

**Equality and
Human Rights
Commission**

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Equality and Human Rights Commission Parliamentary Briefing

Equality Bill

Report stage briefing

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The Equality and Human Rights Commission

The Equality and Human Rights Commission (the Commission), established on the 1st October 2007 is working to eliminate discrimination, reduce inequality, protect human rights and to build good relations, ensuring that everyone has a fair chance to participate in society.

Our approach to equality, opportunity and human rights builds on the achievements of our predecessors, the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC). We are here for the 60 million people of Britain and Parliament has set us the task of:

- Protecting and promoting equality
- Protecting and promoting human rights
- Ensuring good relations.

The Equality Bill

The Commission strongly welcomes the Equality Bill. It represents a once-in-a-generation chance to rationalise and strengthen Britain's equality legislation, providing a firm foundation for a fairer society in which everybody has the chance to fulfil their potential.

For 40 years British equality legislation has enabled those who are mistreated at work or overlooked by public services for discriminatory reasons to pursue justice through the courts. We have made good progress in tackling the most egregious examples of discrimination, because individuals and organisations now know that they can be brought to account.

However, chronic disadvantage and inequality persist. Half of disabled people are out of work. A Bangladeshi woman is six times as likely to be unemployed as a white woman. A child's postcode at birth is a reasonable predictor for their lot in life as an adult. Our choices and chances in life are still, to a great extent, determined by our origins.

This is not simply the product of ill will on the part of either individuals or organisations; it is a systemic bias. And while people may win individual victories here and there, progress will be slow at best and will depend upon those who make great sacrifices in order to take their cases through the courts. The real challenge is to achieve a wholesale shift in attitudes, looking at how to really improve our systems and structures in order to give everyone a fair chance. This is what the Equality Bill will enable us to do.

The Bill spells out that organisations have to look at the evidence and examine their processes, finding ways of delivering for everyone, regardless of race, gender, disability, age, religion or belief, sexual orientation or gender identity.

Better, simpler, more systematic equality law

Since 1997, Britain's equality legislation has been added to so that everyone has similar – though not identical – levels of protection from discrimination in the workplace, regardless of age, disability, ethnicity, gender, gender reassignment, religious and non-religious belief and sexual orientation. Most people are also protected from discrimination on these grounds when accessing private and public sector goods, facilities and services. Public authorities have a duty to promote equality of opportunity and to eliminate discrimination and harassment on grounds of race, disability, sex or gender reassignment. There are additional duties to promote equality for the Welsh Assembly Government, the Scottish Government and the Greater London Assembly.

Although the Commission welcomes the wider protection that has resulted from the combination of recent legislation and the much older law on race and sex discrimination, the incremental way the law has developed has resulted in unnecessary complexity. There are 116 different acts of parliament, regulations, codes of practice and guidance. Similar concepts are expressed in different words

and different tests are applied to what might be thought of as similar situations. Significant parts of the law are contained in decisions and interpretation by judges and courts in the UK and the European Union, rather than in the legislation itself. This situation often makes it very difficult for employers, service providers, individuals, and even expert advisers, lawyers, courts and tribunals, to know exactly how to apply the law in particular circumstances.

The Commission therefore welcomes the government's commitment to use the Equality Bill to 'declutter' our discrimination laws and to make the law clearer. This is an important opportunity to make the law more consistent across different groups. Every group should receive the same protection in every area of activity unless there is a very good reason to leave them out. This will make it much easier for everyone – employers, service providers and individuals – to understand and apply the law.

In tidying up the law and making it more consistent, the Equality Bill should not erode the rights that people currently enjoy. The Commission expects the final Equality Act to fulfil the commitment given in the Discrimination Law Review consultation paper, *A Framework for Fairness* (2007):

"In harmonising and simplifying, we [the government] 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."

A fairer, more efficient use of public money

For public bodies, simplifying the currently complex legislation into one single duty will make it easier to tailor public services to meet their communities' needs. The simplified approach and improved targeting should increase the effectiveness and efficiency of public spending.

The way forward

The Bill represents a real opportunity to improve the way we pursue fairness and equality in Britain. It is now imperative to ensure that it receives Royal Assent before parliament is dissolved prior to the next general election, which must be held on 3 June 2010 at the latest.

The proposed timetable is ambitious. If the Bill does not receive Royal Assent before parliament is dissolved, it may fail or be significantly compromised. As supporters of the Bill, therefore, we intend to do everything in our power to ensure its success. That means that we may not support some measures which, while desirable, may mean that the Bill runs out of time.

Key issues

Age discrimination

We welcome the measures outlined in the Bill to ensure providers of goods, facilities and services (such as high street shops, sports clubs, holiday resorts, and doctors) treat older people fairly and equally.

Currently it is legal, and normal practice, for insurance companies to dramatically increase premiums or refuse to quote based on age. This means that some healthy, active older people find it difficult or impossible to travel abroad to visit relatives or travel. Older people are also denied access to some health services, such as mental health care.

The Commission has contributed to a national review of age discrimination, 'Age Inequality in Health and Social Care' which was published by the Department of Health in October 2009. We believe the law should help service providers and employers consider people's abilities rather than simply their date of birth.

As part of our commitment to produce statutory and non-statutory guidance on many aspects of the new legislation (see 'Guidance and codes of practice', below), the Commission is planning guidance on the implementation of the new provisions to tackle age discrimination in goods, facilities and services, which will be published three months ahead of commencement. We are already working with the NHS on implementing the new provisions throughout the health service, and we will also work with other organisations around this issue.

The public sector equality duty

Today's economic climate increases pressure to deliver effective, efficient public services to all parts of the community. The Commission believes the new public sector equality duty will encourage public sector bodies to tailor public services, like education and health, more closely to community need. The new streamlined approach will help public bodies deliver fair public services more efficiently.

Under the current public sector duties, public authorities are required to consider race, gender and disability issues when developing their policies and delivering their services. However, they are not obliged to take into account the specific needs of other groups, such as older people or those with different religious backgrounds.

We welcome, therefore, the introduction of a single public sector equality duty covering all the different types of inequality people may face. We believe a more coherent approach to equality and undertaking useful equality impact assessments could also save money. For example, when a local council spent money on better fitting, non-slip footwear for elderly people, the results were a significant reduction in the number of people needing hip replacements following a fall. This meant local people had a better quality of life and saved taxpayers' money. Similarly, one fire department discovered that local Bangladeshi homes were more likely to experience

chip pan fires. After targeted outreach work with the community, the number of fires dramatically reduced, saving money and reducing risk to life.

Religion and belief

The Commission recognises that there are concerns about extending the duty to include religion and belief, mainly due to fears that this will lead to the active promotion of religion and belief in Britain. The duty is designed to protect people from discrimination on the grounds of religion and belief and to promote equality of treatment for people of different religions or beliefs. There is no requirement on public sector organisations to promote particular religions or belief systems and in fact doing so may run counter to the duty.

The Commission believes that to exclude religion and belief from the public sector equality duty would create a two-tier system of protections which will lead to unfairness not just between different religions or belief groups, or between religious and non-religious groups, but also between religion and belief and other protected grounds.

Not extending the duty to religion or belief will also amount to a missed opportunity to improve relations and cohesion between different groups and to tackle disadvantage and discrimination based on religion or belief. Until now, this has been lost in the focus on discrimination on the grounds of race.

Socio-economic duty

We welcome the Government's decision to require strategic public authorities to consider socio-economic disadvantage in the planning and monitoring of the services they provide. The Commission was an early supporter of this provision because we believe that to ignore socio economic disadvantage means you ignore some of the most deep-rooted discrimination in the UK.

Socio-economic disadvantage is one of the many complex structural causes of discrimination and inequality. Factors such as changes in the labour market, the delivery of public services such as education and health, and the immediate impact of the economic downturn can negatively affect the life chances of individuals.

Considering socio-economic disadvantage will be important in driving social mobility. Educational success is the most important contributor to life chances. According to research recently released by the Government's Social Mobility Commission three-quarters of judges and 70 per cent of finance directors were independently schooled, as were 45 per cent of senior civil servants and 32 per cent of MPs. At the other end of the social scale 85 per cent of white boys from low socio-economic groups do not get five good GCSEs.

Gender pay gap

Nearly 40 years after the Equal Pay Act, we still live in a society where for every pound earned by our sons, our daughters will take home less than 85 pence for doing the same work.

In some areas, we know that the gender pay gaps are particularly stark. A report issued recently as part of the Commission's inquiry into the finance sector revealed significant gender pay gaps of up to 60 per cent in that sector and evidence that women are overwhelmingly concentrated in lower-paid administrative jobs.

There are strong economic reasons for eliminating the gender pay gap. The Women and Work Commission concluded in 2006 that removing barriers to women working in occupations traditionally done by men, and increasing women's participation in the labour market, would be worth between £15 billion and £23 billion: equivalent to 1.3 to 2.0 per cent of Gross Domestic Product (GDP).

Statistics show that the gap is wider in the private sector than in the public (a full-time gap of 21.7 per cent as compared to 13.8 per cent) and evidence produced for the Commission in 2008 showed that far fewer private than public sector employers are taking action to close the gender pay gap by carrying out equal pay reviews (23 per cent as compared to 43 per cent).

Our 2009 Finance Sector Inquiry found that women in some of the UK's leading finance companies receive around 80 per cent less in performance related pay than male colleagues. The disparity is a major factor behind the massive gender pay gap in the finance sector.

The Commission therefore welcomes the intention to create transparency around pay by lifting gagging clauses and allowing colleagues to discuss their pay.

Gender pay reporting

We have also been calling for organisations to publish figures showing the numbers of men and women in particular pay bands. We therefore welcome the government's request for the Commission to embark on a programme of work with business, third sector and trade union leaders to develop a set of measures to improve private and third sector transparency on the gender pay gap.

We have consulted widely on possible measures and are currently drafting a report and recommendations to government. The Commission has also produced a report showing the extent to which employers are already measuring and sharing information on their gender pay gaps, and this will be published together with our recommendations on the measures we would like to see employers adopt.

We support a voluntary regime, in which participating organisations will agree upon how to report these figures. Within two to three years we hope to have achieved high levels of participation on a purely voluntary basis.

To maximise the effectiveness of the Bill on equal pay we are supporting:

- Representative actions.
- Hypothetical comparisons: we welcome the fact that the Bill will make it possible to make a hypothetical comparison in respect of a claim of direct discrimination. However, as claims of direct discrimination are relatively rare,

we would like to see hypothetical comparisons permitted for indirect discrimination claims as well.

- Employment tribunals making recommendations on equal pay.
- Root and branch review of the equal pay legislation to secure real reform: this is a longer-term objective which we hope to see implemented separately from the Equality Bill.

Procurement

The public sector spends billions of pounds every year on procurement. The Commission welcomes measures that will enable public bodies to choose suppliers who treat their workers fairly and equally, as well as delivering value for money for the taxpayer.

Many businesses, small and large, want to access these contracts available through the public sector and we need to provide them with simple and clear guidance to help them do so.

We believe that the single public sector equality duty should be clear about the need to give due consideration to equality and diversity when making procurement decisions. The Commission has been working with the Government Equality Office and Office of Government Commerce (OGC) to reform the Pre Qualification Questionnaire used in public sector procurement, which we hope will simplify the process for both contractor and bidder. We will continue to work with the OGC to streamline the procurement process and develop clear equality standards.

Positive action

Many employers understand the value of a diverse workforce. However, the law around positive action is confusing with many well-intentioned employers fearful of breaking anti-discrimination legislation and confusing positive action with positive discrimination, which is unlawful. The Commission welcomes the provisions in the Equality Bill to clarify the existing legislation and promote positive action.

Lots of businesses recognise that a more diverse range of employees may give them a greater insight into new markets by helping identify the needs or preferences of certain sectors of society. A more diverse workforce may attract a wider range of customers: for example, women travelling on their own may prefer taxi companies that employ women drivers. Many employers also recognise the reputational benefits of a representative workforce. Consumers and shareholders have shown the competitive benefits that companies can gain through sustainability programmes and fair trade principles.

Public bodies also understand the need for a diverse workforce to better represent the communities they serve. For example, many recognise the problem of under-representation of male primary school teachers, which means that many boys grow up on an environment without positive male role models.

Positive action would allow employers choosing between two equally-qualified candidates to select the successful candidate on the grounds that they are from an

under-represented or disadvantaged group if they wish to do so. In other words, the fact that a candidate is from one of these groups would lawfully be considered as a “tipping factor” in a tie-break situation. It should be stressed that this is a voluntary, rather than mandatory process.

Positive discrimination, on the other hand, means that applicants from particular groups receive preferential treatment in the recruitment process – so a less well qualified applicant might be given a job over a better qualified rival, solely because they come from an under-represented group. This would remain unlawful.

Building on the Disability Discrimination Act

We must ensure that the final Equality Act properly transposes and builds upon the unique provisions of the Disability Discrimination Act (DDA). Unlike other anti-discrimination law, the DDA requires public authorities to treat disabled people differently in order to take account of their disabilities - even when doing so involves treating disabled people more favourably than others. The Commission identified a number of areas where the Bill as originally published fell short of this requirement and has been working with government on a range of improvements. We have called for the government to bring forward its own amendments in relation to:

- restoring the DDA's approach to direct discrimination;
- effectively dealing with the gap left by the House of Lords judgement in the 'Malcolm' case;
- improving the Bill's approach to reasonable adjustments, and
- prohibiting the use of pre-employment health questionnaires.

Guidance and codes of practice

The Commission recognises that both statutory and non-statutory guidance will be of key importance in implementing any future Equality Act. We are already working on a range of resources which will deliver practical advice employers, providers of services, goods and facilities, public bodies, legal and other advisers, and individuals.

Simple, easy-to-follow guidance will explain clearly what needs to be done to implement the law. The Commission will produce at least four statutory codes of practice on employment; services and public functions; the public sector equality duty; and education. In addition the Commission is proposing to produce a separate equal pay code and, where appropriate, specific codes for Wales and Scotland.

Alongside these codes, the Commission will produce the following seven core pieces of non-statutory guidance:

- a guide to what's new in the Equality Act 2010
- a practical guide to the Equality Act 2010 for employers
- a practical guide to the Equality Act 2010 for providers of services and public functions
- a practical guide to the Equality Act 2010 for public bodies
- your rights to equality in employment (for employees)
- your rights to equality in accessing services and public functions (for service users), and
- a guide to equality in the public sector for individuals, private and third sector organisations.

A draft of the first tranche of statutory codes and non-statutory guidance will be made available for public consultation in January 2010, and those codes are currently scheduled to be laid before parliament from June 2010.

Areas for improvement

As we have made clear, the Bill has the full support of the Commission as a progressive and proportionate piece of legislation and it remains our priority to see it receive Royal Assent. However, if parliamentary time were available we would want to work on a number of areas in which we consider that improvements and clarifications could still be made. Further details of these provisions are available on our website.

A new model for the streamlined public sector equality duty

The new public sector equality duty is an area of great importance to the Commission and our stakeholders. We would want to ensure that the public sector duty focuses on outcomes rather than box-ticking and bureaucracy. To this end, the Commission has developed a model for a more outcomes-focused duty.

This would involve rewording the duty to make it clear that public bodies are obliged to take appropriate steps towards achieving equal outcomes for all. The duty would not require any organisation to achieve an absolutely equal outcome, as many factors that contribute towards inequality will be beyond its control. However, if sufficient progress is not made an organisation could be investigated to establish whether it had taken the requisite steps towards achieving equal outcomes.

In addition, the Commission remains concerned that the proposed public sector equality duty does not achieve the clarity provided by the disability equality duty in drawing the attention of public authorities to the need to take account of disabled people's disabilities. We hope that the government will recognise the importance of providing such direction, as acknowledged in evidence from public authorities themselves, and bring forward an appropriate amendment.

Mandatory retirement age

The Commission believes that removing the mandatory retirement age would put age discrimination legislation on an equal footing with the other equality strands and make the law simpler and cleaner – for both employee and employers. Being forced to stand down from a job because of your age rather than your ability is one of the most blatant forms of discrimination older people face.

Age discrimination for the under-18s

The Commission believes that children and young people should also be protected from discrimination. It is one of the recommendations of the Committee on the Rights of the Child that the UK government ensure full protection against discrimination on any grounds, including by taking all necessary measures to ensure that cases of discrimination against children are addressed effectively.

We understand that there are concerns about the complexity of exceptions for age-specific services and that service providers fear they may be vulnerable to legal action. However, in other areas of discrimination law there are exceptions which are made clear and workable due to robust legislation, guidance and codes of practice.

Employment tribunal recommendations

The Commission would like an extension of the power for employment tribunals to make recommendations to include equal pay claims as we believe this will be of significant practical benefit to employers and employees and will reduce the burden on an already stretched tribunal system.

Qualifications bodies

While the Commission broadly supports the proposal to empower the qualifications regulators in England, Scotland and Wales to determine matters concerning where reasonable adjustments can and cannot be made to examination arrangements, we share the concern of a number of disability organisations about the considerable discretion given to the regulator in how they act. This is a particular concern in Scotland where the regulator and the qualifications body are one and the same.

Harassment on the basis of religion or belief and sexual orientation

The Bill as it stands does not prohibit harassment on grounds of sexual orientation and religion or belief outside employment and vocational training. In line with its desire to secure legislation that harmonises and strengthens protection for each equality strand and human rights, the Commission is pressing for amendments that would result in an express prohibition on harassment on grounds of sexual orientation and religion or belief in services, premises and education.

Other possible amendments

In addition to the areas addressed above the Commission has asked the government to make a number of smaller amendments to the current Bill (details of these are available on our website: www.equalityhumanrights.com).