabled. This in turn would significantly extend the responsibilities of those with duties under the legislation. We are not persuaded that this is a proportionate approach, and do not currently propose a change in the law. However, we will in due course consider the impact on British discrimination law of the eventual outcome of a referral which has been made to the European Court of Justice<sup>11</sup>. The issues in this case include whether the Employment Directive<sup>12</sup> (a) protects from direct discrimination and harassment only those people who are themselves disabled, and (b) if not, whether it protects non-disabled people from less favourable treatment or harassment on the grounds of their association with a disabled person.

<sup>11</sup> Coleman v Attridge Law C-303/06 ECJ

<sup>12</sup> (2000/78/EC)

- 1.23 **Sex discrimination:** again the law here is aimed at protecting people against discrimination on the grounds of their actual sex, not their perceived sex or because they associate with someone of a particular sex. We cannot see any practical benefit in extending the law. We therefore propose to keep the current approach to perception and association for sex discrimination.
- 1.24 **Transsexual people:** currently, there is no protection against discrimination which results in a person being treated less favourably because they associate with a transsexual person, or because they are perceived to be transsexual. But it is possible to envisage situations in which an individual might experience discrimination on the basis of an association with transsexual people. We therefore propose to legislate to prohibit discrimination on the basis of association with transsexual people. However, we are not convinced that there is a case for protection from discrimination on grounds of perceived gender reassignment. This would, for example, have the effect of extending protection to people who choose to adopt the appearance of the opposite sex on a temporary basis as a matter of lifestyle choice. We do not therefore propose any extension to perception.
- 1.25 **Age:** The Employment Equality (Age) Regulations prohibit discrimination on the basis of perception, explicitly covering discrimination on grounds of a person's apparent age. We propose to keep this protection. However, discrimination experienced by someone because of the age of those with whom he or she associates is not covered. Extending the definition to include association could potentially bring in parents, carers, teachers, dependants and many others, taking the legislation far beyond its intended scope. We therefore do not propose any extension to association.

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

## Indirect discrimination

### What is indirect discrimination?

- 1.26 Indirect discrimination occurs where a provision, criterion or practice applied equally to everyone actually has a disproportionate adverse impact on people from a particular group.

- 1.27 For example, an employer advertises a job as requiring a person to be over 1.8m tall. This appears neutral, but may in fact mean that fewer women and people from some ethnic groups can get the job because they are less likely to be able to meet this height requirement.
- 1.28 However, if the provision, criterion or practice can be objectively justified, indirect discrimination is not unlawful. So the employer might be able to demonstrate that the height requirement is a proportionate means of achieving a legitimate aim.
- 1.29 Indirect discrimination has been successfully used to challenge unfair practices which did not have an objective justification, such as less favourable treatment for part-time workers, which particularly disadvantaged women.

## Coverage and exceptions

- 1.30 Current British discrimination law prohibits indirect discrimination on the basis of all the protected grounds except gender reassignment and disability.
- 1.31 **Gender reassignment:** A European Court of Justice decision held that the prohibition on direct sex discrimination in European law extends to transsexual people. This is reflected in the current British provisions.
- 1.32 **Disability discrimination:** UK law does not explicitly refer to indirect discrimination against disabled people. However, the concept of unjustified less favourable treatment for a reason relating to a person's disability together with the duty on an employer or the provider of a service, facility, etc. to make "reasonable adjustments" deals with the same situations. Reasonable adjustments are designed to remove unnecessary barriers for an individual disabled person in a particular situation. This is because it is not possible to say that one solution will remove the barriers for every disabled person, even those who appear to have the same impairment.

## Extending protection against indirect discrimination

- 1.33 We want to protect transsexual people from practices which could constitute indirect discrimination on grounds of gender reassignment. These can occur for example when organisations do not change their records to show a person's new name or gender. This puts transsexual people at a particular disadvantage in terms of their right to privacy because it can force them to reveal their personal history. For example, if a transsexual person is unable to obtain re-issued qualifications which reflect their new name, it may result in them not applying for certain

jobs because they would need to explain their gender history and potentially face further discrimination simply because of their change of gender. We therefore propose to extend protection against indirect discrimination to gender reassignment.

1.34 In disability discrimination law, while the use of reasonable adjustments provides individual solutions to the barriers encountered by disabled people, changes made as reasonable adjustments for one disabled person may have a positive benefit for others; for example:

- ramps for people with mobility impairments;
- better signage for people with visual impairments; and
- subtitling at cinemas and on television for people with hearing impairments.

1.35 In this way, the reasonable adjustments requirements can help to address group disadvantage experienced by disabled people in a similar way to the indirect discrimination provisions operating in relation to other protected grounds. We do not, therefore, propose to extend the indirect discrimination provisions explicitly into disability discrimination law.

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

## Current definitions of indirect discrimination

1.36 Different approaches to defining indirect discrimination have been taken in different areas of British law, because of the way the law has developed over time. The majority of the provisions on indirect discrimination in British law follow the wording of the relevant European Directives. They define an act of indirect discrimination as an apparently neutral “provision, criterion or practice” which puts or would put people of the claimant’s group at a particular disadvantage. However, in some areas of the Sex Discrimination Act and the Race Relations Act, the test requires the claimant to demonstrate that a “requirement or condition” applied is such that a considerably smaller proportion of his/her sex or racial group can comply with it than of the other sex or racial groups<sup>13</sup>.

<sup>13</sup>The Gender Directive formulation of “provision, criterion or practice” with regard to goods and services is to be introduced into the Sex Discrimination Act by December 2007 (see Annex B).

### ***Using “provision, criterion or practice” and “particular disadvantage” in all cases***

- 1.37 “Provision, criterion or practice” has a wider meaning than “requirement or condition”. It can include less formal arrangements which alone, or in combination, disadvantage people from a particular group even though they might not remove an opportunity completely. For example, an expectation that an employee must constantly vary his or her hours at short notice could be a provision, criterion or practice which disadvantaged women, who are more likely than men to have responsibilities caring for children. We propose that this wording, which already applies in most employment situations, should be adopted across all indirect discrimination provisions.
- 1.38 Demonstrating that a *considerably smaller proportion* of the claimant’s sex or racial group can comply with the requirement or condition is considered to be harder and it is likely to cause the courts to require statistical evidence. It can also be difficult to establish an appropriate methodology for demonstrating disparate impact.
- 1.39 By contrast, the test that people from a specific group are put at *a particular disadvantage* is more flexible and less reliant on statistical analysis. We therefore propose that the *particular disadvantage* test should be adopted across all indirect discrimination provisions; again this reflects the test that is already applied in most employment situations. If we do harmonise the definition in this way, we will consider how we can promote a clear understanding of what this means across the protected grounds through, for example, practical guidance.

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

#### **Objective justification**

- 1.40 Indirect discrimination (and, on grounds of age only, direct discrimination) is not unlawful where it can be justified if certain conditions are met. This is to provide some flexibility where, taking the situation as a whole, it would be reasonable for an employer or service provider to continue with the provision, criterion or practice concerned, despite its adverse impact on people from a particular group.
- 1.41 For example, a small company requires its staff to work on a Saturday to meet unexpected demand for its product. This may put workers who are not able to work on Saturdays because of their religious beliefs at a particular disadvantage. A member of staff affected by this asks for a dispensation. However, the firm refuses because it is unable to recruit somebody on a temporary basis at such short notice with the relevant

expertise. In these circumstances, the company is likely to be able to justify the requirement to work on Saturday.

## Legitimate aims and proportionate means

- 1.42 The European Directives use the formula that the provision, criterion or practice must be “objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”<sup>14</sup>. British law<sup>15</sup> uses the wording “which he cannot show to be a proportionate means of achieving a legitimate aim”<sup>16</sup>. “Proportionate” has the same effect as “appropriate and necessary”.
- 1.43 A wide variety of aims may be considered legitimate, but they must correspond with a real need on the part of the employer or service provider. Economic factors such as business needs and efficiency may be legitimate aims, but arguing that it could be more expensive not to discriminate may not in itself be a valid justification and the legitimate aim cannot itself be discriminatory.
- 1.44 What is proportionate will depend on the facts of each case. Generally the provision, criterion or practice must be appropriate with a view to achieving the objectives pursued. The need for it must outweigh the disproportionate impact it has on people of a protected group. Consideration may be given to whether the legitimate aim can be achieved by other means which have fewer or no discriminatory effects.

### **“A proportionate means of achieving a legitimate aim”**

- 1.45 We propose to adopt the same objective justification test for all indirect discrimination provisions, and for direct discrimination on grounds of age. We propose that the formulation of the test should be “a proportionate means of achieving a legitimate aim”.

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

<sup>14</sup>It should be noted, however, that the High Court agreed that a referral should be made to the European Court of Justice which includes whether under the Employment Directive (2000/78/EC) it is permissible for a member state to implement a test for objective justification which: does not specifically make reference to the list of permissible practices in Article 6.1(a) to (c); and uses the same words for differences of treatment which would amount to direct or indirect discrimination.

<sup>15</sup>Except in relation to disability, where the concept of less favourable treatment taken together with the reasonable adjustment requirements applies.

<sup>16</sup>The formulation “which he cannot show to be justifiable” is still partly used in the Sex Discrimination Act and Race Relations Act.

## Justification of disability discrimination

### Different tests

- 1.46 Disability discrimination law does not generally use an objective justification test. While the principle of justification does exist, there are different legal tests depending on the activity covered.
- 1.47 In the areas of employment and vocational training and education, less favourable treatment for a reason related to a disabled person's disability can be justified if the reason for the treatment is "material to the circumstances of the particular case and substantial". However, a failure to make a reasonable adjustment in employment and vocational training cannot in law be justified<sup>17</sup>.
- 1.48 In the areas of goods, facilities and services, housing, private clubs and public functions, the current law provides for a limited number of justifications both for less favourable treatment and for failure to make a reasonable adjustment. The current justifications differ between areas. This makes it harder for service providers to justify discriminating against disabled people. However, a service provider and a disabled person may only have very brief contact. To take account of this, a defence is available to a service provider who discriminated if he/she can show that he/she held a reasonable opinion at the time of the discrimination that his/her actions fell within one of the justifications. Even if it subsequently can be shown that the belief was mistaken at the time, the defence will succeed if the opinion was reasonably held *in all the circumstances*.
- 1.49 This means the current justification test is in two parts. The first part, the "reasonable opinion test", can be characterised as a "subjective test". The second part is often described as an "objective test" because of the need to satisfy a list of circumstances. This two-part test has been criticised both for its subjective element and for being too complicated to understand and apply. No case law has developed around these tests.

### A single objective justification test

- 1.50 To address this complexity, we propose that, in future, all the different justification tests in disability discrimination law should be replaced with a single objective justification test. This would be the same test as that used to justify indirect discrimination in other discrimination legislation, namely that the conduct in question is a proportionate means of achieving a legitimate aim.

<sup>17</sup>This is a requirement of the European Framework Directive.

- 1.51 In employment and vocational training, an objective justification test would provide a higher threshold than the current test, so would give employers and others a narrower margin of discretion (sometimes referred to as “a range of reasonable responses”<sup>18</sup>). However, an objective justification test would bring disability discrimination into line with the other grounds, which would help to simplify the law.
- 1.52 In areas outside employment, a single test of objective justification both for less favourable treatment and for failure to make a reasonable adjustment would mean that service providers, etc. will potentially have a wider range of circumstances in which they could justify discrimination. However, the need to show “proportionality” is a considerably stricter test than the subjective (“reasonable opinion”) part of the current justification tests. So a test of objective justification, while widening the circumstances in which discrimination can be justified, also applies a stricter test of whether the discrimination is in fact justified.
- 1.53 We consider that a single test of objective justification for disability discrimination would be easier to understand and would strike a fair balance between the rights of disabled people not to be discriminated against and the need for employers and service providers to be able to operate their businesses sensibly.

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

## The threshold for reasonable adjustments

### Different trigger points

- 1.54 The duty to make reasonable adjustments is a cornerstone of disability discrimination law. However, the circumstances in which the duty arises, also known as the “threshold”, currently differs according to whether the interaction is in employment, or education, or in relation to goods, facilities and services.
- 1.55 The duty in relation to goods, facilities and services, etc. is triggered when a policy, practice or procedure or a physical feature makes it “impossible or unreasonably difficult” for a disabled person to access the “service” in question.

<sup>18</sup> Jones v Post Office [2001] IRLR 384 CA.

- 1.56 The duty in relation to the employment field and education has a lower “threshold” and is triggered when a provision, criterion or practice or a physical feature of premises places a disabled person at a “substantial disadvantage” in comparison with people who are not disabled (substantial in this context means anything which is more than minor or trivial).
- 1.57 So while the current law ensures that disabled people are able to access goods, facilities and services, etc. in a similar way to non-disabled people and to have the adjustments they need to overcome barriers to seeking and retaining employment, different thresholds apply in different situations.

## A single threshold

- 1.58 We propose to establish a single threshold for the point at which the duty to make adjustments is triggered, based on the lower “substantial disadvantage” threshold. We are considering whether this should also apply to the reasonable adjustment duty in relation to premises (see chapter 13).
- 1.59 We believe that a single threshold at which the duty to make reasonable adjustments is triggered would make it clearer to disabled people, employers and service providers what their rights and responsibilities are under the law.

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

## Victimisation

### The need for a comparator in victimisation claims

- 1.60 Victimisation in British discrimination law is generally defined as less favourable treatment of a person because he or she has carried out a “protected act” or intends to do so. Protected acts include bringing proceedings under discrimination law; giving evidence or information in connection with proceedings brought by any person; or making an allegation of discrimination. Currently, someone wishing to bring a claim of victimisation needs to show that he or she has been treated less favourably than another in similar circumstances; that is to say, a comparator is required.

1.61 The approach to victimisation in employment law is different. In the Employment Rights Act 1996, victimisation is framed in terms of protection from suffering any detriment. For example, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has taken certain actions under the Working Time Regulations 1998. The same is true where a person is victimised as a result of bringing a claim for the national minimum wage under the National Minimum Wage Act 1998. This approach does not rely on comparative damage but on absolute harm to the person concerned; a comparator is not necessary.

## Aligning discrimination and employment law

1.62 We propose to remove the requirement for a comparator for victimisation in discrimination law. This would align the law with victimisation provisions in employment law and make it more effective. It would be unlikely to result in significantly more claims, because it would still have to be shown that the adverse treatment or detriment was a direct result of the protected act, allegation or claim. There would be no opportunity to claim general “victimisation” in a colloquial sense.

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

## Simplifying exceptions

1.63 We want to simplify and harmonise exceptions from the requirement not to discriminate. Our general approach is to provide general tests for exceptions which reflect the fact there are sometimes legitimate reasons to treat people differently, together with specific exceptions to clarify the circumstances in which different treatment is allowed.

## Genuine occupational requirement test

### When employers can differentiate for a good reason

1.64 In employment, a genuine occupational requirement test allows direct discrimination by an employer. This applies where being of a particular race or ethnic or national origin, religion or belief, sexual orientation or age is a “genuine and determining” occupational requirement, provided it is proportionate to apply the requirement in the case in question.

1.65 Disability discrimination is treated differently. The Disability Discrimination Act permits more favourable treatment of disabled people, while the Employment Directive permits an employer to reject an applicant on the ground of disability if the disabled person remains

unable to perform the functions of a particular job even after any reasonable adjustments have been made.

- 1.66 The genuine occupational requirement test allows employers to differentiate only where the very strict elements of the test are met. To satisfy the test, the employer will firstly have to be able to show that the nature of the post in question, or the context in which it is being carried out, requires the holder of a particular post to be of a particular race, sexual orientation etc. If this is the case, the employer must be able to show that appointing someone of the race, sexual orientation etc in question to that post is a proportionate measure in that particular situation.
- 1.67 For example, an organisation advising on and promoting gay rights may be able to show that it is essential to the credibility of its chief executive, who will be the public face of the organisation, that s/he should be gay. Sexual orientation may therefore be a genuine occupational requirement for that post. However, the same organisation might not find such a defence successful in relation to another post, such as an employment advice worker.
- 1.68 In some cases, the law lists more specific genuine occupational requirement exceptions to provide clarity. For example, the Employment Equality (Sexual Orientation) Regulations explicitly permit differences of treatment on the grounds of sexual orientation in narrowly-defined circumstances where the employment is for the purposes of an organised religion.
- 1.69 The Sex Discrimination Act, and the Race Relations Act for colour and nationality, take a different approach by setting out an exhaustive list of circumstances when an employer can differentiate because being of a particular sex, colour or nationality is a genuine occupational qualification for the job. One of these genuine occupational qualifications, for example, is the need to employ a man or a woman or someone of a specific colour or nationality to ensure a dramatic performance is authentic.

## A genuine occupational requirement test for all grounds

- 1.70 We propose to introduce a genuine occupational requirement test for all the grounds of discrimination, with the exception of disability (where it is not necessary). While the listing approach in the Sex Discrimination Act and the Race Relations Act may provide legal certainty, it does not provide any flexibility to deal with comparable situations that are not listed, or take account of future developments. However, we will need to consider whether we also need to list specific genuine occupational exceptions to provide clarity.

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

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

## **Genuine service requirement test**

### **When service providers can differentiate for a good reason**

- 1.71 In the supply of goods, facilities or services, housing and the exercise of public functions, there is no general equivalent to the genuine occupational requirement test which employers can use to justify direct discrimination in certain circumstances where it is necessary and proportionate.
- 1.72 Where legislation currently prohibits direct discrimination in these other areas, differential treatment is lawful only where it is permitted either by positive action, which we discuss later in Chapter 4, or by specific exceptions. For example, the Sex Discrimination Act includes an exception which ensures that registered charities may lawfully provide benefits on a single-sex basis if this is the purpose for which they were established.

### **Advantages and disadvantages of a genuine service requirement test**

- 1.73 Introducing a genuine service requirement test would provide a harmonised approach with the employment field. Such a test would allow service providers and those exercising public functions to objectively justify actions which, while being apparently directly discriminatory, were a genuine requirement of the service or public function being provided. The provider would have to prove that the objective was legitimate and the requirement was a proportionate means of achieving that objective. For example, providing women-only or men-only sexual health services, where this increases take-up by patients.
- 1.74 A significant benefit of introducing a genuine service requirement test would be that the legislation would be flexible enough to take account of any future additional exceptions which might be appropriate. Otherwise, it will be necessary to identify whether there is a need for specific exceptions if protection from discrimination is extended in

the future<sup>19</sup>. The genuine service requirement test would however be in addition to, and not instead of, any specific exceptions which are necessary for the sake of clarity and legal certainty.

- 1.75 However, while a genuine service requirement test would be compatible with the requirements of the Gender Directive, there are questions whether it would be compatible with the Race Directive. And, as in employment, it would not be necessary for disability. So if a genuine service requirement test were to be adopted, it would not apply across all the protected grounds. This could make the law in this area more difficult for service providers to understand.
- 1.76 In any event, we consider an objective justification test for direct discrimination would be needed in relation to age, to mirror the equivalent provision in the Age Employment Regulations, should we decide to legislate to prohibit age discrimination beyond the employment field.

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

## Specific exceptions

### Specific circumstances where differential treatment is lawful

- 1.77 Discrimination law currently sets out specific circumstances where differential treatment is lawful; for example, discriminatory acts are not unlawful where they are necessary to safeguard national security. Tables 1 and 2 in Annex A set out the existing specific exceptions in discrimination law.
- 1.78 Many of the existing exceptions apply to more than one protected ground of discrimination, but the way in which they are framed sometimes varies between the different pieces of legislation. For example, there are exceptions in sex, race and religion or belief legislation applying to the letting and management of premises, which are intended to have the same purpose but are worded differently.

## A unified approach

- 1.79 We propose to take a unified approach to similar exceptions across the protected grounds of discrimination, wherever this is appropriate.

<sup>19</sup>For example, if the law is extended in relation to gender reassignment and pregnancy and maternity as we discuss in chapters 10 and 11.

1.80 We propose to retain the current exceptions listed in Table 1 in Annex A, which fall under the two following categories:

- (i) those for recognised public policy reasons. Such exceptions include those whose purpose falls into the following categories:
  - national security;
  - Parliamentary sovereignty;
  - the constitutional independence of the judiciary;
  - statutory authority, i.e. where differentiation is permitted in order to fulfil the requirements of another piece of law;
  - legislative independence and freedom to debate frankly;
  - executive freedom, e.g. making secondary legislation; and
  - decisions on prosecution made by the Criminal Prosecution Service (or Crown Office and Procurator Fiscal Service in Scotland).
- (ii) recent legislative exceptions: these are exceptions that have been introduced in very recent pieces of discrimination legislation. They were developed after careful consideration of views put forward by stakeholders through the consultation process. Examples are:
  - the specific genuine occupational requirement exception in the Employment Equality (Religion or Belief) Regulations for employers with an ethos based on religion or belief; and
  - the exceptions in the Age Regulations permitting ages to be fixed for entry to occupational pension schemes, or entitlement to retirement or disability benefits.

1.81 However, a small number of the existing exceptions are out of date or contain anomalies. We therefore propose to remove these exceptions, which are listed in Table 2 in Annex A.

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

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

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

## Insurance

### Permitting differential treatment in the supply of insurance products

- 1.82 There are specific provisions in the Sex Discrimination Act and regulations made under the Disability Discrimination Act<sup>20</sup> which allow different treatment in the supply of insurance products, provided this treatment is **reasonable** and **based on actuarial or other data or information from a source on which it was reasonable to rely**. This permits insurers to treat certain groups differently if belonging to one category of persons or another is indicative of posing a different level of risk.
- 1.83 In Chapter 9, we consider the case for providing protection against discrimination on grounds of age in the provision of goods, facilities or services and the exercise of public functions. If such protection were to be introduced, we believe it would be necessary to allow different treatment on grounds of age in insurance, on the lines of the provisions that currently apply in sex and disability discrimination law, i.e. provided this treatment is **reasonable** and **based on actuarial or other data or information from a source on which it was reasonable to rely**.
- 1.84 We propose to amend the insurance provision in the Sex Discrimination Act in order to meet requirements in the EU Gender Directive, one of which is that data relevant to establishing the case for differential treatment by gender must be published and regularly updated.
- 1.85 The Equality Act (Sexual Orientation) Regulations 2007 include an insurance provision which allows differential treatment of people on grounds of their sexual orientation where supported by sound actuarial evidence. It is intended that this particular exception will not apply beyond the end of 2008. We are committed to working closely with the insurance industry and others to ensure that, if any insurance exception is required beyond the end of 2008, it reflects a genuine need in the industry and is in line with industry best practice. The latest guidance from the Association of British Insurers makes clear that insurers should not ask about sexual orientation or any HIV negative tests, but instead base their assessment of risk on answers provided about actual behaviour, regardless of sexual orientation.

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

<sup>20</sup>There are no insurance exceptions in the Race Relations Act or the religion or belief legislation.

## Chapter 2 – Goods, facilities and services, and public functions

### Delivering fair services

- 2.1 We want to make sure that people are treated fairly by public authorities and given an equal opportunity to access public services.
- 2.2 At the same time, we want public authorities and providers of public services to be clear what their responsibilities are. It must be as easy as possible for public sector staff to know when it is acceptable to differentiate between people, for example, to use one or more of these characteristics to address a particular person's individual needs.
- 2.3 We must ensure that what we do to improve the law helps to bring about better outcomes and is focused on the practicalities of making public policy and delivering public services which take account of different needs. No-one benefits from an over-bureaucratic or unnecessarily complex approach.
- 2.4 The same is true of private and voluntary sector organisations. In general, anyone providing a service (or supplying goods or making available facilities or premises) to the public should not be able to pick and choose which section of the public he or she will serve. However, there may be good reasons for allowing differential treatment in particular cases. It is important that the law is as clear as possible, and that there is straightforward practical guidance so that organisations know where they stand.

### Summary of proposals

- 2.5 Subject to the views expressed in response to this consultation, we propose to:
  - (a) adopt a harmonised approach to the way the law treats public functions and goods, facilities and services provisions across all protected grounds (paragraph 2.11);
  - (b) streamline exceptions in this area, but consider whether public authorities need more or different exceptions from private bodies (paragraph 2.12);

## Goods, facilities and services, and public functions

- 2.6 British discrimination law protects people from discrimination in broad areas of activity including the supply of goods, facilities and services and the exercise of public functions. The term “goods, facilities and services” covers a very wide range of activities provided to the public or a section of the public by public, private and voluntary sector organisations. It does not matter whether someone is asked to pay or not. Existing legislation does not define “goods, facilities and services”, although it does give illustrative examples of facilities and services. These include accommodation in a hotel and facilities for transport and travel. For public authorities, the term includes, e.g. the provision of library or leisure facilities and services.
- 2.7 “Public functions” is generally used for the activities of public authorities which are not covered by the term “goods, facilities and services”. This includes the policy decisions of Ministers, policing functions (such as the investigation and detection of crime), and the policy-making decisions of local authorities and government organisations. Currently, discrimination in the exercise of public functions is unlawful on the grounds of race, disability, sex, religion or belief and sexual orientation<sup>21</sup>.
- 2.8 However, the different pieces of discrimination legislation contain differences in the interaction between the provisions on goods, facilities and services and those relating to public functions. In the case of race, sex and disability discrimination, “public functions” are a residual category of public sector activities which are not otherwise caught by the goods, facilities and services provisions. Only if a public authority is not providing a service is it necessary to consider the public functions provisions.
- 2.9 By contrast, in relation to religion or belief and sexual orientation discrimination, bodies performing functions of a public nature will be covered by one set of provisions whether they are exercising a public function, or providing goods, facilities or services in the exercise of a public function.

<sup>21</sup> This consultation is seeking views on whether protection should be extended to cover age (chapter 9), gender reassignment (chapter 10) and pregnancy and maternity (chapter 11).

2.10 The difference in approach matters because in some cases different exceptions currently apply under the different sets of provisions. It is therefore important for public authorities and other bodies exercising public functions to know which provisions apply to a particular activity in order to know which exceptions apply. (For a detailed list of exceptions, see chapter 1 and Annex A.)

## Harmonising the law

2.11 We recognise that having different models for different protected grounds can be unhelpful for both providers and users of public services. In order to provide greater clarity and certainty, we therefore intend to harmonise the models across the protected grounds. In doing this, though, we want to keep any necessary exceptions relating to specific grounds.

***Do you agree that there would be benefits in adopting a harmonised approach to the way goods, facilities and services and public functions provisions are structured across all protected grounds?***

## Streamlining exceptions

2.12 We also want views on whether there is scope for streamlining exceptions for goods, facilities and services and public functions, where appropriate. Alternatively, it may be right to confine certain broader exceptions permitting differential treatment to public functions and services. For example, an exception permitting the provision of single-sex services, e.g. to address a specific health issue, may be appropriate in the context of public service delivery but not in respect of commercial service provision. This question should be considered in the context of our proposals in chapter 4 to extend the scope for positive action measures to address discrimination and disadvantage.

***Do you think the exceptions could be streamlined in this area, or do you think that there are any exceptions that should apply to public authorities that it would not be appropriate to apply to the provision of goods, facilities or services by private bodies?***

## Chapter 3: equal pay

### Progress towards equal pay

- 3.1 We are proud of our record on equal pay, in this and previous administrations. Pioneering legislation was introduced in the 1970s. But barriers still remain and there is some way to go before equal pay between women and men is fully achieved. We want to break down the barriers that prevent women from achieving their potential at work. When women are in the workplace, we must make sure that they are treated fairly, whether they work full-time or part-time, and whatever job or career they choose. We also need to support the complex choices that many women make about how and whether they combine paid work with other responsibilities.
- 3.2 We have been making progress, through measures such as the National Minimum Wage, and increased access to flexible working and associated family support mechanisms. The gender pay gap (as measured by the median hourly pay excluding overtime of full-time employees) narrowed between 2005 and 2006 to its lowest value since records began. The gap between women’s median hourly pay and men’s now stands at 12.6 per cent<sup>22</sup>.
- 3.3 The underlying causes of the gender pay gap are related to differences between men and women in their experience of education, training and the workplace, and also in the roles men and women play in the family.
- 3.4 The Women and Work Commission’s final report, published in February 2006<sup>23</sup>, clearly set out the opportunities for women themselves, for their families, and for the UK economy. As the report itself said:
- “Women are crowded into a narrow range of lower-paying occupations, mainly those available part time, that do not make the best use of their skills. The Commission estimates that removing barriers to women working in occupations traditionally done by men, and increasing women’s participation in the labour market, could be worth between £15 billion and £23 billion or 1.3 to 2.0 per cent of GDP”.
- 3.5 Over the past year, this Government has made further progress in response to the Commission’s recommendations<sup>24</sup>. For example:

<sup>22</sup> National Statistics, April 2006.

<sup>23</sup> [www.womenandequalityunit.gov.uk/publications/wwc\\_shaping\\_fairer\\_future06.pdf](http://www.womenandequalityunit.gov.uk/publications/wwc_shaping_fairer_future06.pdf)

<sup>24</sup> See Towards a Fairer Future (April 2007) for a progress report on action across Government at [www.womenandequalityunit.gov.uk/publications/women\\_work\\_5threp.pdf](http://www.womenandequalityunit.gov.uk/publications/women_work_5threp.pdf)

- in school, new quality standards for careers advice will open up wider, non-stereotyped opportunities to young people;
- since 2003, 3.6 million parents of young or disabled children have had the right to request flexible working, and this was extended in April this year to some 2.65 million carers of adults.
- Working carers are supported through improved childcare availability and the delivery of relevant services such as Sure Start Children’s Centres for parents of young children, Extended Schools, and Adult Social Services for carers of vulnerable adults;
- over 100 exemplar employers are sharing best practice on how to challenge the pay gap;
- we are funding projects to help employers learn how to increase the number of high-quality part-time jobs;
- the public sector gender equality duty requires the public sector to promote equality of opportunity between women and men, including as employers through their policies on pay and working practices.

3.6 The causes of the pay gap are complex, and are only partly related to issues that can be addressed specifically through equal pay legislation. We have therefore taken an approach of only legislating or extending existing legislation where there is a clear case, targeting it where it is most needed, and bearing in mind the potential burdens on employers, particularly smaller employers.

3.7 For example, we feel that, at present, the evidence does not support legislation mandating equal pay reviews. Equal pay reviews directly address only one of the causes of the gender pay gap – that of gender pay discrimination – and have had a relatively minor impact in the private sector in those countries and provinces where they are mandatory. Enforced equal pay reviews may also contravene better regulation principles as the costs to employers may be out of proportion to the scale of the problem they will address.

3.8 Instead, we are focusing on promoting the spread of good practice which improve gender equality in both private and public sector organisations, such as getting more women into senior management or improving rates of return from maternity leave. We are developing a light-touch diagnostic tool – the gender equality check tool – which will enable employers to assess quickly and cheaply where any problems they have on gender equality might lie (see chapter 6).

## Summary of proposals

- 3.9 Subject to the views expressed in response to this consultation, we propose to:
- (a) bring equal pay provision within a Single Equality Bill but retain the current differences between claims relating to contractual and non-contractual issues (paragraphs 3.12 to 3.20);
  - (b) include in the legislation settled principles of equal pay law which have come out of judgments in legal cases (paragraphs 3.21 to 3.22);
  - (c) consider how else we can simplify equal pay legislation or make it easier for it to work in practice (paragraphs 3.23 to 3.24);
  - (d) continue with the current approach to comparators, requiring an actual comparator (paragraphs 3.25 to 3.29).

## Equal pay claims

- 3.10 Since our pioneering legislation, which came into force in 1970, British law has upheld the principle that women and men should receive equal pay. Evidence of increasing awareness of the right to equal pay, and women's willingness to assert that right, can be seen in the significant rise in equal pay claims. Between 1999 and 2006 equal pay claims accepted annually by employment tribunals rose from 590 to 17,268. This sends a clear message to employers about the need to ensure that their pay systems are not discriminatory.
- 3.11 However, as noted above, we need to adopt a balanced mix of legislation and practical strategies to address the different causes, as well as the consequences, of this gap.

## The current legislation

- 3.12 Currently British law on discrimination between women and men in relation to pay and benefits is covered by the Equal Pay Act 1970 and the Sex Discrimination Act 1975. The law has to be interpreted in line with the requirements of the Treaty establishing the European Community, European Directives and the case law of the European Court of Justice.
- 3.13 The majority of sex discrimination claims relating to pay and benefits are brought under the Equal Pay Act, which deals with the contractual terms on which a person is employed. Every employment contract is deemed to contain an equality clause which broadly entitles a woman to the same pay and benefits as a man (or vice versa) if she is doing:

- the same or similar work, or
- work that has been rated equivalent in terms of the demands made in areas such as effort, skill and decision-making by a valid job evaluation study carried out by the employer, or
- work which a tribunal deems to be of equal value in terms of the demands made in such areas.

3.14 To bring a claim, a woman has to identify a male predecessor, successor or existing employee with whom she can compare herself, who is or was paid from the same source as her. If a tribunal finds in her favour, she is broadly entitled to receive up to six years arrears to reflect what she would have received had the equality clause been complied with.

3.15 The Sex Discrimination Act deals with some discrimination claims addressing pay and benefits which are not caught by the Equal Pay Act, such as claims in relation to non-contractual pay matters, which could include exceptional bonuses, childcare subsidies or employee share ownership plans. If discrimination is proved, this creates a statutory “tort” or wrong. A successful claimant receives compensation which puts him or her in the position he or she would have been in had the discrimination not occurred. In these cases, a tribunal can award compensation for financial losses and injury to feelings suffered by the victim as well as other types of damages.

## Keeping contractual and non-contractual approaches

3.16 As well as the different legal concepts and models used in the two Acts, there are different defences employers can use; different remedies; and different time limits for bringing claims. These differences raise further difficult technical questions when considering how unjustified differences in pay and benefits between women and men might be covered in a Single Equality Bill.

3.17 It has been suggested that these distinctions are unnecessary, and that simplification could be achieved by amalgamating the right to equal pay for women and men into a Single Equality Bill, based on the anti-discrimination model. If this was done, there would be a need to make specific provisions covering how claims for equal pay for work of equal value should be addressed. Generally, supporters of this approach consider that it would streamline the law on discriminatory treatment and pay across all the protected grounds.

- 3.18 However, abolishing the approach followed in the Equal Pay Act and adopting a new approach in relation to contractual pay and benefits would obscure the links with current equal pay case law. Cases under the new approach would take more time to be resolved, especially as they would probably be appealed until new principles were established. Any benefits of simplification are therefore unlikely to be seen in the short term. A move away from the contractual law approach would also have the effect of removing the certainty of the claimant's continuing entitlement to equal pay.
- 3.19 Moving away from the contractual approach would also mean that the employer could potentially face liability not only for the claimant's past financial losses (which might exceed six years' arrears) but also broadly unlimited aggravated or exemplary damages, damages for injury to feelings and any other injury suffered by the claimant as a result of the discrimination. In many cases, structural differences in pay may have evolved over a long period, with no deliberate discriminatory intent. This is particularly true in relation to equal pay for work of equal value. We therefore consider that this would be an excessive and unfair burden on employers.
- 3.20 We therefore propose to bring equal pay provisions within a single Equality Act but retain the current distinction between contractual and non-contractual pay matters.

***Do you agree that the distinction should be retained?***

## Clarifying and simplifying the law

- 3.21 We will also clarify and simplify the law as far as possible. One of the ways we will achieve this is to include on the face of the legislation settled principles of equal pay law, set out in judgments which have been accepted and applied by the Courts and are unlikely to be challenged. Some key principles we consider it would be helpful to clarify in legislation include:
- with whom a comparison can be made;
  - what can be compared (such as all terms of the contract of employment);
  - what constitutes a defence.
- 3.22 These measures will reduce the confusion caused by having two separate acts and clarify how the law should be interpreted.

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

## Other possible developments

- 3.23 A number of different ideas have been put forward for ways in which equal pay law could be developed. One suggestion to help employers take action is to introduce an equal pay moratorium. This would mean that where an employer carries out an equal pay review and identifies gender inequalities in their pay systems, they would have a set period free from legal challenge, within which to rectify discriminatory pay policies and practices.
- 3.24 While this would have the advantage of encouraging employers to address the issue of equal pay, in practice there may be considerable drawbacks. Protection from legal challenge for the employer could restrict an individual's access to adequate compensation or reparation. As such, it is not clear whether such an arrangement could meet European legal requirements. Also, there remain questions about what would happen to an individual's rights if any pay inequality was not properly addressed during the moratorium.

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

## Hypothetical comparators

- 3.25 One of the Women and Work Commission's recommendations was that the Discrimination Law Review should consider further the issue of whether or not to extend the use of hypothetical comparators to equal pay claims. However, the Commission was unable to reach a consensus on this.
- 3.26 At the moment, the law requires a person bringing a claim under the Equal Pay Act to identify an existing person of the opposite sex who receives, will receive or has received better pay or benefits for doing the same work, work rated as equivalent or work of equal value. This person is described as an "actual comparator". If hypothetical comparators could be used, a person could bring an equal pay claim where no actual comparators are available. The claimant would need to show that if a person of the opposite sex, paid by the same source, were to do the same work, work rated as equivalent or work of equal value, that person would receive better pay or benefits than the claimant does.

- 3.27 The question of whether an equal pay claimant should be able to use a hypothetical, as opposed to an actual, comparator stems from the definitions of direct and indirect discrimination (see Chapter 1) where, for example, in direct discrimination, an employer discriminates against a woman if he treats her “*less favourably than he treats, **or would treat**, a man*”. Those favouring the use of hypothetical comparators argue that they would remove the barrier to bringing equal pay claims in gender-segregated workforces, where it might not be possible to identify actual comparators of the opposite sex. Those against the use of hypothetical comparators are concerned that they would create intolerable uncertainty about whether an employer’s pay arrangements were lawful or not, because it would be impossible to envisage every scenario in which a hypothetical comparison might be drawn.
- 3.28 We consider that there is a combination of practical and legal reasons why hypothetical comparators should not be permitted in equal pay cases. In practice, claimants may find it difficult to provide tribunals with evidence of the pay or benefits that a hypothetical comparator would have received. This would in turn affect their ability to show that the principle of equal pay had been breached. The evidential problems could be most acute in equal value claims where a woman would have to show that a hypothetical man, paid from the same source as her and doing work of equal value, would have been employed under more favourable contractual terms. There are likely to be very few situations where a woman could make out such a case. Added to this, the European Court of Justice has to date ruled that an actual comparator is required when establishing whether or not the principle of equal pay between women and men has been breached.
- 3.29 Taking account of the uncertainties that hypothetical comparators would create, and the potential for significant numbers of unsuccessful claims which would still incur litigation and processing costs, we are not persuaded that allowing the use of hypothetical comparators would give any benefit in practice.

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

## PART 2 – MORE EFFECTIVE LAW

# Introduction to Part 2 – the vision for a Single Equality Act

## What our discrimination law is for

1. Britain has played a pioneering role in developing a strong framework of discrimination law. We should be proud of the advances we have made. The purpose of our discrimination law is:
  - to protect individuals from discrimination; and
  - to tackle disadvantage where it exists.
2. The law underpins our approach to equality, providing a framework against which everyone can assess whether an approach is the right one. The law is key to achieving a society in which all people can fulfil their potential, not held back by unnecessary barriers to equality of opportunity. However, one of the most significant ways legislation brings about change in society is by setting standards for the way organisations are run and services are delivered, or by requiring a different approach to an issue; one which ensures that different people’s different needs are better taken into account. Sometimes, the law has followed a change in society’s attitudes. At other times, it has driven change forwards, encouraging a fresh look at the way we do things.

## Tackling unfair discrimination

3. The fundamental objective of British and European equality law has been to promote equality by tackling unfair discrimination. Discrimination law has been put in place to protect individuals from discrimination based on specific characteristics – sex, race, disability and, more recently, sexual orientation, religion or belief, and age. It is based on the “principle of equal treatment” – that people in similar situations should be treated alike.
4. The law provides a remedy for individuals who have been discriminated against.<sup>25</sup> However, just as important is the role it plays in preventing

<sup>25</sup>In disability discrimination law, the objective of preventing discrimination and achieving equality is based on a different approach that focuses on addressing the particular barriers faced by a disabled person. This approach is reflected in the concept of ‘reasonable adjustment’. We believe that the distinctive features of our disability legislation offer important protections which should generally be preserved.

unfair discrimination. It does this by setting standards to be met in the dealings we have with each other in the workplace and as consumers of goods and services, whether provided by the public or private sector.

5. Over the more than 40 years since the first discrimination legislation was put in place, we have increasingly recognised that, as well as being fair, treating people the same in similar situations makes good business sense. Not discriminating means identifying the best skills and appointing the person who best demonstrates these, without getting distracted by irrelevant characteristics. It means we can recruit from the widest possible pool of applicants, and do not ignore the talents of any part of the population. Suppliers of goods and services recognise it means being able to market themselves to the whole population and serving the public's needs better.

## Promoting equality

6. But our discrimination law also recognises that different situations may require different approaches. Treating everyone the same can actually result in an unequal outcome. So the law allows for positive steps to be taken to create greater fairness or to proactively promote equality. This need is reflected in:
  - the approach of disability discrimination law, which allows more favourable treatment of disabled people;
  - the existing “positive action” provisions; and
  - in the positive duties on public authorities to promote race equality, equality for disabled people, and equality between men and women.
7. There is a very important distinction between positive action and positive discrimination. Positive action means offering targeted assistance to people, so that they can take full and equal advantage of particular opportunities. Positive discrimination means explicitly treating people more favourably on the grounds of race, sex, religion or belief, etc. by, for example, appointing someone to a job just because they are male or just because they are female, irrespective of merit. Positive discrimination is prohibited under British and European law<sup>26</sup>, and we do not believe it provides a solution to addressing disadvantage. However, in chapter 4, we look further at positive action.

<sup>26</sup>Although disability discrimination law does allow more favourable treatment of disabled people.

## The approach of a Single Equality Act

8. A Single Equality Act provides the opportunity to create a coherent legislative framework for fairness. In taking this opportunity, we believe we should build on our current anti-discrimination legislative model. The dual principles of protection from discrimination and addressing disadvantage are well understood. They reflect basic values of our society. For individuals, this model provides well-defined rights which are enforceable through courts and tribunals. It allows, and for public authorities requires, proactive action to tackle disadvantage. For those who have to comply with the law, it provides clear standards which will be enhanced by the simplification measures we propose elsewhere in this green paper.

### A purpose clause?

9. It has been suggested that the Act should include a purpose clause to help set the Act in the wider context of the Government's vision for equality and human rights and clarify what the law is intended to achieve. Purpose clauses are not common in British legislation and some argue that they risk causing confusion about the meaning of the substantive provisions setting out specific and carefully defined rights and obligations. This is a particular risk where a purpose clause is a mainly rhetorical statement setting out the general social policy aims of the legislation. Nonetheless, we think it is important that the Act should be drafted clearly, and in a way which makes clear the results it is intended to achieve.

### The legislative model

10. We have looked carefully at models of discrimination law in other countries, including models based on constitutional equality guarantees, and which require positive discrimination to tackle historical disadvantage. Having done so, we have come to the conclusion that there are no real gains to be made from departing from the British model. Instead, there are considerable risks in doing so. What we have is tried and tested, results in legal certainty and is easily adaptable to reflect changing circumstances in society. It is also compatible with European law. A different model would lead to legal uncertainty and consequential burdens on business and the courts. It would mean a transfer of power from Parliament to the courts and (having regard to the framework of European law within which it would need to operate) most likely result in undesired outcomes.

11. Alongside discrimination legislation, the Human Rights Act gives people a clear legal statement of their basic rights and fundamental freedoms in our democratic society. Rather than just ensuring equal treatment (which could be equally poor treatment), it puts in place standards of behaviour based on dignity and respect. Legislation must be interpreted in the light of these rights. Making sure that everyone's rights are properly respected will often that mean one person's rights have to be balanced against another's. The application of human rights in an equality context has been demonstrated in a number of cases dealing with disability, sexual orientation, gender reassignment and religion or belief<sup>27</sup> and in some cases has led to new discrimination law being brought forward. It is in recognition of these links that equality and human rights are being brought together in the new Commission for Equality and Human Rights.

## What we want your views on

- In Part 2 of this paper, we want to know your views on proposals to:
- allow a wider range of balancing measures to effectively address entrenched discrimination and disadvantage;
- simplify the public sector duty to tackle disadvantage more effectively;
- consider extending the coverage of the public sector duty;
- explore how public authorities can actively take account of equality issues in procurement;
- propose ways to improve equality practice in the private sector;
- seek views on how to improve the resolution of discrimination disputes outside the workplace<sup>28</sup>.

<sup>27</sup> R (A and B) v. East Sussex County Council – February 2003, Ghaidan v. Godin Mendoza – June 2004, Goodwin v. UK – July 2002

<sup>28</sup> Workplace discrimination claims dealt with in employment tribunals have been considered separately by the Gibbons review of employment dispute resolution (DTI, March 2007).

## Chapter 4: Balancing measures

### Why we need balancing measures

- 4.1 In the 40 years since the first discrimination law was introduced, we have made a lot of progress towards equality in our society. In particular, the greater visibility in the public eye of a wide variety of people with different personal characteristics – women and men, people from ethnic minority communities, disabled people, those with different religious or other beliefs, of different ages, of different sexual orientations, and people who have undergone gender reassignment – mean far fewer people in Britain today would think someone was unable to contribute just because they were different in one of these ways.
- 4.2 There is also much greater recognition of the benefits of diversity, for example:
- in the workplace, where it enables a wider range of talents and skills to be used, and allows business to understand and anticipate the diverse needs of customers;
  - in groups of people who make important decisions, such as Parliament and public bodies, where it ensures that conclusions are reached and services delivered with the benefit of a wide range of different experiences.
- 4.3 But change in some areas is coming very slowly. It is true that some individuals from groups which have suffered discrimination and disadvantage have made it to the top. Yet in many spheres of society, and at senior levels, they remain under-represented.
- 4.4 We still notice when a woman leads a FTSE<sup>29</sup> company, or when a visibly disabled person becomes a Cabinet Minister, or when a Sikh becomes a judge. Organisations themselves have expressed frustration at their inability to bring about more rapid change within the current legal framework.
- 4.5 Let us be clear. We do not want a situation where people get promoted just because people with whom they share a personal characteristic are under-represented in a particular sphere of activity – that is positive discrimination, and we do not believe it provides an answer to the persistent inequality experienced by some groups. However, we want to consider whether there is more we could allow business and other organisations to do to make more rapid progress towards greater

<sup>29</sup>Financial Times Stock Exchange

diversity, because this is something which would benefit society as a whole. We think it might be helpful to allow institutions a greater degree of flexibility in order to fulfil their basic functions effectively.

## What we want to achieve with balancing measures

4.6 Where progress towards giving everyone an equal chance of participation is still too slow, we want to:

- remove unnecessary barriers to equality of opportunity;
- allow proportionate action to be taken, but only do what is necessary to make a difference to address a real problem;
- base what is done on a sound analysis of the issues, and be open to the idea that positive action may be needed for any group, not just those groups more usually associated with under-representation;
- ensure we do not inadvertently introduce new and unjustifiable inequality or disadvantage;
- explain what we are doing and why, and ensure that the need for action is understood, and commands the widest possible consensus.

## Summary of proposals

4.7 Subject to the views expressed in response to this consultation, we propose to:

- (a) Confine the concept of “reasonable adjustment” to disability discrimination law as at present, and not to broaden it to other protected groups (paragraphs 4.39 to 4.43);
- (b) Consider whether to adopt wider balancing measures to allow employers and others to make more rapid progress towards redressing under-representation (paragraphs 4.44 to 4.47);
- (c) Allow all protected groups to benefit from measures to meet particular needs in relation to education, training and welfare or other benefits (paragraph 4.48);
- (d) Give the Commission for Equality and Human Rights a role in issuing clear practical guidance and Codes of Practice, but not in approving positive action programmes (paragraphs 4.49 to 4.51)

- (e) Continue and/or broaden if necessary the scope of permitted voluntary positive action in the selection of candidates by political parties (paragraphs 4.52 to 4.57).

## Examples of balancing measures

- 4.8 Balancing measures are measures designed to address the under-representation of particular groups in a variety of roles and situations. This approach recognises that under-representation is usually a consequence of historical or entrenched disadvantage; so, for example, women are still under-represented in senior positions because for most of our history, right up until the last 50 years or less, it has been assumed they are less able than men. Women’s experience in accessing education and jobs has reflected this. Few would now accept this assumption to be true.
- 4.9 Certain balancing measures are already provided in British legislation. There are specific provisions in discrimination law which are described below, but measures to compensate for disadvantage also occur in other legislation. For example, the right to request flexible working allows parents of young or disabled children and carers of adults better access to jobs. Without flexibility every job would be assumed to be one that required fixed hours of full-time attendance, making it much harder for people from these groups to combine work with their family responsibilities.
- 4.10 This “right to request” has been very successful, with only half as many women changing employer on their return from maternity leave as in 2002, meaning that employers’ recruitment costs have dropped, as well as women avoiding having to find a new job just after having a baby, or dropping out of the workplace altogether. Employers can, of course, themselves introduce other balancing measures in the absence of legislation, such as expanding flexible working, using clear and transparent recruitment processes and appointment criteria, etc.
- 4.11 The Government believes that it is important that public institutions such as the police and the Civil Service are representative of the communities that they serve. The Home Office has actively encouraged police forces to take such balancing measures where necessary and has produced two practical positive action plans (“Dismantling Barriers” and “Breaking Through”) to assist them in recruitment, retention and progression of under-represented groups within the limits of the legislation. In the Civil Service, the Cabinet Office has developed a 10 point plan to improve service delivery by achieving a truly diverse workforce.

## Balancing measures in discrimination law

4.12 As we've already noted, discrimination law is generally aimed at protecting individuals from discrimination by making discrimination on grounds of certain protected characteristic unlawful and providing civil justice remedies. However, outlawing discrimination will not necessarily be enough by itself to ensure genuine equality in practice for everyone in our society, because not everyone is in the same position from the outset. In some cases, specific balancing measures may be required to achieve full equality in practice. This is consistent with the principle of equal treatment which recognises that comparable situations are not to be treated differently and different situations are not to be treated alike. British discrimination law already provides such balancing measures in different ways. These are:

- The whole approach of our disability discrimination legislation;
- Existing positive action provisions:
  - Training and encouragement for particular work; and
  - Taking account of special needs in respect of education, training or welfare or any ancillary benefits;
- Positive duties on the public sector to promote equality of opportunity; and
- Positive measures aimed at targeting the selection of candidates by political parties.

## Disability discrimination legislation

4.13 Disability discrimination legislation is based on the premise that treating disabled people the same as non-disabled people would never achieve true equality. This is because the way society is organised means that disabled people are not in comparable situations to non-disabled people. So it may appear fine to say “this public meeting is open to all”, but this will not be true if the venue for the meeting in reality excludes people with a mobility impairment because it is upstairs and there is no lift.

4.14 In order to achieve full equality in practice for disabled people, the law therefore recognises that disabled people need to be treated differently. Disability discrimination law protects disabled people from less favourable treatment, but not those who are not disabled. In addition, in certain circumstances, it requires the making of “reasonable adjustments” to meet the particular needs of disabled people and to alleviate the disadvantages they would otherwise face.

## Existing positive action provisions

- 4.15 There are specific balancing measures in existing discrimination law which are generally referred to as ‘positive action’ measures. They permit targeted measures to prevent or compensate for disadvantage or to meet special needs arising from membership of a protected group. They are designed to create a level playing field so that disadvantaged groups can compete on equal terms for jobs, access to services etc, or to provide services to meet their special needs.
- 4.16 The provisions reflect the possibility that outlawing discrimination may not on its own lead to full equality in practice; in some cases there will not be a level playing field from the outset, and to achieve an equal outcome, a difference in approach is required.
- 4.17 This type of balancing measure should be distinguished from positive discrimination. Positive discrimination in the workplace generally refers to making recruitment/promotion decisions solely to redress the balance of representation of the under-represented group and irrespective of merit, for example, quotas. It is not permitted under European or British discrimination law<sup>30</sup>.

### *Training and encouragement for particular work*

- 4.18 The need for balancing measures to overcome disadvantage and tackle under-representation to achieve full equality in practice has been recognised from the mid 1970s and is reflected in the Sex Discrimination Act and the Race Relations Act. Both these Acts allow employers and other persons to provide access to facilities for training which would help to ensure that someone has the necessary skills and capability for particular work, and encouragement to take up particular work opportunities. This is permitted where there is, or has been in the preceding 12 months, under-representation of the group from which the person comes in the national or regional workforce, or the particular workforce of the employer’s organisation. Such measures must cease when the under-representation no longer exists.
- 4.19 Examples of positive action *training* include:
- management training for women to encourage them to apply for promotion for management positions where they are under-represented;

<sup>30</sup> Although because of the particular nature of disability discrimination law, it does not prevent more favourable treatment of disabled people. The Employment Equality (Age) Regulations also allow for more favourable treatment on the grounds of age; however, any such action would need to be objectivity justified.

- providing ‘access’ courses to members of under-represented groups who have narrowly failed to be short-listed or appointed, to prepare them to apply again.

4.20 Examples of positive action *encouragement* include:

- publishing advertisements for vacancies which specifically encourage applications from under-represented groups;
- placing advertisements in publications specific to the under-represented group;
- offering mentoring schemes to under-represented groups before and during employment.

4.21 The Sex Discrimination Act also allows training to be given to those who are in special need of training because they have had career breaks for domestic or family reasons. In addition, trade unions, employers’ organisations and professional bodies can provide their members who are from an under-represented sex or under-represented racial group access to facilities for training which would help equip them for a post in the organisation, as well as encouragement to take up opportunities for holding posts in the organisation.

4.22 There are similar positive action provisions in the regulations outlawing discrimination in employment on grounds of sexual orientation, religion or belief, and age. These provisions, unlike most of those relating to race and sex, do not explicitly refer to under-representation. Rather, they can be used where it reasonably appears that the act in question “prevents or compensates for disadvantages” linked to sexual orientation, religion or belief or age. This less prescriptive approach is based on the terminology used in the relevant European Directives.

*Special needs in respect of education, training or welfare or any ancillary benefits*

4.23 The Race Relations Act contains a wider provision which enables measures to be taken to meet the special needs of a particular racial group in respect of education, training or welfare or any ancillary benefits. This provision is not subject to an explicit under-representation test, and it applies to all areas in which discrimination is prohibited by the Race Relations Act. This provision has been used to provide special language training such as teaching English to aid integration, outreach health services, counselling services, nursing homes and networks for particular racial groups and to meet special housing needs.

4.24 Similar provisions have been introduced under the religion or belief provisions in Part 2 of the Equality Act and in the Equality Act (Sexual Orientation) Regulations. The Sex Discrimination Act also departs from the principle of equal treatment to cater for the special needs of men and women, for example through provisions relating to separate services for men and women.

### Positive duties on the public sector to promote equality

4.25 The positive duties on the public sector to promote race, disability and gender equality are another form of balancing measure. The duties recognise that outlawing discrimination may not by itself be enough to eliminate discrimination and tackle disadvantage in our society. Proactive equality duties on public authorities are designed to ensure that discrimination is tackled at source from policy-making to service design and delivery which meets the needs of communities.

4.26 There have been calls for Government to introduce a single public sector equality duty to cover all the protected grounds. This is discussed in chapter 5.

### Positive measures aimed at targeting the selection of candidates by political parties

4.27 The Sex Discrimination Act<sup>31</sup> allows political parties to take positive measures towards women's increased participation, such as providing mentoring and training programmes and all-women shortlists for election candidates in national and European parliamentary elections and local government elections. This provision will expire in 2015, unless specifically extended.

4.28 We believe these measures have been successful. While we would never suggest that, for example, only women MPs represent women or only ethnic minority people can represent ethnic minority people – every MP represents the whole community in their constituency – having a more representative Parliament and other elected bodies ensures that our elected politicians as a group better reflect the society they serve.

4.29 When groups of decision-makers seemingly come from a limited section of society, it becomes harder for those they represent to identify with them, and so they may doubt that their needs are being taken into account when policies are being formulated and services being planned. This can lead to people believing that politics has no relevance to their lives.

<sup>31</sup> Section 42A, inserted by the Sex Discrimination (Election Candidates) Act 2002.

- 4.30 We firmly believe that positive measures help good and able candidates to get selected. They do not undermine selection on merit.

## The European context

- 4.31 The provisions for positive action balancing measures in the relevant European Directives are framed more widely than those in British discrimination law.
- 4.32 Article 141(4) of the EC Treaty provides that:
- “With a view to ensuring equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or compensate for disadvantages in professional careers.”
- 4.33 The Equal Treatment Directive allows the adoption of measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women<sup>32</sup>. The Race Directive, Gender Directive and Framework Directive (in respect of religion or belief, sexual orientation and age) allow specific measures to prevent or compensate for disadvantages linked to the protected ground.
- 4.34 The case law of the European Court of Justice allows such balancing measures to be taken not only in respect of training and encouragement but also for selection processes for recruitment and promotion in employment (subject to certain conditions). The European Court of Justice has held that it is not contrary to EC law for equally-qualified women to be given preference for promotion where there are fewer women than men in the relevant post, so long as there is no automatic and unconditional preference or fixed rule<sup>33</sup>. However, it is still unlawful to appoint a candidate from an under-represented group over a better-qualified candidate simply to redress the under-representation<sup>34</sup>.

<sup>32</sup>The amended provisions came into force in October 2005. Prior to that Article 2(4) of the Equal Treatment Directive stated that the Directive shall be “without prejudice to measures which promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities”.

<sup>33</sup>European case law on positive action measures is limited to date, and relates only to the Equal Treatment Directive and Article 141(4) EC Treaty. However, although Article 141(4) refers to the maintenance or adoption of measures for “specific advantages” and the relevant Directives refer to the maintenance or adoption of “specific measures”, it is likely that the European Court of Justice will adopt a similar interpretation to these provisions.

<sup>34</sup>Although because of the particular nature of disability discrimination law, it does not prevent more favourable treatment of disabled people.

4.35 Any measure to tackle under-representation/disadvantage must:

- be shown to be necessary;
- be focused on overcoming a specific disadvantage;
- be proportionate and likely to remedy the situation; and
- not be in force for longer than is necessary to deal with the problem identified.

## Extending the scope for positive action measures

### Disadvantages of the current approach

- 4.36 There is currently confusion about what types of positive action measures are and are not allowed under our discrimination law. Perhaps most crucially, the lack of a clearly understood purpose for positive action measures gives rise to confusion with positive discrimination. This risks fostering unjustified concern about favouritism being shown to disadvantaged groups. Instead, we want everyone to recognise there may be occasions when positive action to address their particular needs may help them, and that this can actually lead to a fairer outcome for all.
- 4.37 Uncertainty about what measures are allowed also has the effect of discouraging the provision of appropriate support. The final report of the Equalities Review highlights that confusion may be preventing organisations making more opportunities available to both employees and clients.
- 4.38 There are no detailed figures on the take-up of the existing British positive action provisions. There is some evidence that a number of employers in both the public and private sectors have made active use of the provisions; but there is also evidence to suggest that the existing provisions may be poorly understood. There are also concerns that the provisions are too restrictive by being limited to training and encouragement for particular work and not wide enough to tackle the kinds of disadvantage suffered in today's society. Ethnic minority job applicants, for example, may be just as well qualified or more qualified in some cases than the majority population, yet under-representation still persists in certain sectors.

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

## Should we extend the concept of “reasonable adjustment”?

- 4.39 There have been suggestions that the Government should consider extending the concept of “reasonable adjustment” to some or all of the other groups protected by discrimination law, or adopting the more extensive concept of “reasonable accommodation” found in Canadian law.
- 4.40 We are not persuaded that reasonable adjustments should be extended in this way. In many of the situations where such provisions may have effect, for example, pregnancy or people with caring responsibilities, there are already targeted balancing measures in employment law relating to, for example, maternity rights and the right to request flexible working which anticipate the role that reasonable adjustment provisions might play. We consider that it would be unduly burdensome and reduce clarity if employers and service providers were required to respond to extensive new duties in this way. Increasing the overall burden of adjustments which employers and service providers would need to consider might also risk reducing the level of adjustments available to disabled people, due to resource constraints.
- 4.41 It would not in any event be possible to apply in full the reasonable adjustments approach followed in disability legislation because of the limits placed by European law. The reasonable adjustments approach for disability has been characterised by the House of Lords as “necessarily entail[ing] a measure of positive discrimination” for the protected group which is not permissible in relation to the other protected grounds<sup>35</sup>.
- 4.42 In addition, the indirect discrimination provisions referred to in chapter 1, which allow practices which operate to the disadvantage of particular groups to be challenged, and which play an important role in tackling the obstacles these groups may face, would need to be retained in any event to comply with European law. It is by no means clear how a reasonable adjustments approach would operate alongside this.
- 4.43 Overall, we consider that extending the concept of reasonable adjustment to areas beyond disability is not justified.

## Other ways of expanding positive action measures

- 4.44 The current provisions for positive action measures in British legislation all fall within the range of measures permitted under European law – but they do not exhaust the possibilities of what it would permit.

<sup>35</sup>In *Archibald v Fife* [2004] UKLH 32

In the Government’s view, there is scope to expand the measures to help address disadvantage, not only in the employment sphere but also in other areas such as education, the provision of goods, facilities and services, and the exercise of public functions. Such an approach might allow, for example, the fast-tracking through initial training of under-represented groups from an equally qualified pool (i.e. those who had already met all the entrance criteria, passed the relevant tests of physical and other fitness, and been accepted for initial training) to speed up the achievement of a more representative police service. This would be subject to the limitations imposed by European law. Positive discrimination – such as quotas for recruitment or progression – would continue to be unlawful<sup>36</sup>.

4.45 The use of this kind of balancing measure would remain voluntary. This is to avoid imposing additional regulatory burdens on private sector organisations. However, there might in some cases be a greater expectation on public authorities to use such balancing measures to promote equality under public sector equality duties (see chapter 5). In any event, such balancing measures would provide an important tool for public authorities to use to promote equality.

4.46 We do not propose to put details of measures which will always be regarded as falling within the positive action provisions on the face of legislation; this would depend on the facts of each case. What will be important is to provide clarity about the purposes for which balancing measures may be used. This will help to ensure better understanding of what is and is not allowed. As a general principle, we propose that balancing measures should be permitted to prevent or compensate for disadvantage or to meet special needs linked to the protected ground. Any balancing measures would always have to be:

- necessary,
- proportionate, and
- time-limited.

4.47 Examples of this type of balancing measures might include action to<sup>37</sup>:

<sup>36</sup> More favourable treatment of disabled people is permitted by disability discrimination law.

<sup>37</sup> Single-sex services are currently permitted by the SDA in certain circumstances. In chapter 9, we are seeking views on whether to extend protection against age discrimination to cover the provision of goods, facilities and services and the exercise of public functions. If this option were to be taken, we are proposing including provisions which would allow differential treatment to prevent or compensate for the disadvantages suffered by particular groups because of their age or to meet the special needs of certain age groups. In addition, other regulations, such as the Equality Act (Sexual Orientation) Regulations 2007, already allow some services to be provided to meet the particular needs of particular people.

- prevent disadvantage to particular service users, e.g. women-only drug and alcohol treatment centres could be provided, because evidence shows that mixed centres are less effective for women;
- compensate for disadvantage, e.g. free sight-tests and prescriptions for older people, who are likely to have a disproportionate need for such services;
- meet special needs, e.g. health services to meet the particular needs of different groups, such as men or women, lesbians, gay men or bisexual people, or particular ethnic groups who currently are at greater risk of developing certain conditions.

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

## Extending measures to meet special needs in education, training, welfare or ancillary benefits

4.48 We consider that measures of the sort set out at paragraphs 4.22 and 4.23 to meet special needs in relation to education, training or welfare or any ancillary benefits should be permitted in respect of all protected groups<sup>38</sup>.

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

## Clear guidance

4.49 Whatever the outcome of this consultation, there is an important role for the Commission for Equality and Human Rights to develop clear and consistent guidance on the scope for balancing measures generally. In particular, it will be important to make clear that balancing measures are intended to address disadvantage by providing equality in practice; they are not a means of acting to achieve equal results through, for example, having quotas for recruitment or promotion, which would constitute (unlawful) positive discrimination<sup>39</sup>, and which we do not accept is the right way to address historic disadvantage.

<sup>38</sup> Except for disabled people, because disability discrimination law already allows more favourable treatment of disabled people.

<sup>39</sup> Except that more favourable treatment of disabled people is permitted by disability discrimination law.

- 4.50 We think that greater certainty about what the proposed approach allowed could be provided through a statutory Code of Practice and/or practical guidance produced by the Commission for Equality and Human Rights. This could be based on relevant up-to-date case law and set out the tests and criteria clearly. Guidance could very helpfully illustrate the range of measures that it may be possible to adopt (depending on the circumstances) in order to prevent or compensate for disadvantage or to meet special needs. This would be important in helping employers and service providers to use positive action measures with more confidence.
- 4.51 We have considered whether it would be helpful for the Commission for Equality and Human Rights to have a role in “approving” positive action programmes designed to address disadvantage or persistent inequalities in particular cases. It is likely that the Commission will wish to promote the benefits of balancing measures as part of its role in promoting good practice. But ultimately, although we would aim through the law and accompanying guidance to be sufficiently clear about what ‘permitted balancing measures’ looked like, it would be for the courts, and in particular the European Court of Justice in the areas in which it has competence, to determine what will and what will not be permitted, taking into account principles such as proportionality. Approval by the Commission for Equality and Human Rights would therefore only add an additional hurdle to the process but would not provide total legal certainty for businesses embarking on positive action programmes.

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

## Political representation

- 4.52 Before 1997, only one in 10 MPs were women; now in Parliament as a whole it is one in five. But if women and men were equally represented, there would be 323 women MPs; currently, there are just 126.
- 4.53 Whether having more women in Parliament and Government has influenced policy-making – for example, by promoting issues of particular concern or interest to women – has been much debated. What is certain is that since 1997 this Government has more than doubled maternity leave and pay; introduced the right to request flexible working for parents of young children and carers of older and disabled people; given all 3 and 4 year olds a free nursery place; and updated the domestic violence laws.

- 4.54 It is because we believe having more women in elected positions is so important, and that it needed to happen faster than it would have if just left to time, that we introduced the Sex Discrimination (Election Candidates) Act. Furthermore in February this year, we set up an independent Commission on the role of local councillors to look at the incentives and barriers to serving on councils<sup>40</sup>. We want to see representative decision-making bodies at all levels, and political parties taking the necessary positive steps (which include additional advice and training, mentoring and financial support for under-represented groups, not just measures affecting shortlists) to bring about change.
- 4.55 All members of all political parties should have the confidence to stand for selection, and to believe that local parties will look at their abilities fairly, and at what they can bring to serving the whole community. Allowing voluntary positive measures by political parties when selecting candidates is designed to overcome a persistent though generally unconscious bias against candidates who break the usual mould, or who are thought of as “risky” – perhaps because they are female and/or from an ethnic minority group.
- 4.56 While there has been progress, it is possible that in 2015 the UK Parliament will still be a long way short of containing broadly equal numbers of women and men. This is not least because some parties have been more reluctant to take positive measures than others. We want to keep the position under review and, if necessary, extend the operation of the provision beyond 2015 if it is a necessary and proportionate response to a continuing problem.
- 4.57 We need to hear the voice in Parliament of all the different communities who make up our society. We believe it is now time to look beyond gender at other characteristics which may make it harder for people to get selected as candidates, even though they have the ability to be very good elected representatives. If ethnic minority representation in Parliament was in proportion to the population as a whole, there would be 51 ethnic minority MPs, rather than the 15 there are at present. Just 2.3% of MPs are from non-white backgrounds, compared with the 8% of the UK population who were from a non-white background at the time of the 2001 Census of Population. The same imbalance exists on other elected bodies.

<sup>40</sup>The Commission is chaired by Dame Jane Roberts, former Leader of the London Borough of Camden.

4.58 We therefore intend to look at whether we should (and if so how) legislate to allow wider voluntary positive measures by political parties in the selection of candidates from ethnic minority communities. Parties could provide assistance, support, training and mentoring, or if necessary do more, so that in future elections we have proper and full representation for all racial groups in Parliament. Like the legislation to allow positive measures to increase the number of women candidates, any legislation would be permissive. It would be for political parties to decide what measures, if any, they wish to adopt.

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

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

## Chapter 5: Public sector equality duties

### Why we need positive duties to promote equality and good relations

5.1 Public sector equality duties are duties on public authorities to take active steps to eliminate unlawful discrimination, promote equality and, in some cases, promote good relations between different groups. The delivery of public services such as:

- health and social care;
- education;
- the justice system;
- housing; and
- support to find work

which fairly address each person's individual needs is at the heart of the modernisation of the public sector. The organisation, structure and delivery of public services can counteract inequalities and have a profound bearing on the life chances of disadvantaged groups.

### What we want to achieve with a positive duty

5.2 By helping public authorities to embed equality considerations throughout their activities, public sector equality duties support the design and delivery of personalised and responsive public services.

5.3 The duties are intended to help bring about a culture change so that promoting equality becomes part and parcel of public authorities core business.

5.4 Under a public sector duty, public authorities – which vary in size from small schools to large local authorities – have to take account of equality considerations in carrying out their functions including:

- policy-making,
- decision-making,
- service provision,
- procurement, and
- employment matters.

## How we can ensure a proportionate approach

- 5.5 There are a number of considerations which need to be balanced when designing a public sector equality duty. These include:
- the outcome which the duty is seeking to achieve;
  - which public authorities should be covered by the duty, taking into account their size, resources and service priorities;
  - how performance of the duty should be evaluated and enforced, and
  - what guidance and other tools should be made available to support effective performance.
- 5.6 In considering these issues, the aim is to design a duty which strikes an appropriate balance between the costs and administrative burdens which will be placed on public authorities, and the benefits in terms of the outcomes which will be achieved.
- 5.7 In this chapter, we set out our proposals for bringing the existing public sector equality duties together in a new model, and consider whether or not to extend the duty to cover age, sexual orientation and/or religion or belief, building on and developing the models of the existing duties. We are therefore seeking views on the various elements of the design of the duty and how together they will achieve the right balance between costs and benefits.
- 5.8 The initial Regulatory Impact Assessment which accompanies this consultation document sets out our initial assessment of the costs and benefits associated with the various options. This assessment is predominantly based on such costs and benefits information as is available for the existing public sector duties, which will be supplemented by the findings of this consultation exercise and independent research being taken forward during the consultation period<sup>41</sup>.

## Outline

- 5.9 This chapter is in 5 sections:
- A. The current duties;
  - B. A single equality duty;

<sup>41</sup> Communities and Local Government is co-sponsoring Schneider Ross to conduct independent research into the effectiveness of the race equality duty and the experiences of public authorities in planning for and implementing the disability and gender equality duties.

- C. Extending coverage of the duty across all the protected grounds;
- D. Implementation of a public sector duty;
- E. Public sector procurement.

## Summary of proposals

5.10 Subject to the views expressed in response to this consultation, we propose to:

- (a) replace the race, disability and gender equality duties with a single duty on public authorities to promote race, disability and gender equality (paragraphs 5.21 to 5.24);
- (b) provide a clear statement of the purpose of a single public sector duty which public authorities should use as a foundation for taking action to promote equality and good relations (paragraphs 5.28 to 5.30);
- (c) require public authorities to identify priority race, disability and gender equality objectives and take proportionate action towards their achievement, and to review them at least every 3 years (paragraphs 5.39 to 5.40);
- (d) consider whether it would be helpful for strategic equality outcomes to be set by the appropriate national Government (paragraph 5.41);
- (e) support effective performance of a single public sector equality duty by requiring proportionate action towards the achievement of priority equality objectives, using four key principles of consultation and involvement; use of evidence; transparency; and capability (paragraph 5.42 to 5.46);
- (f) consider whether the proposed single public sector equality duty should apply to all public authorities or, if not, how it should be targeted (paragraphs 5.47 to 5.56);
- (g) consider whether a single public sector equality duty should be extended to cover age, sexual orientation, and/or religion or belief (paragraphs 5.57 to 5.72);

- (h) consider over what timescale a single public sector duty and any extensions to it should be introduced, and whether public authorities should be given the option to implement any new approach in advance of its becoming a legal requirement (paragraphs 5.73 to 5.74);
- (i) consider whether there should be a single enforcement mechanism for the proposed single equality duty (paragraphs 5.78 to 5.83);
- (j) consider what the role of the public service inspectorates should be in assessing compliance with public sector equality duties (paragraphs 5.84 to 5.90);
- (k) consider what issues should be included in practical guidance on how public sector procurement can be used to achieve equality outcomes in the delivery of public services by the private sector (paragraphs 5.91 to 5.100).

## **A. The current public sector duties**

### **The race equality duty**

5.11 The first far-reaching public sector equality duty<sup>42</sup>, in relation to race equality, was introduced in 2002 following the Macpherson Report into the racist murder of Stephen Lawrence. It reflected concern that more effective tools were needed to tackle the institutional racism<sup>43</sup> which the report identified. The race equality duty imposes a general duty on an extensive list of public bodies, requiring them to have “due regard” to:

- the elimination of unlawful racial discrimination;

<sup>42</sup> Additional equality duties apply to the Welsh Assembly and the Greater London Authority. The Government of Wales Act 1998 places a duty on the Welsh Assembly to have “due regard to the principle that there should be equality of opportunity for all people” in the conduct of its business and exercise of its functions. The Greater London Authority Act 1999 requires the Mayor and Assembly, as well as other specified London authorities, to have due regard to the need to promote equality of opportunity for all persons irrespective of their race, sex, disability, age, sexual orientation or religion, to eliminate unlawful discrimination and to promote good relations between persons of different racial groups, religious beliefs and sexual orientation. The Scotland Act 1998 enables the Scottish Parliament to impose duties on any office-holder in the Scottish Administration or any Scottish public authority subject to its control to make arrangements to ensure that their functions are carried out with due regard to the need to meet the equal opportunity requirements. Such duties have been placed on local government and education bodies. None of these duties have enforcement procedures apart from judicial review.

<sup>43</sup> Defined in the report as “the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin”, which “can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantages minority ethnic people.”

- the promotion of equality of opportunity and good relations between people of different racial groups.

- 5.12 Specific duties were introduced in secondary legislation on some, mainly larger, public authorities to help them meet the general duty. These impose an extensive range of detailed requirements, for example to produce a race equality scheme and to monitor the ethnicity of employees. The general and specific duties are supported by statutory codes of practice and other guidance produced by the Commission for Racial Equality.
- 5.13 The race equality duty was widely welcomed on its introduction and there is encouraging evidence that, to an extent, it has had a positive influence on public authorities' practices<sup>44</sup>. For example, the duty appears to have had some positive effect on public sector employers in compelling them to pay greater attention to ensuring fair treatment of all their employees<sup>45</sup>.
- 5.14 However, there is also evidence that the success of the duty in achieving real change in our society has been more limited than had been hoped for. We agree with the concerns highlighted by the final report of the Equalities Review that the general duty is too weak in the extent to which it requires action to be taken, and too unspecific about the outcomes it seeks to achieve. In addition, the specific duties (in particular the requirements for race equality schemes) may be focused too much on bureaucratic process rather than on delivering tangible equality outcomes for service users and employees<sup>46</sup>.
- 5.15 These difficulties are exacerbated by having the general and specific duties which apply to different lists of public authorities. It is possible for compliance with the duty to be more formal than actual. There have also been many comments that the arrangements for monitoring progress and assessing and enforcing compliance with the duty need to be improved (our proposals for promoting better compliance with public sector equality duties are set out later in this chapter).

<sup>44</sup> "Towards Racial Equality – a survey of compliance with the duty", Schneider Ross & Commission for Racial Equality, July 2003 and "The Journey to Racial Equality – Delivering improved services to local communities", Audit Commission, January 2004.

<sup>45</sup> Equalities Review Interim Report for Consultation, March 2006.

<sup>46</sup> Fairness and Freedom: the final report of the Equalities Review, February 2007.

## The disability and gender equality duties

- 5.16 The disability equality duty came into force in December 2006 and the gender equality duty came into force in April 2007. These newer duties were designed to reflect experience with the race equality duty by having a greater focus on the equality outcomes to be achieved and being less prescriptive about the processes to be followed.
- 5.17 The disability and gender equality duties apply to all public authorities<sup>47</sup> and, like the race equality duty, are supported by specific duties placed on listed public authorities. The specific duties include requirements to:
- publish equality schemes setting out the actions public authorities will take to fulfil their general duties;
  - report on progress; and
  - take the actions specified in the action plan within the lifetime of the scheme.
- 5.18 Under the gender equality duty, public authorities are required to identify gender equality objectives and to consider whether one or more of these objectives should address the causes of any gender pay gap<sup>48</sup>.
- 5.19 Under the disability equality duty, public authorities have a specific duty to involve disabled people in the development and implementation of their disability equality schemes. In addition, the specific duties explicitly recognise that certain Secretaries of State have significant influence over areas of the public sector of particular importance to disabled people and that the way policy oversight is exercised can have a major impact on the way public authorities within the sector implement the disability equality duty. This is recognised by the requirement on certain named Secretaries of State to report periodically on progress across the sector.
- 5.20 The practical operation of these newer duties has of course not yet been fully tested in practice, but we consider they will assist public authorities in delivering better public services and lead to improved outcomes for individuals. We will continue to monitor their impact and effectiveness, and seek to learn lessons we can apply in developing our proposals for a single public sector duty, in considering whether

<sup>47</sup>The duties do not apply to some specified public authorities for reasons related to Parliamentary sovereignty, national security and the constitutional independence of the judiciary.

<sup>48</sup>The gender equality specific duties in Scotland also require listed public authorities to publish an equal pay statement and to review and report on that statement every three years. Scottish Ministers are also subject to a duty to publish reports every three years which provide an overview of progress in priority areas towards achieving equality of opportunity between men and women.

to extend the duty beyond the current grounds and, if so, over what timescale.

## **B. A single equality duty**

### **The case for a single public sector equality duty**

- 5.21 The race, disability and gender equality duties each have slightly different features, together placing a range of requirements on public authorities. In addition, each duty operates on a different three-yearly cycle<sup>49</sup>.
- 5.22 As a result of this, there is strong support among public authorities for the public sector equality duties to be brought together into a single, streamlined approach. This support was evidenced in the recent gender equality duty consultation: some stakeholders argued that a single equality duty or generic duties covering all the groups protected by discrimination law would help public authorities to respond to the requirements more efficiently. A significant number of public authorities are already operating single equality schemes (see paragraph 5.55).
- 5.23 We consider that the existing duties could be brought together to provide a single, effective lever for addressing discrimination and disadvantage. A single public sector equality duty would be simpler and more practical for public authorities to implement. We therefore propose to replace the different duties on race, disability and gender equality with a single duty on public authorities.
- 5.24 As well as enabling public authorities to address their equality responsibilities more efficiently through a single mechanism, a single equality duty would make it easier to address the needs of groups facing multiple discrimination. The current duties focus on the needs related to individual protected grounds rather than encouraging action to address the particular disadvantage experienced by groups such as women from particular minority ethnic communities<sup>50</sup>.

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

<sup>49</sup>The race equality specific duties came into effect in May 2002, the disability equality specific duties in December 2006 and the gender equality specific duties in April 2007. The requirements for three-yearly reviews of equality schemes do, however, allow reviews to be conducted within a shorter period to give public authorities flexibility to produce a single equality scheme in future years if they wish.

<sup>50</sup>See, for example, the Equal Opportunities Commission's investigation on Bangladeshi, Pakistani and Black Caribbean women and work in England, which found that women from these groups experience higher risk of unemployment, lower pay and fewer prospects of promotion. "Moving on Up? Final Report", Equal Opportunities Commission, March 2007.

## Promoting equality and good relations – improving the effectiveness of a single public sector duty

- 5.25 Public authorities are uniquely placed to make a difference to the life chances of people from disadvantaged groups by ensuring they have access to appropriate services in key areas such as education, employment, housing and health. In addition, many public authorities are major employers – the NHS, for example, is the world’s third largest employer – so their employment policies can have a significant effect on participation in and experience of the labour market. Public sector equality duties therefore have the potential to have a significant positive impact on reducing the disadvantage faced by some groups in our society.
- 5.26 As discussed above, integrating the existing public sector equality duties will generate benefits such as efficiency gains and the ability to better address multiple discrimination and disadvantage. However, introducing a single equality duty also provides the opportunity to look again at the requirements of the existing equality duties and consider whether there is scope to maximise their effectiveness in tackling discrimination and disadvantage. Public authorities and stakeholders have welcomed the greater emphasis placed by the newer disability and gender equality duties on the achievement of equality outcomes, and we want to build on this in designing a new single duty.
- 5.27 An effective duty could have a significant impact in promoting economic and social inclusion and a more equal and cohesive society. We want the single equality duty to:
- make it as clear as possible to public authorities what they should be trying to achieve for groups experiencing discrimination and disadvantage;
  - retain particular benefits arising from the current duties;
  - provide confidence that a single duty will continue to meet the particular needs of those who benefit from the current separate duties;
  - help public authorities to focus their activities under the duty on areas which will make a real difference to their employees and service users;
  - build on the good relations element in the race equality duty and the positive attitudes element in the disability equality duty to make clearer the links between promoting equality and promoting good relations between different groups in society.

## Purpose of a single equality duty

5.28 If public authorities do not understand what promoting equality of opportunity actually means in practice, this reduces the effectiveness of the equality duties in achieving meaningful outcomes for disadvantaged groups. We therefore want a clearer articulation of the purpose of a single public sector equality duty, setting out clearly the practical aspects of promoting equality irrespective of race, gender or disability. In developing our proposals, we have had particular regard to the work by Sarah Spencer and Sandra Fredman on this subject<sup>51</sup> and the general duty of the Commission for Equality and Human Rights<sup>52</sup>.

5.29 We have adapted the four “dimensions of equality” as identified by Spencer and Fredman to a proposed statement of purpose for a single public sector equality duty. This statement would guide public authorities in understanding what they should be trying to achieve through the action they take under the duty:

- Addressing disadvantage – taking steps to counter the effects of disadvantage experienced by groups protected by discrimination law, so as to place people on an equal footing with others.
- Promoting respect for the equal worth of different groups, and fostering good relations within and between groups – taking steps to treat people with dignity and respect and to promote understanding of diversity and mutual respect between groups, which is a pre-requisite for strong, cohesive communities.
- Meeting different needs while promoting shared values– taking steps to meet the particular needs of different groups, while at the same time delivering functions in ways which emphasise shared values rather than difference and which provide opportunities for sustained interactions within and between groups.
- Promoting equal participation – taking steps to involve excluded or under-represented groups in employment and decision-making structures and processes and to promote equal citizenship.

<sup>51</sup> “Delivering Equality – towards an outcome-focussed positive duty”, Sandra Fredman and Sarah Spencer, June 2006.

<sup>52</sup> The general duty of the Commission for Equality and Human Rights, set out in section 3 of the Equality Act 2006, is to encourage and support the development 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 groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

5.30 It needs to be remembered that, in deciding what action to take under public sector equality duties to benefit a particular disadvantaged group in the community, public authorities are limited by what is permitted by discrimination law. This means that they may only depart from the principle of equal treatment where this is allowed by exceptions, such as positive action and more favourable treatment of disabled people which is permitted by disability discrimination law. Promoting equality is not about favouring one group over another; rather the opposite. Clear, practical guidance will be needed to ensure public authorities understand the interaction between the duty and discrimination law, and how together they can help to achieve fairer outcomes and better services. This is discussed in more detail below.

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

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

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

## **A strategic equality duty**

5.31 The proposed statement of purpose of a single duty set out above should help public authorities to consider important aspects of equality and good relations when deciding what they need to do to comply with a single equality duty. However, we would like to consider whether the duty would be more effective in tackling the issues which have a major impact on people’s life chances if it required public authorities to focus on taking action in a limited number of priority areas. Such a model builds on one of the features of the recently introduced gender equality duty, which requires public authorities to set out gender equality objectives and the action they will take to fulfil them.

5.32 This model contrasts with the general approach of the existing duties which requires public authorities to have “due regard” to the need to promote equality. That approach leaves a great deal of flexibility about how public authorities weigh equality against other responsibilities and demands on their resources. We are clear that public authorities need to balance the resources they expend on promoting equality

within the overall demands placed upon them; they may not have the resources to tackle every area where action to address discrimination and disadvantage is needed. However, requiring public authorities to identify evidence-based priority equality objectives to work towards could arguably enable a firmer requirement to be placed on public authorities to take action towards the achievement of their objectives.

5.33 We therefore propose to develop an approach in the legislation which places on public authorities a clear requirement to identify priority race, disability and gender equality objectives and take proportionate action towards their achievement. We discuss what we mean by “proportionate” below.

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

## A proportionate duty

5.34 Proportionality means that action taken by a public authority would need to be proportionate to the size, nature and impact of the inequality identified and to take into account other competing considerations. Public authorities would be able to respond to the duty in ways which recognise their particular circumstances in terms of:

- the nature of the functions they perform,
- their size and resources,
- national and local priorities, and
- the composition and needs of their local community, service users, and workforce.

5.35 We want to make it very clear: what is proportionate for a small public authority such as a school will therefore differ hugely from what is proportionate for a large public authority such as a government department. But for all, the emphasis is on outcomes. The duty is designed to help all public authorities to do what they do better, not stop them operating effectively or weigh them down with bureaucracy. The duty should not lead any public authority to feel it needs to take any action which might be disproportionate to the benefits the action would deliver.

5.36 For example, a school might identify three actions to:

- narrow achievement gaps by addressing underachievement by pupils from particular groups;
- make sure that anti-bullying strategies protect pupils who may be bullied because of a particular characteristic; and
- encourage parents to be involved in their children’s education, in particular parents from groups who do not normally attend parents’ evenings (e.g. often fathers).

5.37 These are all actions which schools are highly likely to want to undertake in any event to improve education for their pupils. Making them part of a strategic and proportionate approach to promoting equality means that the school would address the issues in a systematic way, e.g. by involving and consulting, and using guidance from the education authority to help work out what is needed.

5.38 By contrast, the Department of Health’s single equality scheme – which might provide a model for a future proportionate approach by that Department – takes account of the fact that the Department has responsibility for the National Health Service, which is Europe’s largest employer. It sets out in detail the Department’s own goals, and the issues for each group, such as men and women, different ethnic groups, different groups of disabled people and so on. It sets out a series of actions. The Department aims, through its approach, to achieve best practice and to develop and implement health policies and programmes that match the needs of the different communities the Department and the bodies for which it is responsible serves. As a national body, responsible for a key public service at a local level, and as a major employer, what is proportionate for the Department is very different from what would be proportionate for the school.

## Setting priority equality objectives

5.39 If this model is adopted, public authorities will need to decide on their priority equality objectives in the context of local and national priorities. Local priorities are driven by the particular composition and needs of local communities and the workforce. National priorities could be set through mechanisms such as:

- the national performance management framework (which articulates both the UK Government’s Public Service Agreements and departmental strategic objectives, and which also embeds equality as one of the key elements in the framework);

- priorities identified by the Commission for Equality and Human Rights, and
- (for public authorities in Scotland) the Scottish Executive's own national objectives.

5.40 We consider that priority equality objectives will need to be reviewed at least every three years, to enable them to be updated to reflect progress and changing circumstances. A three-year review period would fit with the general planning and resource cycle used by the public sector.

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

## Strategic equality outcomes

5.41 The final report of the Equalities Review proposed an Equality Scorecard to agree priorities, set targets and evaluate progress towards equality. This approach could be used by the UK or Scottish Government to set a framework of national strategic equality outcomes for public authorities to work towards, which could be reflected in the national performance management framework or elsewhere. Public authorities may find it helpful to have a clear statement of strategic equality outcomes which they should take into account, along with other national and local priorities, when deciding what priority equality objectives to pursue under a single equality duty. Such a statement could perhaps be made through a Direction from a relevant UK Government or Scottish Minister, as national priority outcomes could change over time.

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

## Ensuring effective performance

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

- 5.43 However, rather than prescribing exactly what processes public authorities should adopt, we would like to consider whether public authorities should be given flexibility to respond to the duty in ways which are appropriate for their particular functions and circumstances. Such an approach could focus on the key principles which underpin the action needed to ensure effective performance of the duty, applied proportionately. It would mean that public authorities would have more flexibility to adopt processes which will deliver their priority equality objectives best in their particular circumstances, rather than concentrating their efforts on producing detailed information and documentation prescribed by the law.
- 5.44 We consider that the four key principles which underpin effective performance of public sector equality duties are:
- Consultation and involvement. Involving and taking account of the views of employees, service users and their representatives and other stakeholders, particularly from those disadvantaged groups for whom the duty is designed to promote equality, is essential in identifying the priority equality objectives and developing plans for action to be taken.
  - Use of evidence. It is necessary to gather, analyse, consider and make use of a range of information and data in order to understand where discrimination and disadvantage are occurring, to establish the priority equality objectives, to decide what action would be effective in achieving them and to monitor progress towards their achievement.
  - Transparency. Public authorities should ensure that their employees and service users have ready access to information about how they are going to respond or are responding to the duty. This requirement could be met by publishing an equality scheme and progress reports similar to those required under the current duties, or by other means such as in business plans, school development plans and annual reports. However, those affected by the business of the public authority should have clear information about the priority equality objectives which have been set, how they were determined, the action planned to achieve the objectives and the progress made. Transparency will enable effective challenge by local communities where a public authority is not effectively meeting the duty.
  - Capability. It is important to ensure that staff understand their responsibilities under the duty and are trained in the skills needed to effectively discharge the duty.

- 5.45 Our proposed approach would therefore mean that the law would no longer specifically require, for example, employment monitoring of different racial groups, but would instead set out the key principles which support effective performance of a single equality duty, and require these to be applied proportionately. This would give public authorities greater autonomy in determining their priority equality objectives and how they will be achieved, by reference to their particular functions and the communities they serve, while ensuring that the duty is performed in an inclusive, evidence-based and transparent way.
- 5.46 Such an approach would need to be supported by practical guidance from the Commission for Equality and Human Rights giving clear information about the methods and tools different types of public authorities would be expected to use to respond to the duty, the types of processes they might adopt and what proportionality means in practice.

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

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

## Which public authorities should the duty apply to?

- 5.47 We are considering how any legislation on a single public sector duty should clarify which public authorities are subject to the duty<sup>53</sup>. Public authorities are numerous and varied organisations. They include many very large policy making and service delivery bodies such as

<sup>53</sup>The Joint Committee on Human Rights has recently published a report on “The meaning of ‘public authority’ under the Human Rights Act” <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/77/77.pdf>. The Government recognises that this issue is an important one to some of the most vulnerable members of our society. The Secretary of State for Constitutional Affairs intervened to clarify this issue in a case which was heard by the House of Lords on 30 April – 2 May 2007. This is beyond the scope of this consultation document as this work is being taken forward separately by the Ministry of Justice. Although existing discrimination legislation has used similar wording to the Human Rights Act to define public authorities for the purposes of the gender and disability equality duties and the public function provisions, the single Equality Act is not tied to this approach and could adopt a different approach if considered appropriate.

government departments and local authorities, the armed forces, strategic health authorities, universities and non-departmental public bodies of many kinds; but they also include many much smaller bodies with very specific remits, such as museums. The largest group of public bodies in this category is individual schools, some of which are very small indeed.

- 5.48 The *general race equality duty* applies only to listed public authorities, while the *general disability and gender equality duties* apply to all public authorities<sup>54</sup>. The specific duties under all three current duties apply only to certain listed public authorities. Different lists of public authorities are therefore covered by different requirements.
- 5.49 Under a single public sector equality duty based on the current model – of general and specific duties – it may be possible to address this by developing a single list of public authorities to which the duties applied.
- 5.50 Alternatively, using the proportionate approach outlined above might avoid the need for any list, by applying the duty and principles to all public authorities. This would have the advantage of simplicity. However, it could also lead to some uncertainty about which bodies were subject to the duty, which we want to avoid. In particular, there would need to be clarity about whether private bodies carrying out public services on behalf of a public authority are covered.
- 5.51 In addition, we would need to ensure that applying the proposed new model to **all** public authorities did not place a disproportionate new burden on the public sector. This is particularly the case with smaller public authorities which are not currently subject to specific duties, even if they are only asked to do what is proportionate in implementing a single duty.
- 5.52 We believe that streamlining the current equality duties and moving from specific duties prescribing detailed processes to key principles would result in an overall saving in the medium term, but we have nonetheless considered alternative approaches.
- 5.53 For example, we have considered targeting specified public authorities operating in particular sectors such as health or education. However, if we took this approach, we would want to be clear that excluding other sectors would not undermine the impact of the duty on tackling disadvantage and improving people’s life chances. This would be a particular issue where a number of sectors worked closely together to deliver services.

<sup>54</sup>The duties do not apply to some specified public authorities for reasons related to Parliamentary sovereignty, national security and the constitutional independence of the judiciary.

- 5.54 We have also considered applying the duty only to central government bodies in the expectation that they would pass the duties placed on them down to their service delivery bodies by setting equality targets and performance standards. However, such an approach would conflict with the Government's approach (which is also reflected in the approach in Scotland) to devolve service delivery in order to make it more responsive to local needs. An important feature of our proposed model – that public authorities should consult and involve their service users in the development and implementation of their priority equality objectives and be held to account for their performance by their local communities – would be lost.
- 5.55 Another option we have considered is to apply the duty only to public authorities employing a particular number of employees, or serving a particular number of customers. Such an approach would mean that smaller organisations, such as schools or small NHS trusts would not be covered by the requirements. However, we believe that small, local organisations such as these can have a profound impact on people's experiences and life chances so have an important role in addressing disadvantage.
- 5.56 We are keen to obtain views on how a single public sector equality duty could be effectively targeted to a specific group of public authorities, although we have indicated above, this approach brings with it a number of practical difficulties.

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

## C. Extending the coverage of the duty

- 5.57 We also wish to consider the case for extending the coverage of a single public sector duty to all the protected grounds of discrimination. This would mean requiring public authorities to identify whether there was a need for specific proportionate action to address priority objectives on age, sexual orientation and/or religion or belief equality objectives. Extending the duty to these additional areas could ensure that public authorities considered the full breadth of needs in their communities, while ensuring that any action was appropriate and relevant to the circumstances of the authority. It would allow flexibility in meeting these needs.
- 5.58 Some public authorities are already taking an integrated approach to the public sector duties by developing equality schemes covering all the groups protected by discrimination law but meeting the requirements of

the separate duties. This is particularly the case among local authorities in England and Wales which are following the approach of the Equality Standard for Local Government<sup>55</sup>, which has been adopted by 90 per cent of all local authorities and covers age, disability, gender, race, religion or belief and sexual orientation. For example:

- Middlesbrough Council is committed to providing and promoting equality for all its employees and the wider community it serves. To help achieve this, the Council has produced a “Diversity Policy” with the aim of removing discrimination and achieving equality of opportunity across all protected grounds.
- The Crown Prosecution Service saw the introduction of the disability and gender public sector duties as an opportunity to implement an integrated equality scheme covering all protected grounds. A single equality scheme was introduced in December 2006. The development of a single equality scheme provides a framework to integrate equality and diversity so that it becomes an integral part of how the organisation undertakes its day-to-day work. The Crown Prosecution Service believes that equality and diversity are fundamental to delivering fair prosecutions, achieving equitable employment practice and commanding the confidence of all the communities it serves.
- The Department of Health is working with 18 NHS Trusts to develop single equality schemes, integrating all the protected grounds. The learning derived will be used to provide case studies and tools to assist other NHS Trusts to incorporate practices which will enable them to better respond to the needs of their local communities within their core business.
- As part of its commitment to mainstreaming equality across the work of the Assembly Government, the Welsh Assembly Government plans to publish a single equality scheme and single equality action plan from April 2008.
- In Scotland, NHS Greater Glasgow and Clyde has published a single equality scheme which covers all protected grounds and which sets out its ongoing commitment to tackle health inequalities.

<sup>55</sup>The Equality Standard for Local Government was launched in 2001 and revised in 2007 to take account of recent changes to discrimination law. It is a voluntary framework and accreditation scheme owned by the Improvement and Development Agency (IDeA). It provides a framework for levels of achievement in delivering equality for employment and service delivery. It is a (voluntary) Best Value Performance Indicator; councils report what standard they have reached.

- 5.59 Extending the coverage of a single public sector equality duty to age, sexual orientation and/or religion or belief could be an effective way of addressing real needs. However, it is important to understand that a single public sector equality duty would not require the same level of action to be taken for all groups. Under the proposed new model, the priorities pursued by any public authority will depend on the particular circumstances of the authority, the needs of its employees and service users and national priorities. This means that action taken towards achieving equality outcomes will need to be proportionate to the size and function of a public authority, with a focus on the identified priority equality objectives, and will not therefore be aimed at guaranteeing equal outcomes for all groups.
- 5.60 When considering the merits of extending the public sector equality duties, it is important to consider any associated risks or unintended consequences so these can be taken into consideration when designing and implementing the proposed single duty. For example, a public authority dealing with a range of issues and competing interests may have more difficulty prioritising their objectives if they are trying to take account of a greater number of protected grounds. There is also a possibility that extending the duty could divert attention and resources from the existing equality duties (race, gender and disability).

## **Age**

- 5.61 Including age in a single duty raises particular considerations. On the one hand, it may be particularly significant because of the key role played by the public sector in ensuring the provision of health and social care services which can have a profound effect on quality of life for older people in particular. A formal requirement for public authorities to set priority equality objectives for people of different ages when developing and delivering services could be an effective means of addressing some of the concerns which have been expressed about the treatment of older people in health and social care services, which we discuss further in chapter 9. For example, it could lead to the provision of special training for staff caring for older people. It could also lead to greater consideration of the particular needs of vulnerable young adults.
- 5.62 On the other hand, it is recognised that many services are legitimately designed to differentiate between people of different ages as a way of meeting their needs. Chapter 9 sets out some of the areas in which differential treatment on grounds of age is beneficial or justifiable.

5.63 In particular, if we were to prohibit age discrimination outside the workplace, we would not extend age discrimination legislation to cover the treatment of children, because it is almost always appropriate to treat children of different ages in ways which meet their particular needs and stage of development. It is arguable that functions and services which are specifically provided for children and which would not therefore be covered by any prohibition on age discrimination, such as education in schools, should similarly not be covered by a public sector age equality duty. Indeed there is a risk of such a requirement distracting attention from the important task of promoting equality for disabled children, those of different races, and between boys and girls.

### **Sexual orientation**

- 5.64 The recent consultation on the Equality Act (Sexual Orientation) Regulations 2007 has revealed concerns that lesbian, gay and bisexual people continue to face barriers in accessing public services, ranging from difficulties in receiving appropriate health services to unequal protection from abuse and bullying in education and public housing. Despite official estimates that 5-7% of the population is lesbian, gay or bisexual, and Office for National Statistics data showing that over 30,000 people have registered civil partnerships across the UK, there is anecdotal evidence that some public authorities still plan on the assumption that they have no local lesbian, gay or bisexual population.
- 5.65 There is some evidence that prior experience of discrimination has led to wide-spread sensitivity among lesbian, gay and bisexual people about the monitoring of sexual orientation. For example, local surveys show that many lesbian, gay and bisexual people still hide their sexuality from public service providers – a survey in Brighton showed that 50% of gay men had not disclosed their sexual orientation to their GP.
- 5.66 Although the 2007 regulations now provide protection from discrimination, and public services are included in this, there is a difference between this, and a proactive duty to promote equality. If introduced, a duty which covers sexual orientation would ensure that any specific needs, such as specialised or appropriate sexual health services, would be built into the planning of services, if an authority decided that these were priorities.
- 5.67 However, it is important to dispel any misunderstanding about what an extension of the public sector equality duty to sexual orientation might mean. Any duty would only require action to be taken which is proportionate and towards the achievement of priority objectives, allowing different public authorities with different functions to

legitimately prioritise issues of real concern to employees and service users, and to address them in a balanced way which is proportionate in the circumstances. For example, it would not require public authorities to “promote homosexuality” or devalue the importance of marriage. It could, however, help a local authority to address a situation where there was widespread bullying of gay residents.

## **Religion or belief**

- 5.68 Including religion or belief (including non-religious values systems) in a single public sector equality duty could lead to public service provision which better meets the needs of particular groups. For example, women of some faiths may be more likely to take up some important preventative health services in a female-only environment, so extending the range of women’s clinics could be a priority equality objective. This could be of benefit to all women in a local area, many of whom prefer single-sex services.
- 5.69 Some concerns have been expressed that data on religion or belief is not currently widely available and, like data on sexual orientation, can raise sensitivities. This might make it difficult for public authorities to decide on priorities in this area, to determine what action to take and to monitor progress. There are also concerns that extending the coverage of a single public sector duty to religion or belief might lead to particular groups being given too strong a voice in determining how public services are designed and delivered, which could have a negative impact on public service provision generally and on community cohesion.
- 5.70 However, we consider that the structure we are proposing for a single duty should not lead to this result. Public authorities would need to involve their local community and use a range of information in deciding what issues need to be addressed, rather than relying only on routine monitoring. In addition, any different treatment to address disadvantage would be limited to what is permitted through exceptions provided for in the law such as positive action provisions.
- 5.71 The duty would only require action to be taken which is proportionate in the circumstances, so that different public authorities with different types of functions legitimately prioritise issues of real concern to their employees and service users and address them in a balanced way. The aim of the single equality duty we are proposing is to ensure that the needs of all groups covered by the duty are considered, and that proportionate action is taken towards the achievement of priority equality objectives.

5.72 Again, it is important to understand the limits of what any duty would require. If introduced, the duty would not be aimed at guaranteeing equal outcomes for all religious groups, nor at putting the needs of particular religious groups above the needs of the wider community. It would not, for example, require a local authority to ban displays of Christmas decorations or to mark festivals of other religions. This would clearly be absurd. Rather, the duty would require public authorities to consider the needs of their employees and service users and take action proportionate to the need identified, within what is permitted by discrimination law. Far from dividing communities, it could have a positive impact on cohesion. For example, it could mean that a local authority which identifies its population as containing large numbers of people from different religious traditions living in separate areas, with children attending separate schools, might give some of the resources available for voluntary sector projects to groups which bring children from different communities together.

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

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

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

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

## **D. Implementing a single equality duty**

### **Introducing the changes**

5.73 We will need to consider carefully the appropriate timing for the introduction of any new approach to public sector equality duties, and any extensions we decide to implement. In particular, we want to take into account the period of time which will have elapsed since the introduction of the disability and gender duties and experience of the operation of these newer duties, and learn as many lessons as possible<sup>56</sup>.

<sup>56</sup>Should we decide to set out specific duties in secondary legislation, we will consult on these separately.

5.74 Because public authorities are still adjusting to the three current duties operating together, it may be desirable to defer full implementation of any new approach at least until the first three-yearly review point following implementation of the gender equality duty. However, some public authorities – in particular those which are already taking an integrated approach to the equality duties and producing single equality schemes – may wish to have the option to adopt the new approach under a single equality duty earlier than this. This may mean that the current and new duties would need to run in parallel for a period, with public authorities having the opportunity to opt into the new duty before a specified date when the new requirements would apply to all and the current approach would no longer be available.

***Over what timescale do you think a single public sector duty and any extensions to it should be implemented to ensure we have learned as much as possible from the recently introduced duties on disability and gender?***

***Do you think public authorities should be given the option to implement any new approach in advance of it becoming a legal requirement, enabling those authorities who have already taken an integrated approach to build on existing work?***

## Guidance

5.75 There is general consensus on the need for clear, consistent and practical guidance to encourage and enable public authorities to meet their obligations under public sector duties, however they are structured. The Commission for Equality and Human Rights will be responsible for producing statutory Codes of Practice and non-statutory guidance on the public sector duties, working with other relevant agencies and in particular the Public Service Inspectorates. We anticipate that the Commission would wish to publicly consult on guidance on any new single public sector equality duty and to publish the guidance at least three months before the duty is due to be implemented. It will be subject to the approval of the Secretary of State.

5.76 We regard it as very important that guidance should be practically based, as clear as possible, as short as possible and tailored to different types of public authority and their functions. So, for instance, the guidance for schools would be very different from that for a health authority which would in turn be different from that for a government department or large national authority.

5.77 The specific content of the guidance will be a matter for the Commission for Equality and Human Rights, following consultation. We would expect the commission to seek the views of public authorities’ representative bodies and other agencies. The guidance will be subject to the approval of the Secretary of State. It is likely to cover (in an appropriate way to be of maximum assistance for the type of body to which it is issued):

- the ways in which different types and sizes of public authorities should use the four key principles to ensure they meet their obligations;
- how to determine priority equality objectives, having taken account of national and local priorities and evidence and considered and weighed the needs of different protected groups and the resources available;
- what types of actions are more and less likely to lead to the achievement of equality outcomes, so that public authorities can focus on what is effective;
- how to measure and report on progress;
- the tools available for public authorities to use to meet public sector duties: through balancing measures, including positive action to prevent or compensate for disadvantage and meet special needs; through the provision of services geared to the needs of their community; through procurement (see below), etc;
- related issues such as the need for leadership and culture change within the organisation.

## **Enforcement of a single public sector equality duty**

5.78 When the Commission for Equality and Human Rights becomes operational it will assume the role of the current equality Commissions to promote compliance with and enforce public sector equality duties. If a single equality duty is adopted, the Commission will play a key role in raising awareness of the duty and providing advice, guidance and support to public authorities. The Commission will also have some enforcement powers, which are intended for strategic use.

5.79 It is expected that the Commission will work in the first instance through informal contact with bodies which are not carrying out the duty adequately and seek improvement through providing advice and support. It is likely that formal enforcement action will only be

used where necessary when informal routes have been unsuccessful – though it is important that strong enforcement powers are available for use when needed. This has been the experience and practice of the existing Commissions.

- 5.80 The Commission for Equality and Human Rights will have a new power under the Equality Act 2006 to assess whether a public authority has complied with its general public sector duties for race, disability and gender. This will provide a more direct mechanism for enforcing the general duties, complementing the existing route of judicial review. Once the Commission has assessed a public authority, it will produce a report making recommendations to assist the authority in complying with the duty. This is intended to provide a flexible means for the Commission to work with public authorities to secure necessary improvement. While there are no specific sanctions to back up the recommendations, the Commission will be able to issue a compliance notice on the basis of an assessment, if it considers a body has failed to comply with its general duties.
- 5.81 The Commission for Equality and Human Rights will retain the powers available to the current equality Commissions to issue a compliance notice if it has sufficient evidence of a breach of the specific duties. An assessment is not required first, as is the case for enforcement of the general duties, and judicial review is not available as a means of enforcing the specific duties. This is because under the existing public sector duty model, the nature of the specific duties means that it is more straightforward to detect a breach of the specific duties (such as an equality scheme not having been published). Given the broader nature of the general duties, it is likely to be difficult in practice to find a breach of the general duty without a detailed assessment being carried out first.
- 5.82 A compliance notice requires the authority concerned to comply with the duty. It can be enforced through the courts if an authority fails to take adequate steps to comply. Compliance notices relating to general duties will be enforced through the High Court or Court of Session in Scotland whereas compliance notices for breaches of specific duties are enforced through the county court or Sheriff's court in Scotland. This is because it would be disproportionate to have all compliance notices enforced through the High Court, but the High Court is better placed to undertake the nuanced balancing judgement that is required in considering whether a public authority has given due regard to the general duty. The Commission for Equality and Human Rights will also have the power to enter into an agreement with a public authority in respect of a breach of the public sector duties in lieu of issuing a compliance notice.

5.83 The Commission for Equality and Human Rights’ powers to enforce the public sector duties were designed with regard to the structure of the existing public sector equality duties – a general duty to have due regard supported by more detailed specific duties. We are considering whether these enforcement powers will be appropriate and effective if the proposed model for a single public sector equality duty is adopted, which would remove the current distinction between general and specific duties. In particular, we would welcome views on whether there should be a single enforcement mechanism enabling the Commission to issue a compliance notice with or without an assessment, as appropriate in the circumstances, enforceable in the county court or Sheriff’s court in Scotland.

***Do you think there should be a single enforcement mechanism for the proposed single equality duty, enabling the Commission for Equality and Human Rights to issue a compliance notice with or without an assessment, as appropriate in the circumstances, enforceable in the county court or Sheriff’s court in Scotland?***

***If not, please give your reasons.***

## **Role of the public service inspectorates**

5.84 The public service inspectorates across England, Scotland and Wales have an important role to play in assessing compliance with the proposed single public sector equality duty and monitoring performance against equality objectives and outcomes. Although there is no specific statutory requirement on public service inspectorates to assess compliance with the public sector duties, the inspectorates are themselves subject to the duties, and this influences the way in which they carry out their inspection functions.

5.85 In practice, various public service inspectorates such as the Audit Commission, Audit Scotland, the Healthcare Commission and the Office for Standards in Education have taken on the role of assessing compliance as part of their wider responsibilities. Some inspectorates have also developed their own equality standards, some of which go beyond the requirements of the existing public sector equality duties, against which they assess the performance of the bodies they inspect. The extent to which they do this, however, depends on the role and circumstances of each different inspectorate.

5.86 For example, compliance with the race equality duty is one of the core standards against which the Healthcare Commission assesses the performance of NHS bodies. The Healthcare Commission has a Memorandum of Understanding and Information Sharing document

with the Commission for Racial Equality. Under this agreement, the Healthcare Commission can notify the Commission for Racial Equality when it has evidence of non-compliance with the race equality duty in the NHS. The Healthcare Commission and the Commission for Racial Equality can then agree on an appropriate course of action either to investigate the scale of the problem further or to secure compliance.

- 5.87 In August 2006 the Healthcare Commission conducted a web-based audit of NHS compliance with the race equality duty and found that 40% of Primary Care Trusts were not complying with the requirements of the duty. As a result, the Healthcare Commission is working with the NHS to improve performance on race equality.
- 5.88 It is expected that the Commission for Equality and Human Rights will forge close working relationships with the inspectorates, agreeing the roles and responsibilities of both parties through mechanisms such as Memoranda of Understanding and providing guidance and advice on how the duty affects the way in which they carry out inspections. For example, part of the role of the inspectorates could be to inform the Commission where there is cause for concern about an authority's response to the public duty. This would enable the Commission to consider the need to work with the authority or, as a last resort, to take enforcement action to secure compliance using the tools set out above. By working together in this way, the inspectorates and the Commission can ensure that action to support compliance with the duty is co-ordinated and focused on areas of concern, in order to avoid unnecessary burdens on public authorities, in line with the risk-based approach to inspection and enforcement recommended by the Hampton Review<sup>57</sup>.
- 5.89 The Equalities Review final report<sup>58</sup> suggests that there is a lack of clarity about the priority inspectorates should give to equality. It recommends that a single public sector duty should require public sector inspectorates to promote equality in their inspections of public bodies, and that large and persistent equality gaps should be the subject of special investigations by the relevant inspectorate. We have considered the case for placing a clearer statutory requirement on public service inspectorates for their compliance assessment responsibility in respect of the public duties. However, doing this would not be consistent with the move towards more targeted and risk-based assessment which is being taken forward in legislation following the Hampton Review. In addition, if the new model is adopted, the proposed new requirement that public authorities need to identify

<sup>57</sup> "Reducing Administrative Burdens: effective inspection and enforcement", March 2005, [http://www.hm-treasury.gov.uk/budget/budget\\_05/other\\_documents/bud\\_bud05\\_hampton.cfm](http://www.hm-treasury.gov.uk/budget/budget_05/other_documents/bud_bud05_hampton.cfm)

<sup>58</sup> Fairness and Freedom: The final report of the Equalities Review, February 2007.

priority equality objectives and take proportionate action towards their achievement by reference to the four principles will make it easier for inspectorates to monitor progress towards these objectives as part of their routine performance assessment.

- 5.90 What we want to avoid is duplication or any suggestion that the inspectorates' approach could lead to authorities spending more time proving how they are meeting the duty than actually producing real outcomes that make a difference to individuals' day to day experiences. For this reason, we would expect that, under a single equality duty, the information published by public authorities about how they are responding to the duty under the transparency principle should provide the information inspectorates will need to assess compliance with the duty and performance on equality.

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

## **E. Public sector procurement**

- 5.91 The current public sector duties apply in respect of the functions of a public authority. Some stakeholders have suggested that there is a need to clarify on the face of the legislation that the public sector equality duties apply to the procurement functions of public authorities. It has also been suggested that specific duties relating to procurement could be developed, to help public authorities to meet the equality duties in this area of their activities; this was a specific recommendation of the Equalities Review<sup>59</sup>.
- 5.92 Procurement is a function of public authorities. While the legislation on the public sector equality duties does not refer explicitly to procurement, the obligations under the general duties apply to a public authority's functions as a whole. This means that, in carrying out procurement, public authorities need to have due regard to the need to eliminate unlawful discrimination and promote equality as well as continuing to ensure compliance with the legal and policy framework for public sector procurement. There is in our judgement no need to clarify on the face of the legislation that the public sector equality duties apply to procurement.
- 5.93 Having specific duties relating to procurement would risk confusion about the weight which public authorities should give to procurement compared with their other functions. In addition, such an approach would be inconsistent with our proposed model of a single public

<sup>59</sup> Fairness and Freedom: The Final Report of the Equalities Review, February 2007.

sector equality duty which has key principles to underpin how the duty to identify priority equality objectives and take proportionate action towards their achievement can be discharged. The proposed model, covering all the groups protected by discrimination law and providing clarity about the purpose of the duty, would help public authorities to focus on how their public procurement functions are relevant to the achievement of their priority equality objectives. Detailed process-based specific duties are not consistent with this model. For these reasons, we have rejected the idea of specific duties relating to procurement.

- 5.94 It has also been suggested that contractors with a finding of a breach of discrimination law against them should be disqualified from tendering for public contracts. In Northern Ireland, provisions have been introduced which allow for disqualification of bidders who have failed to comply with a statutory requirement to monitor and make an annual return to the Equality Commission on the religious composition of their workforce. This requirement was designed to address the particular circumstances of Northern Ireland, and we are not proposing a similar monitoring requirement on employers under British discrimination law (see chapter 6). Mandatory disqualification is a blunt tool which risks biting on, for instance, one-time offenders who have put their house in order. However, the EU Procurement Directives already allow public authorities to disqualify a contractor from tendering for a contract if he or she has committed an act of grave misconduct in the course of his or her business or profession. Where supported by the facts, this could include a finding of a serious breach of discrimination law. This leaves the question of disqualification from the procurement process to the discretion of the public authority on a case by case basis, where objectively justified.
- 5.95 Nonetheless, business, equality interests and public sector bodies increasingly recognise that the way public authorities conduct procurement can contribute to their achievement of equality objectives under public sector equality duties. A number of public authorities are already taking account of equality issues in their procurement activities, including by:
- ensuring that contracted-out services are sensitive to the diverse needs of users; and
  - considering if there are barriers to the participation of businesses led by people from disadvantaged groups.

- 5.96 Public sector procurement is worth over £125 billion each year in the UK<sup>60</sup>. The contribution public sector procurement can make to advancing equality has been recognised in HM Treasury's Budget Report for 2005, as well as the 2006 report of the Women and Work Commission on closing the pay gap, and the final report of the Equalities Review, published in February 2007. We are keen to ensure that public authorities build equality considerations into their procurement processes, within the overarching legal and policy framework for public procurement, where this will contribute to the achievement of their equality objectives.
- 5.97 Equality considerations should, however, come into play only where relevant to the subject matter of the contract. They should be dealt with in a balanced way so that, for example, overly bureaucratic processes do not discourage smaller businesses from competing for public contracts. The principles of the procurement framework are outlined in Transforming government procurement<sup>61</sup>, which describes how public procurement should be based on delivering world class public services through open and fair competition, at good value for money for the taxpayer.
- 5.98 A number of public sector bodies have issued guidance on equality and procurement: the Office for Government Commerce published a guidance note Social issues in purchasing in February 2006, and guidance is also available from the existing Equality Commissions.
- 5.99 However, experience of the race equality duty suggests that, despite some good practice, some public authorities are unclear about the extent to which equality objectives can be pursued through procurement within European legal requirements, the Government's policy of achieving value for money and best value legislation. This suggests that public authorities need clearer, consistent and practical guidance on the legal and policy framework and the ways in which equality can be factored into the various stages of the procurement process, together with case studies and examples of good practice. The CBI supports the view that public procurement has the potential to achieve wider policy goals including equality, but that to do this public authorities need to ensure they have the necessary procurement and partnering skills to secure these outcomes. The CBI agrees that this can be achieved through the development of clear, consistent and practical guidance.

<sup>60</sup> Transforming government procurement, HMT, January 2007.

<sup>61</sup> Transforming government procurement, HMT, January 2007.

5.100 We therefore consider that:

- there is a need for straightforward, practical guidance for public authorities on procurement and public sector equality duties, agreed jointly between the Commission for Equality and Human Rights and Government. This should focus on what public authorities can do in practice, within the limits set by European procurement law and by value for money policy and best value legislation. It should help procurers to develop their expertise, for example in evaluating contractors' responses to equality requirements and in providing ongoing support and challenge throughout the duration of contracts to meet the service requirements, and should be disseminated widely; and
- further action is needed to encourage good practice, simplify processes and explore the scope to develop streamlined approaches and minimise burdens on the private sector and public authorities alike. These might include encouraging good practice networks and considering the development of standard equality conditions for use in public sector contracts. There are roles here for Government and other interested agencies, with the Commission for Equality and Human Rights in a key position to drive progress.

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

## Chapter 6: Promoting good equality practice in the private sector

### The business case for diversity

6.1 There is a clear business case for diversity, in the sense of recruiting a diverse and representative workforce that includes people with a variety of characteristics, and treating every one of those people fairly:

- Organisations with a diverse workforce are best placed to understand and respond to the needs of the widest possible customer base.
- They are also drawing on the talents of all within the community rather than restricting their recruitment because of preconceptions or prejudice.
- For such employers, good practice on diversity is part of becoming an “employer of choice” and of enhancing their standing with employees, potential employees and customers alike.

Businesses of all sizes and in a wide variety of sectors have found benefits in taking a positive view of complying with equality legislation, both as employers and in their day-to-day business activities. We believe that bringing together and simplifying the law in a single Equality Act will help all businesses to comply more easily and to take this positive approach.

### Summary of proposals

6.2 Subject to the views expressed in response to this consultation, we propose to:

- (a) develop a light touch “equality check tool” for employers to use and consider introducing a voluntary equality standard scheme for businesses, which could be an independently assessed accredited standard or a non-accredited good practice and compliance tool (paragraphs 6.7 to 6.10);
- (b) consider suggestions for ways in which good equality practice could be encouraged and embedded in the private sector, without introducing additional legislation specifically aimed at private sector businesses (paragraphs 6.11 to 6.12).

## Good equality practice in the private sector

6.3 Leading private sector employers recognise the business case as well as the moral argument, and have established equality statements and policies beyond the current requirements of discrimination law.

6.4 For example:

BT Group plc highlight in their recruitment material their commitment as an equal opportunities employer, which goes beyond legal requirements for instance in a commitment to take positive measures to attract applications from any under-represented minority group.

Barclays have an equality strategy founded on creating a virtuous circle of satisfied stakeholders. They believe that diversity makes good business sense whether you look at it from a “people” perspective (recruitment and development), a customer perspective (understanding and serving customers better), or a stakeholder perspective (as a key part of sustainability and corporate responsibility).

6.5 Many businesses now belong to one or more forums or networks related to equality and diversity. Membership may indicate a positive intention not just to comply with equality laws but also show an awareness of issues for particular groups; as well as assisting in promoting good practice (sometimes through an awards scheme); and can act as an endorsement or “quality mark” in relation to a particular equality issue. These networks include:

- Opportunity Now, which brings together members from the private, public and voluntary sectors to transform the workplace through the inclusiveness of women in the workforce;
- Race for Opportunity – a growing network of private and public sector organisations working to promote the business case for race diversity;
- The Employers’ Forum on Disability – which focuses on disability as it affects business, and aims to make it easier to recruit and retain disabled employees and to serve disabled customers;
- The Employers Forum on Age, which is an independent network of leading employers who recognise the value of an age diverse workforce; and
- Stonewall’s Diversity Champions programme – a good practice forum of employers delivering diversity in the workplace, focusing particularly on sexual orientation issues.

6.6 However, alongside the extensive examples of good equality practice in the private sector, there are also areas of poorer practice and organisations which have not yet recognised the business benefits.

## Tools to promote good practice

6.7 As discussed in chapter 3, the Women and Work Commission recommended that a new light touch tool be developed to enable employers to look across a range of issues that impact on the gender pay gap, for example, in advancing women to senior management positions. Where a problem is identified, the tool would then point the way to further investigation and action. The Commission envisaged that the proposed equality check tool could avoid the need to evaluate pay or other data for the business as a whole and allow targeted action appropriate to the size of the employer. The Government has identified a number of stakeholders with which to take this forward, including Social Enterprise London and the Small Business Service and good progress is being made.

6.8 We are also considering whether there is a case for introducing a voluntary equality standard scheme which would set out what businesses, as both employers and providers of goods and services, need to do to comply with discrimination law and achieve higher standards of good practice on equality and diversity. Such a standard scheme would build on the gender equality check tool discussed above, and take into account other accreditation schemes which cover equality and diversity issues (for example the Investors in People accreditation scheme). This might take one of two forms:

- as a standard against which businesses would be independently assessed and certified. Businesses would incur assessment costs, but once accredited could benefit from an enhanced reputation as an employer or service provider of choice, enjoy greater peace of mind and would be less likely to face a claim of discrimination. Accreditation might also be used as evidence of compliance with discrimination law when bidding for public sector contracts.
- as a non-accredited standard which could be used by businesses as a tool to ensure compliance with discrimination law and to encourage good practice on equality and diversity. This could include the option of self-assessment and provide links to further information and guidance. This would allow businesses to reassure themselves that they were complying with the law and pursuing good practice. They would avoid assessment costs, but would not enjoy any reputational benefits flowing from independent certification.

- 6.9 The self-assessment option could complement the generic, on-line employment law checklist which the Department of Trade and Industry is developing for the **www.businesslink.gov.uk** website, which is designed to enable employers to assess whether they are complying with key points of employment law, with links to no-nonsense guidance. An equality standard would cover equality issues in greater depth, extend beyond employment issues and cover good practice as well as compliance.
- 6.10 Both options would involve set-up costs, but these would be higher for an independently assessed scheme, though part of the cost might then be recovered from businesses seeking accreditation.

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

## Reporting on equality in the private sector

- 6.11 Some stakeholders have argued for a specific statutory requirement on employers to monitor and report on their equality practices. We disagree. Although there is a precedent in Northern Ireland where all employers with more than ten employees are required to monitor the religious composition of their workforce and make an annual return to the Equality Commission, this stems from the particular historical and political context of Northern Ireland and we do not consider that this type of approach would be the right solution for Britain. A reporting regime which could guarantee the necessary degree of accuracy would be bureaucratic, burdensome on employers and costly to run and enforce.
- 6.12 However, there may be other ways in which good equality practice could be encouraged and embedded in the private sector without imposing additional burdens. For example, the Companies Act 2006, one of the core objectives of which is to improve company reporting and transparency, provides for improved corporate reporting through enhancements to the existing annual business review, which is required of all companies other than those which qualify as small<sup>62</sup>. The Act specifies information which quoted companies must include in their review where necessary for an understanding of the company’s business. This includes information about the company’s employees and social/community issues.

<sup>62</sup>i.e. those meeting two of the following three conditions: a turnover of not more than £5.6m; a balance sheet of not more than £2.8m; not more than 50 employees.

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

## Private sector equality duties

- 6.13 Some stakeholders have called for positive duties to be placed on private sector organisations similar to the public sector equality duties described in chapter 5. While we believe that the private sector has a valuable role to play in advancing good equality practice, we do not believe that this approach is the right one. As with any specific reporting requirement, this could not be enforced without creating a significant regulatory burden. Such a burden would be likely to have a disproportionate impact on small and medium-sized businesses, risking resentment and mere formal compliance. Experience suggests that businesses deliver good practice most effectively when there is a clear link to business goals, and where they are persuaded of the benefits.
- 6.14 In any case, changes and improvements to the law, such as providing increased scope for positive action to address under-representation (see chapter 4), and giving further encouragement to public authorities to actively take account of equality issues in their procurement activities (see chapter 5), will help to embed good equality practice in the private sector. We believe that these measures, together with the voluntary initiatives already under way in business to promote good diversity practice and tackle obstacles to participation in the workforce, are the right approach.

## Procurement in the private sector

- 6.15 Some stakeholders have also suggested that explicit provisions should be introduced specifically prohibiting discrimination in private sector procurement. The argument in favour of this approach is of course that if discrimination is outlawed in the provision of goods, facilities and services, then it should also be prohibited when organisations are procuring goods and services.
- 6.16 However, it is not clear whether this is a real problem. Many private sector organisations already have good practices in place to promote supplier diversity. In the absence of clear evidence of discrimination in private sector procurement, we consider that legislating in this area is not justified and would risk creating an undue regulatory burden on business, which would be counter-productive.

## Chapter 7: Effective dispute resolution

### What we want to achieve through our approach

- 7.1 In chapter 1 of this consultation paper, we set out our approach to supporting those with responsibilities under the legislation to achieve compliance and to promoting good practice. We believe this, together with legislation that brings together and simplifies the law, will help to minimise disputes.
- 7.2 In an ideal world everybody would fully understand – and comply with – the law and no-one would ever need to bring a discrimination claim in the courts. Unfortunately this is not how the real world works. So in this chapter, we set out our approach to improving the ways disputes arising under discrimination legislation can be resolved, both to enable people to assert their rights more effectively but also to minimise the adverse impact litigation sometimes has on the individuals involved.
- 7.3 Where disputes arise, we believe that the focus should be on:
- Promoting the early resolution of disputes, including through Alternative Dispute Resolution.
  - Improving the accessibility, efficiency and effectiveness of procedures for resolving discrimination cases.
- 7.4 We have considered a wide range of options for improving the resolution of discrimination disputes which arise in the provision of goods, facilities and services, in both the private and public sectors, including premises, education and the exercise of public functions. Disputes which relate to employment and the workplace are now the subject of a separate consultation process (see paragraphs 7.6 to 7.12 below).

### Summary of proposals

- 7.5 In this chapter we seek views on the following issues and proposals:
- (a) how to encourage the use of Alternative Dispute Resolution to resolve discrimination disputes in the non-employment field, and how the role of Ombudsmen might be used more effectively to resolve discrimination disputes (paragraphs 7.13 to 7.19);
  - (b) how to provide for more efficient and effective handling of cases relating to the provision of goods, facilities, services, premises and the exercise of public functions, including by enhancing discrimination expertise in the courts (paragraphs 7.20 to 7.26);

- (c) whether the Additional Support Needs Tribunals in Scotland should have the power to hear disability discrimination school education cases, mirroring the situation in England and Wales (paragraph 7.27);
- (d) retention of the current approach on representative or class actions for discrimination cases in goods and services cases (paragraphs 7.28 to 7.30);
- (e) whether more needs to be done to improve the treatment of multiple discrimination claims when resolving disputes (paragraphs 7.31 to 7.34).

## Disputes in the workplace

- 7.6 When the Discrimination Law Review began in February 2005, discrimination claims heard in the employment tribunal – in other words, those that relate to the workplace – were part of its remit. In December 2006, the Department of Trade and Industry (DTI) announced a wide-ranging, independent review of all aspects of employment dispute resolution, led by Michael Gibbons (the Dispute Resolution Review). The review's remit covered the framework for settling disputes between employers and employees, including the 2004 Dispute Resolution Regulations, the role of employment tribunals and alternative methods of resolving disputes before they reach a tribunal. The review had three key objectives:
- raising productivity through early resolution of disputes and improved workplace relations;
  - ensuring access to justice for employees and employers; and
  - reducing the cost of resolving disputes for all parties, while maximising cost-effectiveness to Government.
- 7.7 It was clearly appropriate for the Dispute Resolution Review to take account of the work we had already done on discrimination disputes in the workplace, which included:
- measures to simplify the management of groups of similar claims brought in the employment tribunals; and
  - consideration of whether to enable employment tribunals to make recommendations about discriminatory policies and practices for the benefit not only of the claimant but also others who may be affected by the acts of discrimination proved in the case, with a view to helping organisations comply with the law and avoid future claims.

- 7.8 The Discrimination Law Review has therefore worked closely with the Dispute Resolution Review, feeding in both the evidence which has been presented to us by stakeholders and the work we had done in considering the options for improving the resolution of discrimination disputes in the employment field. The two reviews will continue to work closely together to ensure that, where relevant, the responses to both consultations are taken into account.
- 7.9 The report of the Dispute Resolution Review<sup>63</sup>, which was published in March 2007, made a number of recommendations which are relevant to discrimination disputes arising in the employment field. Around 25% of all claims presented to Employment Tribunals in 2005/06 were discrimination claims<sup>64</sup>.
- 7.10 Alongside the Review's report, the DTI published its own consultation paper, *Resolving disputes in the workplace*<sup>65</sup>. Views are being sought on a number of measures being considered to improve the resolution of employment disputes both within the workplace and where necessary, within the employment tribunals. The measures proposed are based on the evidence presented during the Review.
- 7.11 The key measures being considered by the Government, as outlined in the DTI's consultation paper, which have relevance for discrimination disputes are:
- the complete repeal of the statutory dispute resolution procedures set out in the 2004 Dispute Resolution Regulations, to be replaced with clear, simple and non-prescriptive guidance;
  - inviting employer and employee organisations and others to develop guidelines for using alternative dispute resolution and to promote its use to their members;
  - encouragement for all parties to follow good practice in resolving disputes, which could include penalties for those who make little or no attempt to resolve their dispute before an employment tribunal hearing;
  - providing a new advice service on dispute resolution, accessible by telephone and internet;

<sup>63</sup> A review of employment dispute resolution in Great Britain, Michael Gibbons, DTI March 2007.

<sup>64</sup> Employment Tribunals Service Annual Report and Accounts, 2005-06.

<sup>65</sup> Resolving disputes in the workplace – a consultation, Department of Trade and Industry, March 2007 (closing date for consultation responses 20 June 2007).

- encouraging earlier conciliation in appropriate cases and removing the fixed conciliation periods which place time limits on the Advice, Conciliation and Arbitration Service’s duty to conciliate employment tribunal claims;
- a range of measures to simplify the employment tribunal system, including:
  - simplifying employment tribunal forms;
  - considering unifying time limits and the grounds for extension;
  - improving procedure and encouraging more active case management;
  - simplifying management of multiple-claimant claims;
  - considering when chairs should sit alone in employment tribunals.

7.12 The proposals in this chapter therefore relate only to the resolution of non-employment discrimination cases, which are dealt with in the county and sheriff courts.

## Promoting early resolution of disputes

- 7.13 While our emphasis is on promoting compliance to prevent discrimination occurring, disputes will continue to arise. Dealing with disputes quickly and effectively can avoid the need for litigation and have benefits both for individuals whose rights have been breached and for organisations which have failed to meet their responsibilities. Taking a case to court can be time-consuming, costly and stressful.
- 7.14 There are a number of processes available designed to encourage and help parties to reach agreement on a dispute which can help to avoid the need for litigation. These are known collectively as Alternative Dispute Resolution. Alternative Dispute Resolution is not meant to replace courts but it can provide a quicker, cheaper and less stressful means of resolving disputes. The Government is committed to encouraging the use of Alternative Dispute Resolution in discrimination disputes and more broadly.
- 7.15 Alternative Dispute Resolution can be particularly useful in resolving discrimination cases because:
- Discrimination cases often involve sensitive issues, so it may be easier to express these in the less formal and less adversarial setting of an Alternative Dispute Resolution process.

- Some discrimination cases can be very complex, so the potential Alternative Dispute Resolution offers for saving time and expense is particularly important.
- Some discrimination cases are of modest monetary value but are pursued on a point of principle. Alternative Dispute Resolution may provide a more suitable arena for the offering of apologies or undertakings to make appropriate changes if this is actually more important than any compensation award.

- 7.16 Many organisations have internal complaints and grievance procedures which can provide an effective way of raising a range of problems, including discrimination complaints. While setting them up requires some initial investment of time and effort, this should be offset by later savings for businesses and public sector bodies which can resolve at least some discrimination complaints themselves.
- 7.17 Ombudsmen are independent ‘referees’ who look at complaints about public and private organisations. They are free to use, and their decisions are generally not binding on the claimant. Some Ombudsmen already make specific recommendations where it appears that discrimination has occurred, for example in relation to staff training. They may also recommend that the organisation in question seeks advice from the relevant equality Commission. We would like to explore whether there is scope to increase the role played by existing Ombudsmen in ensuring compliance with discrimination law.
- 7.18 Other forms of Alternative Dispute Resolution may be useful after a claim is formally commenced or as it proceeds through a court but before it reaches final hearing. There is a range of Alternative Dispute Resolution schemes available for non-employment disputes. A best practice toolkit has been developed by Her Majesty’s Courts Service so that county courts can refer court users with claims up to £50,000 to the National Mediation Helpline, which provides advice on mediation, as well as referral to a low-cost, time-limited mediation service. In addition, Her Majesty’s Courts Service is appointing a number of in-house mediators to provide a free mediation service for court users with small claims (less than £5,000).
- 7.19 The Commission for Equality and Human Rights will have a new power to provide a voluntary conciliation service for non-employment discrimination cases on all the protected grounds; this power is currently only available to the Disability Rights Commission.

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

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

## **Improving the handling of discrimination cases in the courts**

- 7.20 Some discrimination cases will inevitably proceed to litigation. Where this happens, we wish to ensure that cases are handled as efficiently and effectively as possible.
- 7.21 Complaints of discrimination in most non-employment cases are handled by county courts (sheriff courts in Scotland). There are also specialist tribunals dealing with allegations of discrimination in some areas of education.
- 7.22 There are currently very few claims of discrimination in the provision of goods, facilities and services. Concerns have been expressed by some stakeholders that the outcomes of these cases are unpredictable, partly as a result of many judges' relative unfamiliarity with discrimination law compared to employment tribunal chairs, who deal with discrimination cases in greater volumes. Employment tribunal chairs also receive additional training before being able to deal with discrimination cases, whereas judges do not routinely receive specialised training in discrimination law.
- 7.23 We are not attracted by proposals made by some stakeholders for allowing goods, facilities and services cases to be dealt with within the tribunal system, using the discrimination law experience of employment tribunal chairs and members. This would divert specialist resources from the employment tribunals and would create significant jurisdictional problems, for example where claims of discrimination in goods and services are combined with other claims for civil wrongs which would still have to be heard in the courts.
- 7.24 We are therefore considering how discrimination expertise could be enhanced in the county and sheriff courts. One possible approach would be to designate certain courts to hear all non-employment discrimination cases. Within those courts, a small number of judges could be provided with specialised training in discrimination law and would then be charged with hearing all discrimination cases. This would lead to the creation of centres of discrimination expertise, as

designated courts and judges built up their experience and expertise of dealing with discrimination cases. It would, however, be necessary to make arrangements to ensure that a reduction in the number of courts dealing with these cases did not restrict access to justice, e.g. by unreasonably increasing travelling distances.

- 7.25 We are also considering whether it would be beneficial to increase the use of expert assessors in discrimination cases. Assessors must currently be used to provide expertise on discrimination law in race discrimination cases unless both parties agree otherwise. In Scotland assessors can also be used in all other discrimination cases in the sheriff courts. In England and Wales, they may be used in sex discrimination cases, but there is no provision for their use in discrimination cases on the other protected grounds.

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

## Making the courts easier to use

- 7.26 Other more general changes being carried out by the Ministry of Justice should also assist in resolving discrimination cases, including:
- A comprehensive programme of work in England and Wales to make the court system easier to use and to ensure that its processes are clear, easy to understand and respected by the public<sup>66</sup>; and
  - A fundamental review of court fees<sup>67</sup>, on which a consultation was recently held. Key objectives of the review are to ensure that the system of exemptions and remissions adequately protects access to justice and that the structure of the fee system is fair to litigants, while meeting the Ministry of Justice's commitment to return to full cost recovery for the civil courts.

## Disability discrimination education cases in Scotland

- 7.27 Currently, claims regarding disability discrimination in education are heard by the Special Educational Needs and Disability Tribunals (SENDIST) in England, and in Wales by the Special Educational Needs Tribunal for Wales. In Scotland, these cases are heard by the sheriff courts. At the request of Scottish Ministers, the Government is considering whether disability discrimination education cases in Scotland should be transferred to the Additional Support Needs Tribunals for Scotland, thereby mirroring the situation in England and Wales, which is generally regarded as working well.

<sup>66</sup> Her Majesty's Court Service Business Strategy, February 2006.

<sup>67</sup> Civil Court Fees, Her Majesty's Court Service, March 2007.

***Do you think that the powers of the Additional Support Needs Tribunals for Scotland should be extended to include consideration of disability discrimination cases in education?***

## **Representative actions in goods and services cases**

- 7.28 We have considered the approach in other legal systems, where a body such as an equality commission or trade union may be empowered to bring a claim on behalf of a group of individuals – often known as a representative action. This can take one of two forms: action on behalf of a group of unnamed individuals who have some defining characteristic but are not identified (sometimes known as a class action), or action on behalf of a group of named individuals.
- 7.29 Some argue that representative actions brought by such bodies can provide a useful route for people to bring their cases to court when they are unwilling or unable to bring claims themselves. However, a number of stakeholders, including business, have expressed reservations about creating a further mechanism for litigation. Representative actions are often seen as a major factor in developing an undesirable ‘litigation culture’. Although they may assist those with legitimate claims, the system can also benefit those with spurious claims, who may not even have felt aggrieved until encouraged to join a representative action. Representative actions on behalf of a group of unnamed individuals are also particularly difficult to quantify, making it hard for an organisation to consider early settlement proposals which would keep legal costs down.
- 7.30 Having considered the arguments carefully, we are not persuaded that there is a good case for establishing this further mechanism.

## **Multiple discrimination**

- 7.31 Our discrimination law protects everyone in our society from unfair treatment on the basis of a number of different characteristics – their sex (including gender reassignment), race, disability, sexual orientation, age and religion or belief. People therefore belong to more than one protected group. If a person experiences discrimination, it may sometimes be hard to disentangle which of their protected characteristics is driving the less favourable treatment to which they have been subjected, or whether more than one protected characteristic was involved; they may have experienced multiple discrimination.

- 7.32 This was one reason for the establishment of the Commission for Equality and Human Rights: to provide an improved platform for addressing these issues of multiple discrimination. The Commission will bring together knowledge and experience in the equality field to overcome and challenge all types of discrimination and take a more joined up, effective approach to tackling different types of disadvantage. It will provide a single source of expertise and advice for people experiencing multiple discrimination.
- 7.33 Some academic commentators have raised concerns that the current legislative framework does not provide adequate protection for people who experience multiple discrimination, because the protection provided is on the basis of separate grounds. They argue that the current system does not provide adequate redress for those who face multiple discrimination. They propose, as one possible answer, that fully combined multiple claims should be permitted. However, this would significantly complicate the law and place additional burdens on business and the public sector.
- 7.34 We do not have any evidence that in practice people are losing or failing to bring cases because they involve more than one protected ground, and would therefore welcome information about instances of this happening. We will then consider whether there is a need to develop a proportionate approach to any practical problems identified.

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

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

## **PART 3 – MODERNISING THE LAW**

### **Introduction to Part 3 – The need for modernisation**

#### **Why we need to modernise the law**

- 1 As noted elsewhere, our discrimination law has developed over more than 40 years. When the first legislation was introduced, society was very different. Then, far fewer women worked, especially after marriage. When they did, they were largely confined to particular occupations and almost always paid much less than men, even for identical work. It was not uncommon for black people to be refused service in pubs. Many disabled people were written off as “unfit for work” or were confined to low-paid, low-responsibility jobs, and there was little recognition that the barriers they faced were created by society and should therefore where practicable be addressed by society. People who had retired were dismissed as being “old”, and life expectancy was shorter. Being a transsexual person was little understood and seen to be unacceptable. Views which were commonplace in 1965 would now be completely alien to many people not born then or whose attitudes have changed, for example, attitudes towards lesbians and gay men. We should celebrate how we have changed to reach today’s fairer society.
- 2 Over the last 4 decades, discrimination law has adapted to new circumstances and changes in attitudes. It is right that it should keep pace with and reflect the changes in our society. Sometimes the law has led the way, and helped to drive cultural change. That was especially true of the original Race Relations and Sex Discrimination Acts.
- 3 Society will continue to change and attitudes to evolve. It is therefore important that we keep under review whether there may be a need for new legal protection for groups which experience disadvantage, and whether we want to characterise any different treatment which is identified as discrimination or as legitimate differentiation. Sometimes we may want to remove existing protections, on the ground that they are no longer necessary.

#### **Where we are now**

- 4 The grounds – the personal characteristics which form the basis for protection from discrimination – currently protected in one way or another under British discrimination law are:

- age,
- disability,
- race (including ethnic and national origin, colour and nationality),
- religion or belief (including lack of religion or belief),
- sex (including gender reassignment, married person/civil partner status, pregnancy and maternity), and
- sexual orientation.

5 The protections provided for the different grounds of discrimination vary. Protection from discrimination in the area of employment and vocational training is provided for all the grounds listed above. Protection from discrimination in the supply of goods, facilities and services, premises, education in schools, and other functions of public authorities does not fully extend to all the grounds – specifically, the grounds of age, gender reassignment, pregnancy and maternity.

6 A general approach of harmonising protection for all groups would be attractive in terms of simplification and consistency, because it would give greater clarity to individuals and organisations about their rights and responsibilities. However, we believe that the benefits of harmonisation need to be balanced against the burdens of additional regulation on employers and service providers. Legislation extending protection to new areas should be used only where there is a real case for doing so – either because it is required by European law or because it is an appropriate and proportionate means of addressing real inequalities.

7 We also want to avoid negative consequences, whether deliberate or unintentional, or the prohibition of perfectly legitimate differentiation. Any changes must pass a common sense test, and address real problems, as well as avoiding disproportionate additional regulatory burdens.

## What we want your views on

- 8 In Part 3 of this paper, we want to know your views on proposals to:
- simplify the definition of disability;

- continue to provide protections for people on grounds of their family status mainly through employment rights legislation and specific legislation on carers;
- consider whether specific protection for married people and civil partners is still needed;
- retain a non-legislative approach on issues around genetic predisposition;
- consider the case for prohibiting age discrimination for adults in areas outside employment;
- strengthen the protection on grounds of gender reassignment in the supply of goods, facilities, services and premises and the exercise of public functions;
- strengthen the protection on grounds of pregnancy and maternity in the supply of goods, facilities, services and premises and the exercise of public functions;
- strengthen and clarify prohibitions on discrimination by private clubs;
- improve access to and use of let residential premises for disabled people; and
- consider the case for extending protection from harassment outside the employment area for the different grounds of discrimination.

## Chapter 8 – The grounds of discrimination

### Why we need to review who is protected from discrimination

8.1 To ensure that the law remains a dynamic reflection of our society's attitudes, we need to consider the case for updating the grounds or personal characteristics protected under discrimination law. However, we will only change the law if there is evidence that to do so would be a proportionate response to a real problem experienced by individuals who share a particular characteristic. Before deciding to legislate, we will consider any additional regulatory burden that would result from extending the law.

### Summary of proposals

- 8.2 Subject to the views expressed in response to this consultation, we propose to:
- (a) simplify how the definition of disability operates in relation to “normal day-to-day activities” by removing the list of capacities (paragraphs 8.3 to 8.6);
  - (b) continue to deal with issues relating to parents and carers through targeted provisions and specific measures rather than a broad anti-discrimination provision (paragraphs 8.7 to 8.20);
  - (c) consider whether specific protection for married people and civil partners is still needed in the absence of a “marriage bar” in employment (paragraphs 8.21 to 8.22);
  - (d) continue with the current non-legislative approach to genetic predisposition (paragraphs 8.23 to 8.31).

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

8.3 The Disability Discrimination Act protects more than 10 million people with a very wide range of impairments – about 1 in 6 of the population. In general, it protects anyone who has a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, and people who have had a disability in the past.

- 8.4 We consider that disability discrimination law should continue to protect from discrimination only those people who are disabled in the generally recognised sense of that term, because they have a long-term or permanent impairment. We are concerned that any substantial changes to the definition of disability would broaden coverage of disability discrimination law too widely.
- 8.5 However, we intend to simplify how the definition of disability operates in relation to “normal day-to-day activities”. The Disability Discrimination Act does not define normal day-to-day activities, but it requires that they must affect one or more of a number of factors including mobility, manual dexterity, speech, hearing and eyesight, which are referred to in Statutory Guidance<sup>68</sup> as “capacities” (often incorrectly described as a list of normal day to day activities). This requirement was included in the Disability Discrimination Act in 1995 as there were concerns that, without such a qualification, the protection of the Act would be too wide-reaching. In practice, this concern has proved unfounded.
- 8.6 There is also evidence of confusion about the purpose of the list of “capacities” and it has often incorrectly been described as a list of normal day-to-day activities. Furthermore, it has sometimes proved difficult for some people, particularly those with a mental impairment, to show how their impairment affects one of the “capacities”. In order to put this right, we propose to remove the list of “capacities” from the definition of disability.

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

## Addressing the needs of parents and carers

- 8.7 In recognition of parents’ and carers’ vital role in our society, this Government has made genuine support for families a core role for the state. This takes the form of targeted legal rights and practical support.

### Current protection for parents

- 8.8 Parents already benefit from a number of legal rights, including some under discrimination law. In particular, the indirect sex discrimination provisions can be used to challenge practices<sup>69</sup> which present more difficulties for women. This is because it is still mainly women who have primary responsibility for the care of children, although there is

<sup>68</sup> ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’, published by DWP, May 2006.

<sup>69</sup> For example, requirements to work full-time, or long or irregular hours, or compulsory overtime.

evidence that, for example, the role of fathers has changed dramatically in recent years. Occasionally, sex discrimination provisions have been used to ensure that fathers had access to benefits that had already been given to mothers<sup>70</sup>.

- 8.9 Some employment legislation also targets parents. Since 2003, parents of children under 6, or of disabled children under 18, have had the right to request flexible working and employers have a statutory duty to consider these requests seriously. To date, over 80 per cent of flexible working requests have resulted in an agreement with employers.
- 8.10 In addition, the public sector gender equality duty, which came into effect in April 2007, requires public authorities to take account of the differing needs of men and women. This includes women's needs resulting from the fact that they are more likely to have caring responsibilities, but also, where appropriate, the needs of men where these have in the past been overlooked, e.g. services previously provided for mothers may now need to take account of the needs of fathers. For example, the Department of Health has recognised that involving prospective and new fathers through maternity services which support fathers' involvement is extremely important for producing a happy and healthy child<sup>71</sup>. The same responsibility extends to public authorities' role as employers.
- 8.11 We explain in chapter 11 why we are considering legislation to extend protection from discrimination on the grounds of pregnancy and maternity in the provision of goods, facilities and services and in public functions. These will specifically benefit new mothers; we set out in that chapter why in this instance we believe it is right for mothers to be treated differently from fathers.
- 8.12 We have also put in place other significant support for parents, including tax credits, improved maternity leave and pay, paid paternity leave, free nursery places, good quality affordable childcare places, Sure Start Children's Centres, extended schools, and access to new advice services.

## Current protection for carers

- 8.13 Since 1997, we have taken unprecedented steps to support carers. For example, we have increased rights for carers through employment legislation:

<sup>70</sup> Before the right to request was introduced for parents of young and disabled children in 2003, and an employer allowed women to work part-time but refused the same arrangement for a man who wanted to share caring responsibilities for his child.

<sup>71</sup> Funding research by Fathers Direct (June 2007).

- The Work and Families Act 2006 extends the right to request flexible working to carers of adult partners or relatives, or an adult living at the same address. This came into effect in April 2007.
- Many carers who want to work reduced hours may have protection under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

8.14 Carers also have other legal rights:

- Carers in England and Wales were given a new right to a carer's assessment under the Carers and Disabled Children Act 2000, which gave local councils duties to support carers by providing services to them directly and in the provision of breaks.
- The Carers (Equal Opportunities) Act 2004 built on these rights, placing new duties on councils to support carers. Councils must inform carers of their right to an assessment of their needs and, when providing an assessment, take into account whether the carer does or wishes to work or undertake education, training or leisure activities.
- In Scotland, the Community Care and Health (Scotland) Act 2002 introduced new carers' rights, including an entitlement to a carer's assessment, with an obligation on local authorities and NHS Boards to ensure carers are aware of this entitlement, and a requirement for local authorities to take account of the contribution and views of carers before deciding on services to provide for a cared-for person.

8.15 Carers may be able to use indirect sex discrimination provisions to challenge practices that have a disproportionate impact, and responsibilities caring for adults also need to be considered by public authorities under the gender equality duty.

8.16 The Pensions Bill published in November 2006 makes provision for a new National Insurance credit for those caring for children and for severely disabled people in order to reflect the different ways in which people contribute to society. This measure will ensure that both parents and carers have improved opportunities to build State Pension entitlements.

8.17 We have put in place other significant support for carers, including a package of measures announced in February 2007, including additional funding for short-term home based respite care for carers in crisis or emergency situations in every council; the establishment of a national

helpline for carers; a wide ranging review of the 1999 National Carers Strategy; and the development of an expert carers programme.

## Targeted provisions and specific measures, not a broad anti-discrimination provision

- 8.18 There have been calls to provide protection against discrimination on the specific ground of having parenting or caring responsibilities. It has also been suggested that the duties on public authorities to promote equality of opportunity should include specific obligations in respect of parents and carers, as they do in Northern Ireland.
- 8.19 Parents and carers play a vital role in society and we are committed to providing them with practical support, as set out above. However, we continue to believe that issues relating to parents and carers are best dealt with through targeted provisions in employment legislation and specific measures to address the issues they face in areas other than employment. This approach ensures a focused and proportionate way of addressing the particular needs of people with caring responsibilities which avoids placing undue burdens on employers and service providers. Further, the Commission for Equality and Human Rights will have power to publish information and give guidance to promote equality and encourage good practice in relation to equality and diversity, which could cover issues of importance to parents and carers.
- 8.20 A broad anti-discrimination provision would cut across the balance achieved by the existing provisions, which are widely accepted. We are therefore not persuaded of the need to create freestanding discrimination legislation for carers.

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

## Married persons and civil partners

- 8.21 The Sex Discrimination Act currently prohibits direct or indirect discrimination in employment against people on the ground that they are married or a civil partner. The original purpose of this 1975 provision was to ensure that women affected by the “marriage bar” (a requirement that women had to resign from employment on marriage, which still existed in a few workplaces at that time) would be able to claim discrimination even when the absence of a male comparator in the workplace made a claim of direct sex discrimination difficult. The Civil Partnership Act 2004 extended this provision to include civil partners. It does not cover unmarried partners or single people.

8.22 It is generally recognised that this provision is no longer required for its original purpose. Recently the provision has been used for other purposes, for example, the Employment Appeal Tribunal has held that a policy of not allowing married couples to work within a line management chain was unlawful<sup>72</sup>. This is an unintended consequence of the provision. We are therefore considering whether this provision is still needed.

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

## Genetic predisposition

8.23 A genetic predisposition can take the form of an increased likelihood of developing a health condition in the future. There is some concern that people with a genetic predisposition may be discriminated against by employers and insurers.

8.24 Until recently, tests were available only for a very limited number of single gene inherited disorders or ‘familial’ forms of diseases such as cancer or heart disease. However, increased knowledge of the role of genetics in health will inevitably increase the role of genetic tests in many areas of medicine.

8.25 The Human Genetics Commission, the independent body that advises the Government on genetics issues, has recently carried out a review of the prevalence of genetic testing in the workplace and found that employer-driven genetic testing is not presently occurring in the UK. However, it is possible that genetic testing may be used to assess long-term health prospects in pre-employment health checks in the future. This could lead to unfair discrimination against those with a pre-symptomatic genetic condition. For example, applicants with a high risk of illness in the future might be denied employment because of their chances of early retirement or multiple sickness leave.

8.26 The issue in insurance is the use of genetic test results to determine whether or not to offer insurance or in the setting of premiums. Concerns have been expressed that those with a genetic predisposition will be denied access to, or will be unable to afford, a variety of insurance products.

8.27 There is currently no protection against discrimination on grounds of genetic predisposition in British law. However, the use of genetic data is subject to the Data Protection Act and the Information Commissioner’s

<sup>72</sup>Chief Constable of the Bedfordshire Constabulary v Graham [2002] IRLR 239 EAT.

Office has provided specific advice to employers on the use of information from genetic tests. In addition, in 2005 the Government and the insurance industry published a Concordat which included an extended voluntary moratorium on insurers' use of predictive genetic test results until 2011. This moratorium requires that customers will not be required to disclose the results of any predictive genetic test if their policy falls below specific financial limits (£500,000 for life insurance, £300,000 for critical illness insurance or £30,000 per annum for income protection insurance). Even if these limits are exceeded, insurers may only require customers to disclose the results of any predictive genetic tests where that test has been approved by the Government's Genetics and Insurance Committee. Around 97% of policies currently issued are below these financial limits and currently only one test (Huntington's disease) for life insurance policies has been approved by the Committee. The Concordat also requires that insurers will not require a customer to take a test or to disclose the results of tests taken by relatives or during research. The moratorium is monitored by the Genetics and Insurance Committee, and is currently working effectively.

- 8.28 The Human Genetics Commission considered whether the Disability Discrimination Act (DDA) should be amended to provide protection for people with a genetic predisposition, but concluded that this would not be appropriate. We agree with this recommendation. People with a pre-symptomatic genetic predisposition do not have a mental or physical impairment which affects their normal day-to-day activities, and there is no certainty that they will go on to develop a health problem. Extending disability discrimination protection to cover people who are not disabled would change the very nature of disability discrimination law and risk being seen as a dilution of disabled people's rights.
- 8.29 At present, there is little, if any, evidence of discrimination against those who have a genetic predisposition, or that genetic testing is being used in a way which would give rise to such discrimination in the UK. We therefore do not believe there is currently a need to legislate to prohibit discrimination on grounds of genetic predisposition.
- 8.30 However, we wholeheartedly endorse the Human Genetics Commission's view that no-one should be unfairly discriminated against on the basis of their genetic characteristics and we are committed to the continued monitoring of the use of genetic testing in the UK. There is a need to ensure that individuals are able to take medically recommended genetic tests secure in the knowledge that the results will not be used unfairly, while recognising the needs of employers to protect the public and their workforce and the need of insurers to be able to assess risk.

8.31 If necessary, the option of further non-legislative measures (e.g. guidance, moratoriums or voluntary industry codes or schemes) and legislative measures should be debated and considered carefully in the future, as and when justified by the emergence of any discriminatory practices in this area. Future approaches could target the use of testing in particular ways (e.g. by restricting its use for particular purposes). It is also expected that the Commission for Equality and Human Rights, once established, will take an interest in this area and make recommendations to Government as it sees appropriate.

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

## Chapter 9 – Age discrimination beyond the workplace

### Protection from age discrimination in employment

9.1 Protection from discrimination on grounds of age was introduced in the area of employment and vocational training in October 2006 through the Employment Equality (Age) Regulations. There is currently no legal protection from age discrimination in the provision of goods, facilities and services, premises, education or the exercise of public functions.

### Why we might legislate to prohibit age discrimination against adults in areas outside employment

9.2 There will always be positive reasons to treat people differently because of their age, for example when providing concessionary travel for both younger and older people, and services targeted at particular age groups. It is particularly important that services for children are tailored in an age-appropriate way, because the age of a child is so closely related to his or her levels of development and need.

9.3 However, there is evidence that some people experience unjustified discrimination in the provision of goods, facilities and services because of their age<sup>73</sup>. This can mean, for example, inferior service from providers of goods and services, or restricted access to financial products, simply on the basis of age and without objective justification.

9.4 There is also evidence that older people in particular are not always treated with dignity and respect, for example, in relation to care services, either at home or in residential care. We are considering whether legislation to prohibit negative age discrimination beyond the workplace would help to ensure that people are always treated with respect in our society, whatever their age.

### What any legislation should and should not do

9.5 If we did legislate, we would want to make sure that legislation addressed negative age discrimination without preventing different treatment on grounds of age which has positive consequences or is justifiable, for example because it enables services to be delivered more efficiently and effectively. Different treatment often fulfils an important function, so we would set a number of tests any legislation must pass:

<sup>73</sup> See for example *Age of equality? Outlawing age discrimination beyond the work place* Age Concern May 2007.

- it must be a proportionate response to a real problem and not create unnecessary burdens on the private, public or voluntary sectors;
- it must not have the unintended consequence of prohibiting positive benefits for either younger or older people, such as youth clubs or clubs for older people, holidays catering for people of particular ages, or concessions and discounts which help younger or older people;
- it must pass a “common sense” test.

## Summary of proposals

9.6 In this chapter we call for evidence of unfair discrimination outside the workplace, and seek views on the following issues and proposals:

- (a) whether legislation is the most appropriate and proportionate way of addressing the needs of older people and preventing harmful age discrimination outside the workplace (paragraphs 9.7 to 9.15);
- (b) how, if we do legislate, we can avoid unintended consequences and disproportionate burdens (paragraphs 9.16 to 9.22);
- (c) if we do decide to legislate, we propose to:
  - exclude children (i.e. people under 18) from the scope of any protection (paragraphs 9.26 to 9.27);
  - make provision for objective justification of age discrimination (paragraphs 9.28 to 9.29);
  - include positive action provisions (paragraph 9.30);
  - exclude a significant number of beneficial or justifiable activities, which legitimately treat people differently because of their age (paragraphs 9.31 to 9.33).

## Addressing older people’s needs

9.7 The Government is committed to public services which meet the needs of people of all ages and to helping individuals achieve their aspirations for better later lives for themselves and their families. With these aims, we have put in place a number of non-legislative measures.

- Opportunity Age – the Government’s strategy for an ageing society – represents a comprehensive programme of action across government to:
  - end the perception of older people as ‘dependent’;
  - ensure that longer life is healthy and fulfilling; and
  - ensure that older people are full participants in society<sup>74</sup>.
- The Welsh Assembly has a strategy in place to address the implications of an ageing population<sup>75</sup>, and its Commissioner for Older People will help promote and safeguard the interests of older people in Wales.
- The Scottish Executive recently published All Our Futures; Planning for a Scotland with an Ageing Population<sup>76</sup>.
- The Department of Health’s National Service Framework for Older People (England) sets national standards to ensure that health and social care services of a high quality are available to all older people, with an explicit focus on tackling age discrimination in service delivery. The Welsh Assembly has put in place a similar National Service Framework for Wales.

## When is it justifiable to treat someone differently because of their age?

- 9.8 It is part and parcel of the normal operation of our society to treat people of different ages differently, because people’s capacities, needs and aspirations change as they grow up and age. Different treatment often fulfils an important function such as promoting social integration, compensating for disadvantage, or enabling services to be delivered more effectively or efficiently. It is clear that there will always be a need for age-specific facilities and services.
- 9.9 The following are some examples of legitimate different treatment based on age:
- The operation of schools is based on organising children in age-based year groups.

<sup>74</sup> Opportunity Age – Meeting the challenges of ageing in the 21st century – HM Government, March 2005.

<sup>75</sup> Strategy for Older People in Wales, Welsh Assembly Government, 2003.

<sup>76</sup> <http://www.scotland.gov.uk/Experience>, Scottish Executive, March 2007.

- Limits must be set for voting age, age of consent and State pension age etc, and for access to some goods and services such as alcohol and gambling.
- Age is used as a qualifying condition for many benefits, such as free TV licences for people over 75 and travel discounts for people below 25.
- Concessions such as discounted access to leisure facilities during off-peak periods are often targeted at both young and older people.
- The incidence of mortality, morbidity, criminality and accidents varies by age and is a factor in underwriting some insurance contracts and in the calculation of annuities.
- Leisure and travel activities are aimed at and restricted to people of particular ages.
- Age limits are used widely in amateur and professional sports, for example, veterans' competitions.
- The NHS targets certain disease prevention programmes, such as cancer screening, at age groups with the greatest clinical need.

9.10 However, there are also instances where different treatment based on age leads to people of different ages experiencing unfair treatment or outcomes. According to research published in October 2006, 28% of people report having suffered discrimination on grounds of age<sup>77</sup>. Age discrimination can impact on people of all ages, but a wide range of evidence suggests that older people are most likely to suffer the negative effects of unfair attitudes and behaviours. For example, an older person who makes a complaint about their treatment may be more likely to have their complaint dismissed as unfounded, simply because of their age. Harmful age discrimination could become more significant because of our increasingly aged society. Today, people aged over 50 make up one third of the population. By 2021 this will have increased to 40%. By the middle of this century, the number of people aged 80 or over will be double what it is today.

9.11 In 2006, the Social Exclusion Unit reported that 20% of older people are socially excluded, and that discrimination led to some older people being denied access to services the rest of the population take for granted, or receiving a different standard of treatment. The negative impact of discrimination and the social exclusion to which it contributes

<sup>77</sup> Ageism: A benchmark of public attitudes in Britain – University of Kent, published by Age Concern, October 2006.

increases as older people age – almost one in three people aged over 80 are excluded from basic services compared to only one in 20 of those aged 50 to 59<sup>78</sup>. Yet older people are likely to be in much greater need – the final report of the Equalities Review states that in 2004 the average wealth of those aged 80 and over was only a third of the average wealth of those aged 60-64<sup>79</sup>.

## Considering the case for legislation

9.12 There are some concerns that non-legislative measures of the type set out above may not be sufficient to tackle discriminatory attitudes and behaviours. For example, while a recent review of the National Service Framework for Older People in England found that it had made significant improvements in older people’s experience of health and social care<sup>80</sup>, the review also found that “deep-rooted cultural attitudes to ageing” are hampering wider Government plans to improve health and social care and local council services such as transport for older people.

9.13 Specific areas of concern included:

- perceived unfair differences in the mental health services available to those below state pension age compared with older adults;
- a perceived lack of priority given by local authorities and primary care trusts to the needs of older people when planning and commissioning services;
- lower rates paid by local authorities for older people’s residential social care (as opposed to residential care for younger adults), leading to a greater likelihood of older adults being placed in residential care rather than cared for at home;
- some examples of a lack of dignity and respect in the way older people are sometimes treated when in hospital.

9.14 There is less evidence of harmful age discrimination in the private sector, although the provision of health and social care within the private and voluntary sectors is also likely to be affected by

<sup>78</sup> <http://www.socialexclusionunit.gov.uk/downloadaddoc.asp?id=797>

<sup>79</sup> Fairness and Freedom – The Final Report of the Equalities Review, February 2007

<sup>80</sup> [http://www.healthcarecommission.org.uk/\\_db/\\_documents/Living\\_well\\_in\\_later\\_life\\_-\\_full\\_report.pdf](http://www.healthcarecommission.org.uk/_db/_documents/Living_well_in_later_life_-_full_report.pdf)

discriminatory attitudes<sup>81</sup>. In the financial services sector, concerns have been voiced that older people buying insurance may be charged premiums which do not fairly reflect the underlying actuarial risk they present, and that some insurers decline to offer some types of cover to older people altogether. Some older people report that they find it difficult to hire cars, while some credit facilities are only available to those aged between 18 and 65.

- 9.15 We recognise that legislation could send out a strong signal that discriminating unnecessarily on grounds of age is unacceptable and thereby help to change cultural attitudes to ageing, as well as providing a means of redress for individuals who experience harmful age discrimination. However, we are not yet convinced that legislation is necessarily the most appropriate way to tackle age discrimination in these areas.

## Avoiding unintended consequences and disproportionate burdens

- 9.16 Any legislation in this area would need to be carefully framed to ensure it prevented harmful age discrimination while enabling beneficial and justifiable age differentiation to continue. It is likely that legislation would therefore be relatively complex, with a significant number of exceptions from the principle of equal treatment. This could be confusing for both the providers and consumers of services and undermine our commitment to create a simpler, fairer and more streamlined framework of discrimination law.
- 9.17 Given that there is less evidence of harmful age discrimination in the private sector, we are also particularly concerned that legislation would place undue regulatory burdens on business and run counter to the Government's commitment to better regulation. It might instead be more appropriate to work with relevant sectors to agree specific measures to deal with any areas of concern, such as the provision of insurance and financial services. The Association of British Insurers has recently established a taskforce, which is considering what industry-led initiatives might improve information or "signposting" for older customers who find it difficult to locate cover.
- 9.18 Regardless of whether legislation is introduced, we would of course continue to tackle harmful age discrimination by way of non-legislative, targeted measures such as the National Service Framework for Older People and those contained in the Government's strategies for meeting

<sup>81</sup> The Commission for Social Care Inspection reports that 80% of the social care providers it regulates are small businesses, whilst around 1,700 independent healthcare providers are registered with the Healthcare Commission.

the needs of an ageing population. We are also considering, in chapter 5 of this document, whether a public sector duty to promote equality should be extended to cover age. If we did this, it would provide a legislative driver to ensure that public authorities considered the needs of people of different ages, and how best to address disadvantage associated with being a particular age, when developing and delivering policies and services.

- 9.19 In addition, the Commission for Equality and Human Rights will play an important role in helping to eliminate ageist attitudes and bring about cultural change, as part of its wide remit to tackle prejudice and discrimination and to promote equality and diversity.
- 9.20 In considering whether there is a case for legislation in this area, we have considered carefully how any legislation would need to be framed should we decide to introduce it. To enable people to make an informed decision about whether legislation is the best means of tackling harmful age discrimination, we have set out our thinking below. Paragraphs 9.23 and 9.24 summarise the approach we consider would be needed should we decide to legislate in this area, followed by some more detailed information about different aspects of the approach.
- 9.21 We are also seeking further evidence of what the costs of legislation would be for service providers, particularly in the areas of health and social care and the financial services sector.
- 9.22 The initial Regulatory Impact Assessment which accompanies this consultation document sets out our initial assessment of the likely costs and benefits associated with the various options. We are undertaking work to assess costs and benefits for health and social care providers during the consultation period, and the Regulatory Impact Assessment will then be updated on the basis of that work and the evidence presented to us by consultees.

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

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

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

## Issues which would arise with a legislative approach

9.23 The general principle underpinning any legislation would be that a difference in treatment based on age should not be permitted unless it can be justified – perhaps because it promotes social integration or the interests of a particular age group, or enables services to be delivered more effectively or efficiently by organising customers into age groups – or it prevents or compensates for disadvantage. As discussed above, the need for age-specific facilities and services means that any legislation in this area would be complex, containing a significant number of exceptions which could make it difficult for both providers and consumers of services to understand.

9.24 We consider that any legislation would need to include:

- a general requirement not to discriminate against adults aged 18 and over on grounds of age in the provision of goods, facilities, services, premises and the exercise of public functions;
- an ‘objective justification’ defence for different treatment where it is a proportionate means of achieving a legitimate aim;
- positive action provisions to help address disadvantage more effectively (discussed in more detail in chapter 4); and
- specific exceptions to enable beneficial or justifiable differential treatment to continue without fear of legal challenge, including in the provision of insurance, so long as that treatment was reasonable and based on objective evidence.

9.25 Codes of practice and guidance could provide explanations and practical examples of what would be covered by the new law or unaffected by it.

## Excluding children from the scope of any legislation

9.26 We have given particular consideration to how legislation in this area could impact on children (aged under 18). A child’s age is closely related to his or her levels of development and need, something which is not generally true of an adult’s age. It is important that services for children are tailored in an age-appropriate way – a child of three is very different from a child of ten, or a teenager. The basic principle of age discrimination legislation, that people should not be treated differently on the basis of their age, is therefore rarely appropriate to the treatment of children.

9.27 We are committed to ensuring that children have appropriate means of redress where they perceive they have been treated unfairly, and the Commission for Equality and Human Rights will be considering the equality needs of children as part of its Strategic Plan. However, we believe that age discrimination legislation is unlikely to be the most appropriate way to meet the needs of children. Furthermore, legislation might encourage providers of services to children to standardise provision across all age groups even if this was not the intended outcome. This could clearly operate to the detriment of children. We do not think, therefore, that any extension of age discrimination legislation should cover children or the provision of education in schools.

## Objective justification of age discrimination

- 9.28 While the provisions for indirect discrimination in the various existing equality statutes include an objective justification test where differential treatment is a proportionate means of achieving a legitimate aim, there is no equivalent provision for direct discrimination, except in the Employment Equality (Age) Regulations 2006. This has been provided because it is recognised that differences in treatment on age grounds can be justified in certain circumstances. For example, it may be necessary to make special provisions for younger and older workers in order to protect their safety and welfare.
- 9.29 Given the widespread and numerous examples of beneficial or justifiable age differentiation in the provision of services etc, we consider that there would be an even stronger case for permitting direct age discrimination to be justified in this area. If new legislation were introduced in this area, therefore, we consider that a comparable means of objective justification should also apply in the case of direct age discrimination. This would allow for the justification of age-related limits and practices, as long as they could be shown to be a proportionate means of achieving a legitimate aim, such as the promotion of effective service delivery. For example, it may be objectively justifiable for a bank to refuse a 25-year term mortgage to a person aged 75.

## Balancing measures

- 9.30 In chapter 4, we set out for consultation options for extending permissive positive action provisions, which would allow different treatment to prevent or compensate for the disadvantages suffered by particular groups because of, for example, their age or to meet the special needs of certain groups. If we were to legislate to prohibit age discrimination outside the employment area, we would ensure that initiatives such as free off-peak local bus travel for people aged 60 and over, or safe and affordable accommodation for young people at risk, would be permitted to continue.

## Specific exceptions

- 9.31 There would be a need to specifically exclude some activities from the prohibition on discrimination, either because they are regarded as beneficial or justifiable or because there are good public policy reasons for an activity being excepted from the requirement not to discriminate. Specific exceptions provide a greater degree of legal certainty so can help to ensure that service providers do not mistakenly end beneficial practices out of concern that they may be open to legal challenge.
- 9.32 General proposals on exceptions to wider discrimination law are set out in Chapter 1 and Annex A, and where relevant these would also apply in relation to age discrimination in the provision of goods, facilities and services etc. For example, the general statutory authority exception would allow discriminatory actions to be taken under age-specific legislation. This exception would cover a number of laws, including those setting lower age limits for gambling and the sale of alcohol, and laws which target State benefits and allowances at particular age groups to cater for the different needs and circumstances of people as they move from childhood to adult life and then to retirement and old age, in order to target resources where need is greatest.
- 9.33 We would welcome views on what specific exceptions might be needed should we decide to legislate in this area, in order to ensure a common-sense approach to preserving beneficial and justifiable practices such as cheaper access to leisure facilities for people of State pension age. For example, we consider that exceptions would probably be needed to allow:
- age-based concessions, whether in the private or public sector;
  - disease prevention programmes such as cancer screening or immunisation to be targeted at people in particular age groups, on the basis of robust, clinical evidence;
  - the provision of fertility treatment to people in a particular age range;
  - age differences in the calculation of annuities and insurance premiums and benefits, provided they are reasonable and based on objective evidence of the underlying difference in risk – we consider that the approaches currently taken in the Sex Discrimination Act and Disability Discrimination Act may provide suitable models;
  - insurance companies to design and provide products for specific market segments (for example, younger or older drivers);

- the use of age criteria to provide tailored, targeted housing services for older and younger people; and
- age limits on group holidays.

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

## Chapter 10: Gender reassignment

### Why we might legislate to strengthen protection for transsexual people

- 10.1 There are estimated to be about 5,000 transsexual people in the UK – people whose gender identity does not match their appearance and/or anatomy. Transsexual people feel a deep conviction to present themselves in the appearance of the opposite sex and live permanently in their acquired gender. Some may undergo medical interventions to make their appearance and physical characteristics conform more closely to their acquired gender.
- 10.2 The number of transsexual people may be small, but the discrimination they experience has a significant impact on them as individuals. Discrimination in the area of goods, facilities and services and public functions limits the ability of transsexual people to access essential services and the opportunity to play a full role in society.

### Summary of proposals

- 10.3 Subject to the views expressed in response to this consultation, and in addition to implementing the Gender Directive as described in Annex B, we propose to:
- (a) prohibit discrimination on grounds of gender reassignment in the exercise of public functions (paragraph 10.11);
  - (b) exclude education in schools from the scope of any strengthened protection (paragraph 10.12);
  - (c) consider the inclusion the Single Equality Bill of a provision allowing organised religion to treat people differently on the grounds of gender reassignment (paragraphs 10.13 to 10.14);
  - (d) keep the existing definition of gender reassignment (paragraphs 10.4 to 10.6 and 10.15).

### Current legislation

- 10.4 Transsexual people are protected from direct discrimination, harassment and victimisation in employment and vocational training under the Sex Discrimination Act 1975, as amended by the Sex Discrimination (Gender Reassignment) Regulations 1999. These provisions provide protection

for people who plan to undergo, are undergoing or have undergone gender reassignment. Gender reassignment is defined as:

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

- 10.5 The ‘medical supervision’ referred to in the definition of gender reassignment could be as minimal as counselling. This ensures that transsexual people who are unable or have elected not to undergo surgical or hormone treatment as part of the process of gender reassignment are protected under the law.
- 10.6 The concept of indirect discrimination does not currently apply in respect of discrimination on grounds of gender reassignment. Neither is there any domestic law protection from discrimination on grounds of gender reassignment in the areas of goods, facilities and services and public functions.

## The Gender Directive

- 10.7 European Directive 2004/113/EC (‘the Gender Directive’) requires equal treatment between men and women in the access to and supply of goods and services. The Directive does not explicitly mention gender reassignment. However, the European Court of Justice has ruled that the right not to be discriminated against on grounds of sex includes discrimination arising from a person’s gender reassignment. Therefore, we are required to outlaw discrimination against transsexual people in the provision of goods and services which fall within the Directive’s scope.
- 10.8 The deadline for implementing the Gender Directive is 21 December 2007. The proposed Single Equality Bill will not come into force until after this date, so we intend to transpose the Gender Directive using regulations under the European Communities Act 1972. Our approach to implementation is to make the amendments necessary to fulfill our obligations under the Gender Directive. The implementing regulations will amend the Sex Discrimination Act 1975 in order to outlaw direct discrimination in goods, facilities and services on grounds of gender reassignment. We intend to deal with any wider issues, for example those that are outside the scope of the Gender Directive and beyond our regulation-making powers, in the context of the Single Equality Bill.

10.9 Our proposals for implementing the Gender Directive are set out in more detail in Annex B. Comments are invited in response to the questions set out in Annex B to aid further development of those proposals. Our proposals for the Single Equality Bill are set out below.

## Our proposals for the Single Equality Bill

10.10 Domestic legislation currently does not protect transsexual people from indirect discrimination. We propose to introduce protection for transsexual people against indirect discrimination through the Single Equality Bill. This would apply to all areas in which discrimination on grounds of gender reassignment is unlawful. Our proposals for this are set out in more detail in Chapter 1. This will provide transsexual people with the same protection from discrimination in the provision of goods, facilities and services as is afforded on grounds of sex, race, disability, religion or belief and sexual orientation.

10.11 In addition, the scope of the Gender Directive means that the implementing regulations will not protect transsexual people from discrimination by public authorities in the exercise of their public functions. Generally speaking, public functions are those which only a public authority can carry out, such as setting national or local government policy or allocating public funds (see chapter 2). Extending protection to public functions would ensure that discrimination is unlawful across the full range of activities carried out by public authorities. It would be necessary to do this if we were to ensure that a single public sector duty (see chapter 5) would apply to transsexual people in the same way as to other protected groups. We therefore propose to outlaw discrimination on grounds of gender reassignment in the exercise of public functions.

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

## Schools

10.12 Discrimination on grounds of gender reassignment is already prohibited in relation to vocational training, which includes discrimination by further and higher education institutions<sup>82</sup>. The prohibition does not currently extend to education in schools, and will not be extended when we implement the Gender Directive because education is explicitly outside its scope. It will be very rare for a child to be planning to undergo or undergoing the process of gender reassignment as

<sup>82</sup>Workers and students in such institutions are, of course, already protected from discrimination on the grounds of gender reassignment.

defined in the Sex Discrimination Act. If such a case does occur, there are already duties on schools and local authorities under education law and guidance, and obligations and individual rights under the Human Rights Act, which protect pupils. We do not therefore believe that outlawing discrimination on grounds of gender reassignment in respect of school pupils and education in schools is necessary, proportionate or appropriate.

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

## Organised religions

10.13 For the reasons set out in paragraphs 10.8 and Annex B, the scope of the Gender Directive does not extend to goods, facilities or services of the type provided at places used for the purpose of organised religions, such as churches, mosques and synagogues. These would include communal worship, preaching, officiating in marriage or giving sacraments to members of a particular religious community. For clarity, and because of the constraints on the scope of the Directive, the regulations implementing the Gender Directive will make clear that the new protections against discrimination on the grounds of gender reassignment do not extend to these types of services.

10.14 However, we want the Single Equality Bill to take full account of, and strike the right balance between the rights of transsexual people and freedom of religious expression. Bearing this in mind, we would welcome views on whether it is necessary for the Single Equality Bill to allow for organised religion to treat people differently on the grounds of gender reassignment and, if so, in which circumstances would it be possible to justify such discrimination.

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

## Keeping the existing definition of gender reassignment

10.15 We propose to use the existing definition of gender reassignment in the Sex Discrimination Act when implementing the Gender Directive and for the purposes of the Single Equality Bill. This definition meets the obligations placed on us by European case law and provides clarity about who is protected by the law. The requirement for medical supervision and the implied permanence of gender reassignment makes it clear who is included and excluded from protection.

The law is intended to provide protection for transsexual people with a diagnosable medical condition, and who intend to or are living permanently in their acquired gender, rather than those who temporarily adopt the appearance of a different gender, perhaps as a matter of lifestyle choice.

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

## Chapter 11: Pregnancy and maternity

### Why we might legislate to strengthen protection for expectant and new mothers

- 11.1 There are important reasons to ensure that expectant and new mothers are protected from discrimination. Pregnancy and the period after a child is born is a time of enormous physical, emotional and practical change. There are specific health and safety issues for expectant and new mothers and their babies. This is reflected in our existing law which protects women from discrimination at work on the grounds of pregnancy and maternity, and gives rights to have a health and safety assessment, attend ante-natal appointments and take maternity leave.
- 11.2 Once the Gender Directive has been transposed into British law, the law will clearly state that expectant and new mothers are protected from discrimination in relation to goods, facilities and services generally. However that protection will not extend to the way public authorities exercise their public functions. We wish to achieve consistency with the remainder of sex discrimination law and provide clarity for public authorities about their obligations. This requires legislation.

### Summary of proposals

- 11.3 Subject to views expressed on in response to this consultation, we propose to prohibit less favourable treatment of a woman on grounds of pregnancy and maternity by public authorities in the exercise of public functions, but to exclude schools from the scope of any strengthened protection (paragraphs 11.7 to 11.9).

### Existing protection on the grounds of pregnancy and maternity

- 11.4 Currently, the Sex Discrimination Act<sup>83</sup> explicitly provides that less favourable treatment on grounds of pregnancy or maternity leave in the field of employment and vocational training is direct sex discrimination<sup>84</sup>. There is nothing on the face of the Sex Discrimination Act making similar provision in respect of goods, facilities, services, premises, education in schools or public functions. However, an

<sup>83</sup> As amended by the Employment Equality (Sex Discrimination) Regulations 2005.

<sup>84</sup> As a result of a recent court decision (*Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin)), we will be amending the Sex Discrimination Act to make it clear that a) a woman who claims pregnancy or maternity leave discrimination does not have to compare her treatment to that of anyone else, and b) a woman on maternity leave can bring a claim of discrimination where it is consistent with the the ECJ cases of *Lewen v Denda* [2000] IRLR 67 ECJ and *Land Brandenburg v Sass* [2005] IRLR 147 ECJ.

expectant or new mother who is treated less favourably in relation to those areas on grounds of pregnancy or maternity may be able to claim that she is the victim of indirect discrimination, depending on the facts of the case.

- 11.5 Once the Gender Directive is transposed into British law, less favourable treatment of women for reasons of pregnancy and maternity will constitute direct discrimination in the field of goods and services. We intend to transpose the Gender Directive using regulations under the European Communities Act 1972 in order to meet the implementation deadline of 21 December 2007.
- 11.6 Our proposals for implementing the Gender Directive are set out in more detail in Annex B, including a discussion of how ‘maternity’ should be defined in the context of goods, facilities and services.

## Providing clarity for public authorities

- 11.7 Because of the limited scope of the Gender Directive, the implementing regulations will not prohibit less favourable treatment of a woman on grounds of pregnancy and maternity by public authorities in the exercise of public functions, other than those functions which will be caught by the general goods, facilities and services provisions. We propose to make direct discrimination on grounds of pregnancy and maternity unlawful across the full range of activities carried out by public authorities and provide clarity for public authorities about their obligations under the law in the Single Equality Bill.

## Excluding schools from any increased protection

- 11.8 Education in schools is also outside the scope of the Gender Directive. We are seeking to reduce levels of teenage pregnancy and motherhood. Where this does occur, we are firmly committed to ensuring that it does not prevent access to education. However, we do not believe it is necessary or appropriate to prohibit discrimination on grounds of pregnancy and maternity in respect of school pupils<sup>85</sup>. Schools and local authorities already have duties under education law to provide suitable education to all children and the Department for Education and Skills has issued guidance for schools specifically on the issue of school age parents<sup>86</sup>. There are also obligations and enforceable rights under the Human Rights Act.

<sup>85</sup>Workers in such institutions are, of course, already protected from discrimination on the grounds of pregnancy and maternity.

<sup>86</sup>There is separate guidance provided on this by the devolved administrations for Scotland and Wales.

11.9 We believe that schools, in consultation with other agencies where appropriate, need to retain the ability to provide for pregnant schoolgirls on a case by case basis, taking account of the pupil's age, ability, aptitudes and any particular individual or special needs. It is, in fact, often desirable to provide for pregnant schoolgirls in a different way from other pupils. For example, they are likely to need home tuition and more periods of authorised absence to attend medical appointments. There are also health and safety issues to consider, for example in physical education and during break times. However, guidance clearly states that pregnancy is not a reason for exclusion from school, and health and safety is not a reason for preventing attendance at school.

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

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

## Chapter 12: Private clubs and associations

### What we want to achieve through our approach

- 12.1 Private clubs and associations are an important and positive part of many people’s lives. We do not in general want to stop anyone setting up or belonging to a club or association which enables them to meet others who share their interests or to restrict membership to people with the same interest.
- 12.2 But we think there are arguments that we should stop people being unfairly excluded from some clubs altogether or being “second class members”, who have fewer rights than other members. For example, there are still golf clubs which restrict the times their female members can have access to club facilities. We do not think there is any reason to allow this to continue in private clubs as currently defined in discrimination law.
- 12.3 At the moment, the law stops some types of discrimination by clubs but not others. We want to make the law as clear and simple as possible, and to remove harmful discrimination, while still enabling people to set up and belong to clubs whose membership is restricted to a particular group for a positive reason.

### Summary of proposals

- 12.4 Subject to the views expressed in response to this consultation, we propose to:
- (a) ensure that private clubs whose purpose is to bring together people who share a protected characteristic can continue to do so (paragraph 12.9);
  - (b) extend the protection against discrimination that disabled people already have as guests in private clubs to race and sexual orientation (paragraph 12.11);
  - (c) make it unlawful for clubs with 25 or more members which have both men and women as members to discriminate on grounds of sex (paragraph 12.12);
  - (d) prohibit discrimination by clubs on the grounds of religion or belief except for clubs set up specifically for members who belong to a particular religion or hold a particular belief (paragraph 12.13);

- (e) consider whether there is a case for outlawing age discrimination by private clubs, other than those set up to cater for a particular age range (paragraph 12.14).

## Different types of club and association

- 12.5 Clubs and associations which require the public to take out membership simply as a formality in order to access their facilities or services (e.g. becoming a member of a video club in order to rent films) are already prohibited from discriminating on the grounds of sex, race, disability, religion or belief and sexual orientation. Their activities are covered by legislation making it unlawful to discriminate in the provision of goods, facilities and services to the public.
- 12.6 As private clubs by their nature restrict admission to membership, they are not considered to cater to the public or a section of the public and so are not caught by general goods, facilities or services provisions when providing benefits, facilities or services to their members.

When private clubs can and cannot discriminate

- 12.7 Where a private club (such as a golf or book club which operates a policy of membership selection):
- has 25 or more members,
  - is an incorporated or unincorporated association, and
  - regulates admission to membership by a constitution, whether or not in writing,

it must not discriminate against its members, associates and applicants for membership on grounds of race, disability or sexual orientation. Private clubs are also prohibited from discriminating against disabled people as guests. There are no similar laws in relation to discrimination on the grounds of sex, or religion or belief.

- 12.8 Exceptions are, however, provided to allow people who share particular characteristics to get together:
- the Race Relations Act 1976 permits the existence of private clubs whose main purpose is to allow the benefits of membership to be enjoyed by people of particular races, nationalities, ethnic or national groups (which must not be defined by reference to colour);
  - a similar exception applies on the ground of sexual orientation;

- the Disability Discrimination Act 1995, as amended by the Disability Discrimination Act 2005, is designed to be interpreted to allow private clubs and associations to limit membership to people with a particular disability.

## Our proposals

- 12.9 Where the main purpose of private clubs is to bring together people who share a characteristic – sex, a particular race, ethnicity or nationality, etc., disability, sexual orientation, religion or belief, or being in a particular age range – we think this is entirely legitimate. We want to ensure the law allows this to continue<sup>87</sup>.
- 12.10 However, we consider that private clubs, as defined in paragraph 12.7, whose main purpose does not depend on their members having a characteristic protected by discrimination law should not be able to discriminate against their members, associates, applicants for membership or their guests.
- 12.11 We therefore want to extend the protection against discrimination that disabled people already have as guests in private clubs to race and sexual orientation.
- 12.12 If private clubs do have both men and women as members, we propose to make it unlawful for them to discriminate on grounds of sex against their members, associates, applicants for membership or their guests<sup>88</sup>. We have for many years encouraged clubs to address this issue voluntarily, but we continue to receive numerous representations from women club members who experience blatant sex discrimination because some private clubs still limit women members’ access to activities and benefits, and treat them as “second class members”. We cannot see any justification for this.
- 12.13 In addition, we do not consider that it is right for clubs to discriminate on the grounds of religion or belief, for example by excluding someone because they are or are not of a particular religion (except for clubs set up specifically for members who belong to a particular religion or hold a particular belief). We therefore intend to prohibit such discrimination against members, associates, applicants for membership or guests.

<sup>87</sup>Although we would retain the prohibition on restricting membership to people of a particular colour, as we do not want to allow all-white or all-black clubs or associations.

<sup>88</sup>including gender reassignment.

12.14 We also want to consider whether there is a case for outlawing age discrimination by private clubs (other than those set up to cater for a particular age range), if age discrimination is made unlawful in the provision of goods, facilities and services (see chapter 9). We recognise that in some situations it is of course quite reasonable to treat people differently on grounds of age. For example, a club may wish to impose a lower age limit on accessing certain facilities for reasons of safety, e.g. an off-road motorcycling club. However, in many other situations, it is difficult to see what justification there is for using age as a membership criterion, e.g. by barring people over 60 from a badminton club, unless it is the age group to which all members belong that is the main reason for them to get together.

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

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

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

***Do you think that the law should address unjustified age discrimination by private clubs with 25 or more members (other than those set up to cater for a particular age range) if age discrimination is made unlawful in the provision of goods, facilities and services?***

## Chapter 13: Improving access to and use of premises for disabled people

### Why we want to legislate

13.1 Currently, landlords and managers of rented or “let” residential premises must:

- not treat a disabled tenant or occupier less favourably than the non-disabled person,
- make reasonable adjustments (though not physical alterations) to the disabled person’s home; and
- not unreasonably refuse permission for disability-related alterations to the disabled person’s home to be carried out.

However, there is no similar requirement for disability-related alterations to the physical features of the common parts of let residential premises, such as stairs and hallways. This means that some disabled people can only use the common parts of their home with difficulty. Some may become virtual prisoners in their own home, when a simple alteration, paid for by the disabled person. This would avoid the need for the disabled person to move, with all the attendant upheaval and difficulty in finding suitable accommodation.

### Summary of proposals

13.2 Subject to the views expressed in response to this consultation, we propose that:

- Where a disabled person finds it impossible or unreasonably difficult to use the common parts of their let residential premises, the landlord should be under a duty to make a disability-related alteration to the common parts, where reasonable, and at the disabled person’s expense (including any reasonable maintenance costs).

### Disability discrimination and let premises

13.3 The current premises provisions of the Disability Discrimination Act 1995 contain three elements:

- a duty on landlords and managers of all premises not to treat disabled people less favourably;

- a duty of reasonable adjustment on landlords and managers of let premises only; and
- a duty in certain circumstances not to unreasonably refuse consent to disability-related alterations to residential premises.

13.4 The duty of reasonable adjustment does not require landlords and managers of let premises to make any alterations to the physical features of any part of the premises, including the common parts (e.g. stairs, hallways and communal space). However, it might require a landlord or manager to make some changes to the use of the common parts (e.g. permission to store a wheelchair in a hallway, or to park a car in a special space), where these do not involve physical alterations.

## Enabling disabled people to have alterations made to the common parts

13.5 We are considering whether to harmonise the current justifications of disability discrimination by replacing them with an objective justification test and to standardise the threshold for reasonable adjustments (see chapter 1). Any changes could also affect the premises provisions and our proposal for common parts set out in this chapter.

13.6 The lack of a requirement for disability-related alterations to the physical features of common parts of let residential premises, can have a significant negative impact on the everyday lives of disabled people, for example, the lack of a stair-lift, a hand rail or the construction of a ramp. We therefore propose that provisions should be included in the Single Equality Bill to enable disabled people to have disability-related alterations made to the common parts of their let residential premises.

13.7 Where a disabled person finds it impossible or unreasonably difficult<sup>89</sup> to use the common parts of their let residential premises, we propose that the landlord should be under a duty to make a disability-related alteration to the common parts, where reasonable, and at the disabled person's expense (including any reasonable maintenance costs). Failure to comply with the duty would be unlawful discrimination. Because legislation in Scotland already covers some of these issues, the duty would only apply to England and Wales.

<sup>89</sup>This test is consistent with the Review Group on Common Parts' report ([http://www.dwp.gov.uk/aboutus/review\\_common\\_parts.pdf](http://www.dwp.gov.uk/aboutus/review_common_parts.pdf)). However, if the Government decides to reduce the threshold for reasonable adjustment (see Annex A), we will also consider applying the threshold of substantial disadvantage to this new duty.

- 13.8 To help the landlord decide whether it is reasonable to make an alteration, factors to be taken into account would be set out in a statutory code of practice produced by the Commission for Equality and Human Rights. These might include, for example, whether the alteration would affect the health and safety of other tenants, the tenant's ability to pay for the alteration, or the length of the letting. Landlords would be able to impose reasonable conditions, for example, re-instatement of the building at the end of the tenancy.
- 13.9 Where the landlord needs permission from third parties, for example, planning authorities, superior landlords or mortgage companies before he or she can make the alteration, the landlord would not have to proceed until that permission has been received, but they would have to seek permission within a reasonable time.
- 13.10 A similar duty would be placed on Commonhold Associations in respect of commonhold premises.

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

## Chapter 14 – Harassment

### What we want to achieve

- 14.1 Harassment – unwanted comments or behaviour which focus on a particular protected characteristic someone has –creates an intimidating, hostile, degrading, humiliating or offensive environment at work or in wider society. This can be very damaging. For example, if a young person in their first job experiences harassment, it may have a profound and long-lasting effect on their working life.
- 14.2 We believe that part of the basic decent values of our society should be to protect people from this type of harm. At the moment, some groups are expressly protected while others are not, and while everyone is protected at work, different rules apply outside the workplace. As a general principle, we want to make the law as consistent as possible.
- 14.3 However, it is very important that we balance the right to live free from harassing behaviour with the right to freedom of speech and intellectual debate. We also need to be clear that this is about particular situations – for example, whether a disabled person is humiliated by an employer or a member of staff in a shop. It is not about people being shouted at in the street, which would be a matter for the law on public order, and not discrimination law.
- 14.4 We therefore want to consider very carefully whether extending express statutory protection against harassment is the best way of addressing the real issues which people face.

### Summary of proposals

- 14.5 Having considered the views expressed in response to this consultation, we will decide whether there are groups who currently have no statutory protection, especially in situations outside the workplace, but who should be protected. We would consider making specific exceptions to the protection to make it clear what would not be regarded as harassment. We will only legislate if:
- this is a proportionate response to a real problem; and
  - we are sure we can avoid unintended consequences, such as limiting the right to express a legitimate view or hold a different belief.

## What is harassment?

- 14.6 Under British discrimination legislation, a person subjects another to harassment where, on grounds of<sup>90</sup> a protected characteristic (e.g. race, disability or sex<sup>91</sup>), he or she engages in unwanted conduct that has the purpose or effect of:
- (i) violating that other person’s dignity, or
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.
- 14.7 For example, a gay theatre worker was repeatedly referred to as a “gay boy” by his manager. The employment tribunal commented that “it is hard to envisage conduct more likely to shatter the trust and confidence of an employee in his employer”. The tribunal found that the manager had harassed the employee and the employing organisation had failed in its duty to the employee, in breach of the Sexual Orientation Employment Regulations<sup>92</sup>.

## Harassment at work

- 14.8 A specific and freestanding right to be protected from harassment in employment (and in vocational training) on all the grounds protected by discrimination law was only introduced into British discrimination legislation relatively recently, as a result of the implementation of European Directives. Before this, the British courts had established that acts of sexual and racial harassment at work could be direct discrimination, where the conduct amounted to less favourable treatment on the grounds of race or sex and where the claimant could show that he or she had been subjected to a detriment, and this protection still applies
- 14.9 Freestanding statutory protection means that harassment is an unlawful act distinct from direct or indirect discrimination. In particular, a claimant is not required to identify a comparator in order to show less favourable treatment<sup>93</sup>.

<sup>90</sup>In relation to disability, harassment is for a reason related to the disabled person’s disability. In relation to gender, following a recent court ruling in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin), we will amend the definition of harassment under the Sex Discrimination Act to clarify that harassment is not limited to conduct caused by the sex of the claimant.

<sup>91</sup>The Sex Discrimination Act provides separate protection from sexual harassment, defined as any form of unwanted verbal or physical conduct of a sexual nature.

<sup>92</sup>*Gismondi v Durham City Council* [2005] ET.

<sup>93</sup>Although in practice a comparator may be useful to establish that the conduct is on grounds of the protected characteristic.

14.10 The freestanding statutory protection against harassment at work and in vocational training<sup>94</sup> does not cover colour or nationality<sup>95</sup>. We think this is an anomaly, and want to rectify it.

## Outside the workplace

14.11 In addition, the Race Relations Act expressly prohibits harassment on grounds of race or ethnic or national origin in the provision of goods, facilities, services, education in schools, housing and in the exercise of public functions. The Government intends to extend these statutory provisions so that they apply in respect of colour and nationality as well.

14.12 Express harassment provisions on grounds of sex in the exercise of public functions were introduced by Part 4 of the Equality Act 2006, which came into force in April 2007. The Government also intends to expressly prohibit harassment on grounds of sex and gender reassignment in the provision of goods, facilities and services and in housing in order to implement the Gender Directive<sup>96</sup>. We propose to expressly prohibit harassment in schools on grounds of sex, and harassment on grounds of gender reassignment in the exercise of public functions, in the Single Equality Bill.

14.13 As can be seen from the following table, this leaves four main areas where there is currently no express statutory protection against harassment in the provision of goods, facilities, services, education in schools, disposal or management of premises and the exercise of public functions: religion or belief; sexual orientation; age (where there is no protection against discrimination outside the workplace either); and disability.

<sup>94</sup>Vocational training includes further and higher education.

<sup>95</sup>Because these grounds are not within the scope of the Race Directive.

<sup>96</sup>Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to goods and services.

## Statutory harassment provisions in current or pending discrimination legislation

	Sex including gender reassignment	Race, ethnic or national origin	Disability	Religion or Belief <sup>97</sup>	Sexual Orientation <sup>98</sup>	Age
<b>Employment/ related areas &amp; vocational training</b>	Yes	Yes	Yes	Yes	Yes	Yes
<b>Education in schools</b>	No (but see paragraph 14.12)	Yes	No, but see 14.19	No	No	N/A <sup>99</sup>
<b>Provision of goods, facilities and services</b>	Pending <sup>100</sup>	Yes	No, but see 14.19	No	No	N/A
<b>Disposal and management of premises</b>	Pending <sup>101</sup>	Yes	No, but see 14.19	No	No	N/A
<b>Exercise of public functions</b>	Pending <sup>102</sup>	Yes <sup>103</sup>	No, but see 14.19	No	No	N/A

<sup>97</sup> The religion or belief discrimination provisions in the Equality Act 2006 which apply in respect of the provision of goods, facilities, services, education in schools, disposal or management of premises and the exercise of public functions came into force in April 2007.

<sup>98</sup> The Equality Act (Sexual Orientation) Regulations 2007 which apply in respect of the provision of goods, facilities, services, education in schools, disposal or management of premises and the exercise of public functions came into force in April 2007.

<sup>99</sup> There is currently no age discrimination legislation in respect of the provision of goods, facilities, services, education in schools, disposal or management of premises or the exercise of public functions.

<sup>100</sup> Implementation of the Gender Directive will extend statutory protection against harassment in the supply of goods and services by public and private bodies and the disposal or management of premises (this must be implemented by December 2007).

<sup>101</sup> See footnote 64.

<sup>102</sup> The provisions in the Sex Discrimination Act, as amended by the Equality Act 2006, came into force in April 2007. They do not apply in respect of gender reassignment but see paragraph 14.6.

<sup>103</sup> In respect of public functions which fall within the scope of the Race Directive.

## Consistency, fairness and legal certainty

- 14.14 In a fairer society, we believe that people should be protected from the damaging effects of harassment on the basis of particular characteristics. We have indicated that we wish to act against harassment in certain areas outside the workplace<sup>104</sup>. The aim of extending express statutory protection would be to provide consistency, fairness and legal certainty, which is the overall aim of the Single Equality Bill.
- 14.15 We do not, however, wish to risk prohibiting behaviour or actions which it is not appropriate to catch or limit, or creating a situation in which people avoid perfectly reasonable behaviour, debate or actions because they are worried that they might break the law. There has been significant debate about the issue of extending statutory harassment protection beyond the employment sphere, in particular in Parliament in the context of the Equality Bill, when the Government attempted to expressly prohibit harassment on grounds of religion or belief in the provision of public services and the exercise of public functions, in housing and in schools. The debate has focused on the importance of balancing the right to freedom of speech and expression with the need to protect against acts which violate a person's dignity.
- 14.16 The need to achieve this balance arises particularly in relation to harassment on grounds of religion or belief. We believe that abusive, insulting and provocative behaviour, actions and practices against people because of their religion or belief are unacceptable in our society. However, we recognise the need to protect the free expression of views and the doctrinal activities of religious bodies.
- 14.17 We do not wish, for example, to constrain legitimate freedom of expression (such as plays which touch on religious themes) or academic or critical enquiry and debate, particularly in educational settings, or to prevent the display of religious icons (such as the display of religious symbols by bodies with a religious ethos delivering services). Achieving the right balance in legislation is not a straightforward matter. We therefore wish to consider very carefully whether extending express statutory protection against harassment is the best way of addressing the real issues which people face.

<sup>104</sup> Meg Munn, MP, Second Reading Equality Bill, 21 November 2005, Hansard col 1248: "We remain convinced that it is important to act against harassment on the grounds of a person's religion or belief, particularly in the provision of public functions and the other areas that I have mentioned." In addition, the Government made a commitment when consulting on the regulations prohibiting discrimination on grounds of sexual orientation in the provision of goods, facilities, services, education, premises and the exercise of public functions to address harassment on grounds of sexual orientation within the context of this review.

## Other existing means of protection against some forms of harassment

14.18 While there is a case for extending protection for reasons of consistency, it is also important to consider whether and to what extent the current law leaves a gap in protection against harassment on the grounds protected by discrimination law and, if so, whether this leaves people without means of redress in respect of conduct which we believe should be prohibited. It is therefore important to identify examples of situations where harassment may be taking place outside the workplace on grounds of sexual orientation, religion or belief, age or disability.

14.19 As well as the express statutory protection currently in place, as outlined above, there are already some other protections against some forms of harassment. For example:

- There may be some protection in some cases under existing direct discrimination provisions. As explained in paragraph 14.8 above, the courts have been prepared to address harassment as a form of direct discrimination on the basis of less favourable treatment, even in the absence of express provisions. However, such protection requires a comparative approach and is not a freestanding right, so if a comparator were treated just as badly there would be no remedy. Additionally, there may be a risk that the courts will be reluctant to continue to take this approach in areas where Parliament has not expressly legislated under any new legislation containing harassment provisions in other areas.
- The Protection from Harassment Act 1997, which makes harassment causing alarm or distress a criminal offence and a civil wrong, may provide protection in some circumstances. However, the Act deals only with behaviour which the perpetrator knows or ought to know amounts to harassment (thus incorporating an element of intention), and harassment occurs only where there have been two or more actions which together amount to harassment. It has been primarily aimed at “stalking”.
- In respect of disability discrimination, although there is no explicit coverage of harassment, it is likely that a court would regard harassment as a form of less favourable treatment for a disability-related reason for the purposes of Parts 3 (access to goods and services, etc) and 4 (education) of the Disability Discrimination Act 1995.

- In schools, there is already a duty on heads of schools to prevent, for example, bullying of pupils and other forms of behaviour which may constitute harassment.
- The majority of cases of harassment which have been brought to the Government's attention – for example, Muslim women, lesbians and gay men, or disabled people being insulted in the street – would not come within discrimination legislation whether we extended the law or not, but may instead be caught by public order offences to deal with insulting and abusive behaviour in public places.

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

## The definition

- 14.20 The British definition of harassment derives from the relevant European Directives (the Race Directive, the Employment Directive and the Equal Treatment Amendment Directive). In British legislation, however, the two parts of the definition are separate; a case may be brought if either a person's dignity is violated or an intimidating, hostile, degrading, humiliating or offensive environment has been created for him/her. By contrast, the definition in the European Directives requires both limbs to be satisfied.
- 14.21 The Government did not adopt the European approach in the Race Relations Act when implementing the Race Directive, because under domestic case law under that Act a complainant need only prove one of the limbs<sup>105</sup>. To have followed the European approach could have reduced the domestic protection in this area. Other British discrimination legislation then followed this approach for the sake of consistency. In practice, there may be considerable overlap between the two limbs; conduct which violates a person's dignity almost invariably creates an offensive etc. environment for that person and vice versa.
- 14.22 The British definition does not require harassment to be intentional; the conduct must have the purpose or *effect* specified above. However, in the absence of intention, conduct is only regarded as having the effect of harassing the claimant if, taking into account all the circumstances, including in particular the claimant's perception of the conduct, it should reasonably be considered as having that effect. We refer to this

<sup>105</sup> See "Towards Equality and Diversity" – Proposals for the implementation of the EC Article 13 Race and Employment Directives.

test, in this document, as the “reasonable consideration” test. This test, which reflects British case law on sex discrimination, is partly subjective and partly objective<sup>106</sup>. It is for the court or tribunal to decide, on the facts of each case, whether conduct should reasonably be considered as having the effect of harassing the claimant.

14.23 We consider that the “reasonable consideration” test is an important element of the statutory definition of harassment in discrimination law. By placing objective parameters around the extent to which a claimant’s perception of the effect of conduct determines whether conduct amounts to harassment, the test reduces the possibility of unmeritorious claims based on the perception of an unreasonable or over-sensitive claimant.

14.24 As to concerns that express harassment provisions along these lines would restrict freedom of speech or religion, the Human Rights Act 1998 requires the courts to interpret all legislation compatibly with convention rights. These include the right to freedom of thought, conscience and religion (article 9) and freedom of expression (article 10), so these fundamental values are already protected, allowing the courts to strike a proper balance.

## The options

14.25 We wish to consider the case for and against extending express statutory protection against harassment to some or all the areas where it is not currently provided, and the different options for doing so. Each of the options offers different advantages and disadvantages in relation to the aim of providing consistency, fairness and legal certainty.

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

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

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

- ***the provision of goods, facilities and services;***

<sup>106</sup> *Driskel v Peninsula Business Services Ltd* [2000] IRLR 151

- *education in schools;*
- *the management or disposal of premises;*
- *the exercise of public functions?*

*Please state your reasons why.*

## Specific exceptions

14.26 Extending the same statutory protection against harassment on all protected grounds and in all areas would provide consistency. This approach could be backed by specific exceptions so that some forms of behaviour would not constitute harassment, to deal specifically with any concerns and put beyond doubt that such behaviour was not prohibited.

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

## No protection from mere offence

14.27 It is argued by some that religion or belief is different in kind from the other protected grounds, in that it is necessarily defined in relation to a set of beliefs or opinions which are not held by all and may conflict with those of others. We recognise the strength of feeling which has been expressed on this issue and it is not our intention to protect people against merely being offended by the expression or manifestation of differences in beliefs.

14.28 If the “reasonable consideration” test were considered insufficient to deter cases being brought on grounds of mere offence, or to result in such cases being dismissed if brought, it might be possible to minimise the risk of such cases by providing a different, more stringent, definition of harassment on grounds of religion or belief, for example by following the European approach where the two limbs of the definition need to be satisfied; or by requiring the behaviour to be intended to cause harassment. This would, of course, mean that different definitions of harassment would apply in different circumstances, making the law less consistent.

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

## **“Open” and “closed” environments**

14.29 Some argue that a distinction should be drawn between harassment in a “closed” environment where there is a special relationship (for example, an employer-employee relationship or in the context of core public service provision and public functions such as prisons, immigration detention centres, benefits offices and housing offices), and harassment in an “open” environment where there is an element of choice as to whether to enter that environment in the first place (eg a shop, pub, club etc).

14.30 In relation to harassment under the Sex Discrimination Act, as a result of a recent court decision<sup>107</sup> we will be amending the law to make it clear that an employer can be held liable for harassment if it fails to take action to protect an employee in the workplace when it is aware that he or she is being subjected to persistent acts of sexual harassment by a customer or client. For example, if a client came to an office or factory every week to place or inspect a regular order and sexually harassed the staff on those occasions, and the employer knew of this but failed to take action to protect the staff. The judgment does not require us to do so, but if there is evidence of this type of harassment in relation to other protected grounds, the Single Equality Bill may provide an opportunity for making similar provision to deal with it.

14.31 Outside the employment context, and in respect of service provision, we would not make the service provider liable if one customer thinks that he/she is being harassed by another customer.

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

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

<sup>107</sup> *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin).

## Annex A

### Simplifying exceptions

This annex should be read with chapter 1. The tables in this Annex set out the detailed provisions which contain exceptions which we intend to retain or remove. Our general approach is to provide general tests for exceptions which reflect the need to treat people differently for legitimate reasons, together with specific exceptions to clarify the circumstances in which different treatment is allowed.

### Exceptions in current and forthcoming discrimination law

<b>Table 1: Exceptions that Government considers should be retained</b>	
<b><i>Employment and vocational training</i></b>	
Organised religion – Ministers of Religion etc	SDA s19; SO Regulation 7(3), 16(3)
Ethos based on religion or belief	R/B Regulation 7(3)
Protection of Sikhs on construction sites	R/B Regulation 26
“Faith schools <sup>108</sup> ”	R/B Regulation 39
Police – in relation to differences in uniform; and special treatment of women in connection with pregnancy or childbirth; and pensions	SDA s17(2)
Armed Forces	SDA s85(4); DDA s14C(5) and s64(7); Age Regulation 44(4)
Office holders	SDA s10A(3); RRA s76ZA(9); DDA s4C(5), s4F(1); SO Regulation 10(10); R/B Regulation 10(10); Age Regulation 12(10)
Terms and conditions during maternity leave	SDA s6A
Acts done for the protection of women	SDA s51
Seamen recruited abroad	RRA s9 (nationality)
Occupational pensions	DDA s4G(4); SO Regulation 9A(1); R/B Regulation 9A(1); Age Regulation 11(1)

<sup>108</sup> The term “faith schools” is used to describe foundation or voluntary schools with a religious character, independent schools with a religious ethos, schools in Scotland conducted in the interest of a church or denominational body and independent schools in Scotland that admit only pupils who belong (or whose parents belong) to one or more particular denomination.

<b>Table 1: Exceptions that Government considers should be retained (continued)</b>	
Benefits dependent on marital/civil partnership status	SO Regulation 25
Local councillors and members of the Greater London Authority	DDA s15B(3) and 16A(2)(a)
Aiding unlawful acts – liability of employers and principals	DDA s58(4)
Age-specific	Age Regulations 3(1), 30-34 and Schedule 2
<b>Goods, facilities and services; premises; general exceptions<sup>109</sup></b>	
Particular skills exercised in a specific way <sup>110</sup>	SDA s29(3), Equality Act Part 2 s46(3)
Small dwellings	SDA s32; DDA s23, s24B(1) and (3), s24H(1) and (3); Equality Act Part 2 s48(1); SO Regulation (GFS) 6(2)
Separate services for women and men – to protect the individual’s right to privacy and the preservation of decency	SDA s(35)(1) and (2); s46
Care within family	RRA s23(2); Equality Act Part 2 s62; SO Regulation (GFS) 6(1)
Organisations relating to religion or belief	Equality Act Part 2 s57; SO Regulation (GFS) 14
“Faith schools”	Equality Act Part 2 s59
Religion or belief related membership of charities	Equality Act Part 2 s60
Charities	SDA s43; RRA s34; DDA s18C; Equality Act Part 2 s58; SO Regulation (GFS) 18
Voluntary bodies	SDA s34
Private clubs and associations	RRA s26 (not on grounds of colour); SI 2005/3258 (disability) Regulations 3, 11(2), 12(2), 14; SO Regulation (GFS) 17
Political parties	SDA s33
Sport	SDA s44; RRA s39 (nationality, place of birth, length of residency)
Advertisements	RRA (nationality); DDA s16B
Insurance	SDA s45; SI 2005/2901 (disability); SO Regulation (GFS) 27
Blood donation	SO Regulation (GFS) 28

<sup>109</sup> We have proposed amendments to some of the SDA exceptions as part of implementation of the Gender Directive.

<sup>110</sup> This is a declaration rather than an exception.

<b>Table 1: Exceptions that Government considers should be retained (continued)</b>	
Duty of providers of services to make adjustments <sup>111</sup>	DDA s21(6)(7)
Providers of transport services – transport vehicles	DDA s21ZA(1)(2)
Statutory authority	SDA s51A; RRA s41 and s75(5)(a); DDA s59(1); Equality Act Part 2 s56; Age Regulations s27; SO Regulation (GFS) 12
National security	SDA s52; RRA s42; DDA s59(2A)(3); SO Regulation 24; R/B Regulation 24; Equality Act Part 2 s63; Age Regulation 28
<b>Education in schools</b>	
Single-sex educational establishments	SDA s26-27
“Faith schools”	Equality Act Part 2 s50
Local education authorities/education authorities	Equality Act Part 2 s51(2)(3)
<b>Public authorities exercising public functions/services</b>	
Certain (named lists of) public authorities <sup>112</sup>	SDA s21A(3); RRA s19B(3); DDA s21B(3); Equality Act Part 2 s52(3); SO Regulation (GFS) Schedule 1 Part 1
Acts of a private nature	RRA s19B(4); DDA s21B(4)
Judicial and legislative acts etc	SDA s21A(9) paras 1-5 of table; RRA s19C; DDA s21C(1)(2)(3); Equality Act Part 2 s52(4) (a)-(e); SO Regulation (GFS) Schedule 1 Part 2
Immigration	RRA s19D (nationality, ethnic/national origins); Equality Act Part 2 s52(4) (f)-(i)
Decisions of the prosecuting authorities not to prosecute	SDA 21A(9) paras 6-7; RRA s19F; DDA s21C(4); Equality Act Part 2 s52(4) (j); SO Regulation (GFS) Schedule 1 Part 2 (6)
Charity Commissioners etc	SDA 21A(9) para 14; Equality Act Part 2 s58(2); SO Regulation (GFS) 18(2)
Separate services	SDA 21A(9) paras 8-12 of table
Positive action	SDA s21A(9) para 13
Educational institutions	Equality Act Part 2 s52(4)(k)
Local Government Act	Equality Act Part 2 (s52(4)(l))

<sup>111</sup> These are provisos rather than exceptions

<sup>112</sup> The Race Relations Act lists all the public authorities so there is no need to exclude certain bodies

**Table 1: Exceptions that Government considers should be retained (continued)*****Public duty to have due regard to eliminate unlawful discrimination (and in some cases harassment) and to promote equality of opportunity etc)*<sup>113</sup>**

Certain (named lists of) public authorities	SDA s76A(3); DDA s49B(1)(b) and s49B(2)
Judicial and legislative acts etc	SDA s76A(4); DDA s49C(1)(2)
Immigration and nationality	RRA 71A
Armed forces	DDA s49C(3)

**Table 2: Exceptions that Government considers should be removed*****Employment and vocational training***

Police – in relation to height	SDA s17(2)(a)
Prison officers – height	SDA s18
Training in skills to be used outside Great Britain	RRA s6 and 7 (4) (nationality/colour)
Private households	RRA s4(3) (nationality/colour)
Small partnerships	RRA s10 (1A) (nationality/colour)
<b><i>Goods, facilities and services; premises; general exceptions</i></b>	
Small dwellings	RRA s22 (nationality/colour)
Education/training for persons not ordinarily resident in Great Britain	RRA s36 (nationality/colour)
Sale or letting of owner-occupied premises	SDA s30(3); RRA s21 (3) (nationality/colour); DDA s22(2), s22(8), s24B(1) and (3); Equality Act Part 2 s48(3); SO Regulation (GFS) 6(4)
Consent for assignment or sub-letting of premises	SDA s31; RRA s24 (2) (nationality/colour); DDA s22(2), s22A(7), s24E(1), s24H(1) and (3); s24J(5); Equality Act Part 2 s48(1)

<sup>113</sup> There is currently no public duty to promote equality of opportunity in relation to gender reassignment, sexual orientation, religion or belief and age.

### Implementing the EU Gender Directive

B.1 This Annex sets out our plans for implementing Council Directive 2004/113/EC (‘the Gender Directive’), which implements the principle of equal treatment between women and men in the access to and the supply of goods and services. The deadline for implementation is 21 December 2007. Because a Single Equality Bill could not come into force until after this deadline, we intend to implement the Directive using powers under the European Communities Act 1972. The Directive requires us to amend some existing provisions in the Sex Discrimination Act 1975 which we intend to do by introducing regulations. A copy of the draft regulations can be found at [www.communities.gov.uk](http://www.communities.gov.uk) and <http://www.womenandequalityunit.gov.uk>. We also intend to produce accompanying guidance on amendments being made to the Sex Discrimination Act ahead of them coming into force. Guidance on the insurance provisions will be available at [www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk)

### Our general approach

B.2 Our general approach to implementation is to make the amendments necessary to fulfil our obligations under the Gender Directive while ensuring that the proposals, wherever possible, reduce existing inconsistencies and avoid creating further complexity, in line with better regulation principles. We intend to deal with any wider issues, for example those which are outside the scope of the Gender Directive and beyond our regulation-making powers, in the context of the Single Equality Bill for which our proposals are set out in the main part of this document. Consultees are encouraged to consider the proposals for implementing the Gender Directive in the context of the wider proposals for the Bill. We aim to meet the terms of the Gender Directive by amending the Sex Discrimination Act (though retaining its familiar structure, scope and approach), while taking a step towards the proposals for a Single Equality Bill.

### Summary of proposals for change

B.3 In order to implement the Gender Directive we propose to:

- extend the Directive-based definition of indirect discrimination as it currently applies to goods, facilities or services and premises;

- introduce an express prohibition on harassment and sexual harassment in the field of goods, facilities or services and premises;
- apply the Directive's burden of proof provisions to goods, facilities or services and premises, in line with that for employment and vocational training;
- amend some of the exceptions which currently exist in the Sex Discrimination Act, to ensure that they are compatible with the Directive;
- extend protection against direct discrimination on grounds of a person's gender reassignment to goods, facilities or services and premises;
- extend protection against discrimination on grounds of pregnancy and provide protection on grounds of maternity in the field of goods, facilities or services and premises; and
- amend the Sex Discrimination Act exception relating to insurance to specify the circumstances under which insurance companies may charge different premiums or offer different benefits to men and women.

B.4 Our proposals are set out in detail below. Comments are invited in response to the questions below to aid further development of the proposals.

## Scope of the Gender Directive

B.5 Sex discrimination in matters relating to the access to, and the provision of, goods, facilities or services and premises has been unlawful in Great Britain for over 30 years under the provisions in Part 3 of the SDA. The Gender Directive's scope is narrower than that of the SDA. While the Gender Directive applies to many of the activities which are covered by the SDA, it **does not** cover them all. Matters which the Directive explicitly does not cover are: the content of media and advertisements, employment and education. The Directive also makes clear the need to take account of fundamental rights and freedoms including the protection of private and family life and transactions carried out in that context, and freedom of religion. In addition there are other matters which the scope of the Directive does not cover. These include matters which can only be decided by Member States for example through their national legislatures, or the public policy-making functions of public authorities, and services and facilities provided at a place occupied or used for the purposes of an organised religion for example, for religious observance and practice. Accordingly, references in this Annex

to proposals for change concerning “goods, facilities or services and premises” are only to goods, facilities or services and premises which fall within the scope of the Directive.

- B.6 When considering how to implement the Directive’s requirements, we have guarded against adding new levels of complexity in the law which could arise because of the differences in scope between domestic and European law on gender equality.
- B.7 However, we recognise that some inconsistencies will remain in the Sex Discrimination Act, given the narrower scope of the Directive. We intend to resolve these during the development of proposals for the Single Equality Act.

## Proposals for change

### Definition of indirect discrimination

- B.8 The Gender Directive defines indirect discrimination as:

“where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.

- B.9 A very similar definition of indirect discrimination is already used in the Sex Discrimination Act in relation to employment and vocational training, as a result of amendments made by the Employment Equality (Sex Discrimination) Regulations 2005, which implemented the Equal Treatment Amendment Directive. The definition in section 1(2)(b) of the Sex Discrimination Act is as follows:

“a person discriminates against a woman if he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but

- (i) which puts or would put women at a particular disadvantage when compared with men,
- (ii) which puts her at that disadvantage, and
- (iii) which he cannot show to be a proportionate means of achieving a legitimate aim”.

- B.10 In order to implement the Gender Directive, we intend to amend the Sex Discrimination Act so that the above definition of indirect discrimination, which currently applies in relation to employment and vocational training, also applies to the field of goods, facilities or services and premises.

## Harassment and sexual harassment

- B.11 The Gender Directive requires that people must have protection from harassment and sexual harassment in goods and services. Article 2 defines harassment as:

“where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”;

and sexual harassment as:

“where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”.

- B.12 The Sex Discrimination Act now contains specific provisions prohibiting harassment and sexual harassment in relation to employment and vocational training. Before this free-standing right to be protected against harassment was explicitly set out in law, the courts established that sexual harassment at work could be direct discrimination, where the conduct amounted to less favourable treatment on the grounds of sex and where the claimant could show that they had been subjected to a detriment. Following a recent court ruling<sup>114</sup>, we will amend the existing provisions to clarify that harassment is not limited to conduct caused by the sex of the claimant.
- B.13 In implementing the Gender Directive, we intend to amend the Sex Discrimination Act to make explicit that harassment and sexual harassment are prohibited in the field of goods, facilities or services and premises.
- B.14 Chapter 14 of this consultation document discusses further the practical implications of outlawing harassment in goods, facilities or services and premises. In particular, it highlights the distinction between the relationship between an employer and employee and that between a service provider and customer. The regulations will not make service providers liable for the conduct of one customer towards another.

<sup>114</sup> *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin)

## Burden of proof

B.15 It can be difficult for an individual to prove sex discrimination. The Gender Directive, as with all other European Directives on equal treatment matters, requires that where a complaint of discrimination in relation to goods or services is brought, if the aggrieved person can provide evidence that discrimination has occurred, then it is for the goods or services provider to prove that there has been no breach of the principle of equal treatment. This approach is aimed at improving the effectiveness of access to justice for those who consider they have been subjected to sex discrimination. The Sex Discrimination Act already provides for an equivalent burden of proof provision for employment complaints taken to employment tribunals. We intend to amend the Sex Discrimination Act so that this approach also applies to goods, facilities or services and premises cases which are brought before county and sheriff courts.

## Difference of treatment between men and women in the provision of goods, facilities or services and premises – exceptions

- B.16 Article 4(5) of the Gender Directive permits differences in treatment between men and women if the provision of goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
- B.17 The Government negotiated this provision to ensure that we could retain certain specific exceptions in the Sex Discrimination Act such as the provision of accommodation by a person in a part of their home for reasons of privacy and decency, single-sex voluntary bodies to promote the interests of men or women, membership of single-sex clubs to allow freedom of association, and the organisation of single-sex sports events.
- B.18 We have reviewed the existing exceptions in the Sex Discrimination Act which allow for difference of treatment, to assess whether each one is compatible with the Directive or whether any changes are necessary. There are many which we consider already meet the test set out in the Directive or do not fall within its scope. However there are some where we consider specific changes are needed to ensure any differences of treatment are justified. Table 1 lists all the current exceptions in the Sex Discrimination Act which apply in the context of the Directive and sets out where we consider changes are needed.

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

B.19 The following paragraphs set out in more detail our proposals on particular issues where we consider new or significantly amended provisions in the Sex Discrimination Act are required.

## Financial and insurance products

B.20 The Sex Discrimination Act allows sex discrimination in the provision of insurance, provided that it is based on actuarial or other data upon which it is reasonable to rely, and the treatment is reasonable. The Gender Directive permits proportionate differences in premiums or benefits where sex is a determining factor in risk assessment based on relevant and accurate actuarial and statistical data. It requires that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. It also requires that any costs related to pregnancy and maternity should not result in differences in individuals' premiums and benefits.

B.21 We propose to amend the existing insurance exception in the Sex Discrimination Act to make an insurer's ability to discriminate on grounds of gender subject to the conditions required by the Directive, including the provisions relating to the compilation, publication and updating of supporting data. HM Treasury will issue guidance outlining how the latter requirement may be met. Insurers will be able to publish summary data, either individually or through collective arrangements.

B.22 The new insurance exception will also contain a condition requiring that the costs of pregnancy and maternity shall not result in differences in individuals' premiums and benefits. Implementation of this specific provision can be deferred until 20 December 2009, but it would be desirable not to do so unless a good case can be made for deferral.

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

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

## Gender reassignment: discrimination against transsexual people in the provision of goods, facilities or services and premises

- B.23 We have made clear that we consider discrimination against transsexual people is unacceptable. European case law<sup>115</sup> has held that the right not to be discriminated against on grounds of a person's sex includes discrimination on the grounds of the gender reassignment of a person. We therefore consider that the Gender Directive provides protection for people who intend to undergo, are undergoing or have undergone gender reassignment against discrimination in the provision of goods, facilities or services and premises.
- B.24 We propose to make direct discrimination and harassment on grounds of a person's gender reassignment unlawful in the fields of goods, facilities or services and premises, as it already is in the fields of employment and vocational training. Proposals concerning *indirect* discrimination on the grounds of a person's gender reassignment are not addressed here but are dealt with as part of the proposals for a Single Equality Bill (see Chapter 1).

## Single-sex services – exceptions to the prohibition of discrimination on grounds of a person's gender reassignment

- B.25 As highlighted above, the Sex Discrimination Act contains a number of exceptions from the general prohibition on sex discrimination in goods, facilities or services and premises. The Gender Directive also allows for different treatment if the provision of goods and services exclusively or primarily to members of one sex is justified. Most transsexual people wish to be treated in their acquired gender. Nevertheless, we consider it is appropriate in policy terms and necessary for reasons of clarity, for the law to allow, in certain limited circumstances, single-sex service providers (such as voluntary or charitable organisations set up for the benefit of one sex only) to treat a transsexual person differently from other men or women. Those limited circumstances are where the single-sex service provider can demonstrate that their different treatment of a transsexual person in a particular case was a proportionate means of achieving a legitimate aim, in accordance with Article 4(5) of the Directive.
- B.26 The reason for this limited exception is that we recognise that there may be some cases where it may not always be clear to a single-sex service provider whether their services can be made available to a transsexual person. This may occur, for example, where someone is in the middle

<sup>115</sup> P v S and Cornwall County Council case C-13/94

of the process of gender reassignment or has undergone the process but does not present in their acquired gender and it is unclear whether the particular single-sex service can be provided to the transsexual person in accordance with their birth sex or their acquired sex. Much will depend on the particular circumstances of each case. To rely on such an exception, single-sex service providers will need to be able to point to a legitimate aim and demonstrate, in the circumstances of the particular case, why no less discriminatory alternatives of achieving that legitimate aim were available. Relevant factors which may need to be taken into account include the particular service being provided or the facilities available; the views of the transsexual person; the stage of transition of the transsexual person when they seek access to the service; and the impact on other users of the service. We propose to provide guidance on the factors which may need to be taken into account when a decision is made to treat a transsexual person differently from other men or women in the provision of single-sex services.

## Sport

B.27 We intend to clarify in the Sex Discrimination Act that in single-sex sporting competitions, it will be lawful to discriminate on grounds of a person's gender reassignment where this is necessary to secure fair competition or the safety of competitors, but not otherwise.

## Insurance and actuarial factors

B.28 We propose that the regulations should make clear that discrimination on grounds of a person's gender reassignment in access to or the provision of insurance or financial services is generally unlawful. For the sake of clarity for insurance companies and transsexual people seeking insurance policies, we propose to provide an exception so that calculations of premiums and benefits for a person who intends to undergo or is undergoing gender reassignment should be based on data relating to their birth sex. However, calculations for premiums and benefits for a person who has undergone gender reassignment should be based on data relating to their acquired gender. There will be no requirement that a transsexual person must have a Gender Recognition Certificate to prove that they have undergone gender reassignment. We do not envisage that general policy terms relating to any pre-existing medical condition or history will be affected, enabling their continued use for risk assessment.

## Discrimination on grounds of pregnancy and maternity

- B.29 The Gender Directive stipulates that less favourable treatment on grounds of pregnancy or maternity in goods and services is direct sex discrimination.
- B.30 The Sex Discrimination Act explicitly provides that less favourable treatment on grounds of pregnancy or maternity leave is unlawful in relation to employment, but there is nothing on the face of the Sex Discrimination Act making similar provision in respect of goods, facilities or services and premises.
- B.31 To ensure clarity and consistency of the law, we intend to make explicit that less favourable treatment on grounds of pregnancy and maternity in the provision of goods, facilities or services and premises is direct sex discrimination.

### Defining 'maternity'

- B.32 There are no precedents for a definition of 'maternity' in discrimination law concerning provision of goods, facilities or services and premises. When considering how maternity should be defined, we noted that:
- the definition used in the Sex Discrimination Act in the context of employment relates to 'maternity leave'<sup>109</sup>; and
  - The Sex Discrimination Act also contains a provision for special treatment of women in connection with 'pregnancy and childbirth' (section 2(2) Sex Discrimination Act). This applies to both employment and other fields, including goods, facilities or services and premises. This means that it is not discriminatory to afford women special treatment in connection with pregnancy and childbirth.
- B.33 Options for defining maternity for the purpose of the Sex Discrimination Act provisions covering goods, facilities or services and premises therefore include:
- Defining maternity as 'childbirth'.
  - Defining maternity according to the age of the child – for example, protecting mothers of babies aged up to one year.
  - Providing protection for 'mothers of young children'.
  - Not defining maternity.

<sup>109</sup> Following the recent court ruling in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHAC (Admin) we will amend this definition to remove the need for a comparator.

B.34 The draft regulations which we have prepared for consultation define maternity for the purposes of the goods, facilities or services and premises provisions as one year (52 weeks) after the birth of the child. We consider that this would add clarity and certainty about rights and responsibilities.

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

<b>Table 1: Gender Directive – Exceptions in the Sex Discrimination Act</b>		
<b>Sex Discrimination Act reference</b>	<b>Effect of existing provision</b>	<b>Proposed changes</b>
S21A (4)	Public authorities can discriminate on grounds of someone's sex only when carrying out functions that cannot be undertaken by private organisations.	No change. The scope of the Directive does not extend to the functions that are covered by this exception.
S26	Educational institutions can restrict admissions to pupils of one sex.	No change. The scope of the Directive does not apply to schools.
S30(3)	Owner-occupiers can discriminate against a buyer on grounds of sex if they sell their property without advertising the sale or using an estate agent.	No change. The scope of the Directive does not extend to the functions which are covered by this exception (as it concerns private and family life issues).
S31(2)	Owner-occupiers in small dwellings who choose to share their accommodation on a subletting basis can discriminate.	No change. The scope of the Directive does not extend to the functions which are covered by this exception (as it concerns private and family life issues).
S32	Owner-occupiers of small, (i.e. residential) properties, or their relatives, can refuse to provide accommodation, if it involves sharing facilities, to a person because of their sex. This applies irrespective of whether the accommodation is provided as a service for the public or on a private basis.	No change. The scope of the Directive does not apply to private life.

**Table 1: Gender Directive – Exceptions in the Sex Discrimination Act (continued)**

S33	Political parties can make specific provisions for one sex, for example women's committees.	No change. We do not consider section 33 SDA (political parties) and section 42A SDA (selection of candidates) to be services for the purposes of the Directive and therefore, do not consider them to be in scope.
S34	Voluntary bodies can restrict membership or benefits to people of one sex.	The Directive makes clear that differences in treatment for women and men by voluntary bodies may be justified if in pursuance of a legitimate aim. For the avoidance of doubt, we propose to make clear that different treatment for transsexual people will be lawful only where this would be a proportionate means of achieving a legitimate aim. We propose to develop guidance on the factors that need to be taken into account in such circumstances.
S35 (1)(a)	Services and facilities can be restricted to one sex only in hospitals, or other establishments for people requiring special care, supervision or attention.	We propose that the regulations make clear that it is lawful to restrict such services to one sex only as long as that restriction is justified by a legitimate aim and the restriction is made in a way that is proportionate to achieving that aim. For the avoidance of doubt, we propose to make clear that different treatment for transsexual people will also be lawful where this would be a proportionate means of achieving a legitimate aim. We propose to develop guidance on the factors that need to be taken into account in such circumstances.
S 35(1)(b)	Services and facilities can be restricted to one sex in a place occupied or used by an organised religion and the restriction is made in order to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of its followers.	No change. We do not consider such facilities and services fall within the scope of the Directive.

<b>Table 1: Gender Directive – Exceptions in the Sex Discrimination Act (continued)</b>		
S35(1)(c)	Services and facilities which are likely to be used by two or more people at the same time can be restricted to one sex for reasons of privacy and decency.	No change. The Directive makes clear that reasons of privacy and decency are a legitimate aim. Service providers will need to ensure any difference in treatment is a proportionate means of achieving that aim. For the avoidance of doubt, we propose to make clear that different treatment for transsexual people will also be lawful where this would be a proportionate means of achieving a legitimate aim. We propose to develop guidance on the factors that need to be taken into account in such circumstances
S42A	Political parties' procedures for selecting election candidates can be designed to reduce inequality in the numbers of men and women elected.	No change. We do not consider section 33 SDA (political parties) and section 42A SDA (selection of candidates) to be services for the purposes of the Directive and therefore, do not consider them to be in scope.
S43	Charitable bodies can restrict benefits to people of one sex if their charitable instrument makes clear that this is their purpose.	Given the wide range of reasons why charities are set up, we propose to make explicit that, if it is challenged, a charity will need to justify restricting services to one sex as long as that restriction is justified by a legitimate aim and the restriction is made in a way that is proportionate to achieving that aim. For the avoidance of doubt, we propose also to make clear that different treatment for transsexual people will also be lawful where this would be a proportionate means of achieving a legitimate aim.

**Table 1: Gender Directive – Exceptions in the Sex Discrimination Act (continued)**

S44	Sporting competitions involving physical strength, stamina or physique can be restricted to one sex only if it would put “the average woman” at a disadvantage to “the average man”.	The Gender Directive makes clear that organising sporting competitions can be a legitimate aim. For the avoidance of doubt, we propose to make clear that different treatment for transsexual people will be lawful where this is necessary to secure the safety of competitors or fair competition, but not otherwise.
S45	Insurance can be offered at different premium and benefit rates for men and women as long as that difference is based on relevant and accurate actuarial data showing different risk levels as between men and women, and the treatment is reasonable.	Insurance can be offered at different premium and benefit rates for men and women as long as there is supporting data; the differences are proportionate; and the differences do not result from costs related to pregnancy or maternity. The data relied upon must comply with Treasury guidance relating to its compilation, publication and updating. For the sake of clarity we propose that calculations of premiums and benefits for a person who intends to undergo or is undergoing gender reassignment should be based on data related to that person’s birth gender. If a person has undergone gender reassignment then calculations for premiums or benefits should be based on data related to that person’s acquired gender.
S46	Where residential accommodation is being provided on a communal basis, such as in hostels, the respective demands of women and men for that accommodation should be provided as fairly and equitably as circumstances allow.	For the avoidance of doubt, we propose also to make clear that different treatment for transsexual people will also be lawful where this would be a proportionate means of achieving a legitimate aim.

## Glossary

### A

Audit Commission Non departmental public body which appoints auditors to in particular local government in England

### C

CBI Confederation of British Industry

CEHR Commission for Equality and Human Rights

### D

DDA 2005 Disability Discrimination Act 1995 (as amended)

DTI Department of Trade and Industry

### E

Employment Equality (Age) Regulations 2006 (SI 2006/1031)

Employment Equality (Religion or Belief) Regulations 2003 (SI 2003 1660)

Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003 11661)

The Employment Directive Equal Treatment Directive (2000/78/EC) covering disability, religion or belief, sexual orientation and age in employment and vocational training.

Equal Pay Act Equal Pay Act 1970 (c.41)

Equal Pay Directive Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay

Equal Treatment Directive Council Directive 76/207/EEC 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.

	Equal Treatment Amendment Directive/ ETAD	Council Directive 2002/73/EC which updates Directive 76/207/EEC to reflect modifications to the EU Treaty and developments in case law
	Equality Act	Equality Act 2006
	The Equalities Review	The Equalities Review chaired by Trevor Phillips, announced in February 2005; final report published 28 February 2007
F	Fairness and Freedom	'Fairness and Freedom: The Final Report of the Equalities Review 28 February 2007
G	Gender Directive	Council Directive (2004/113/EC) implementing the principle of equal treatment between women and men in the access to and supply of goods and services
H	Her Majesty's Court Service	Executive agency of the Ministry of Justice, now including Magistrates Courts
	Human Genetics Commission	The UK Government's advisory body on new developments in human genetics and how they impact on individual lives.
O	Opportunity Age	Opportunity Age – Meeting the challenges of ageing in the 21st century – HM Government 2005
R	Race Relations Act	Race Relations Act 1976 (as amended)
	The Race Directive 2000	Council Directive (2000/43/EC) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
S	Scottish Executive	The devolved Government for Scotland
	Sex Discrimination Act	Sex Discrimination Act 1975 (as amended)
W	Welsh Assembly Government	The devolved administration of Wales
	Women and Work Commission	Independent commission set up to consider the causes of the gender pay and opportunity gap.