



**Discrimination Law Review - 07 Sep 07**

## **Discrimination Law Review**

### ***A Framework for Fairness***

### ***Proposals for a Single Equality Bill***

### ***for Great Britain***

***A collective response, written and endorsed by a range of Scottish voluntary organisations specialising in equalities and human rights issues and facilitated by the Scottish Council for Voluntary Organisations.***

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Black & Ethnic Minorities Infrastructure in Scotland (BEMIS) – [www.bemis.org.uk](http://www.bemis.org.uk)

Close The Gap – [www.closesthegap.org.uk](http://www.closesthegap.org.uk)

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Equality Network – [www.equality-network.org](http://www.equality-network.org)

Inclusion Scotland – [www.inclusionscotland.org](http://www.inclusionscotland.org)

LEAD Scotland (Linking Education & Disability) – [www.lead.org.uk](http://www.lead.org.uk)

LGBT Youth Scotland – [www.lgbtyouth.org.uk](http://www.lgbtyouth.org.uk)

Nil By mouth – [www.nilbymouth.org](http://www.nilbymouth.org)

Positive Action in Housing (PAIH) – [www.paih.org](http://www.paih.org)

Positive Action for Training in Housing Scotland (PATH Scotland)

Poverty Alliance – [www.povertyalliance.org](http://www.povertyalliance.org)

Quarriers – [www.quarriers.org.uk](http://www.quarriers.org.uk)

Rape Crisis Scotland – [www.rapecrisisscotland.org.uk](http://www.rapecrisisscotland.org.uk)

Scottish Association for Mental Health (SAMH) – [www.samh.org.uk](http://www.samh.org.uk)

Scottish Consortium for Learning Disability – [www.scld.org.uk](http://www.scld.org.uk)

Scottish Council for Voluntary Organisations (SCVO) –  
[www.scvo.org.uk/equalities](http://www.scvo.org.uk/equalities)

Scottish Disability Equality Forum – [www.sdef.org.uk](http://www.sdef.org.uk)

Scottish Interfaith Council – [www.interfaithscotland.org](http://www.interfaithscotland.org)

Scottish Refugee Council – [www.scottishrefugeecouncil.org.uk](http://www.scottishrefugeecouncil.org.uk)

Scottish Women's Aid – [www.scottishwomensaid.co.uk](http://www.scottishwomensaid.co.uk)

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

## Introduction

Deep and entrenched inequalities and unfair discrimination persist for people living in the UK despite 40 years of anti-discrimination legislation. Reducing these inequalities is not just a moral imperative; it will benefit society as a whole by tapping into the abilities and skills of groups in the UK currently disadvantaged, as well as improving social cohesion and integration.

We recognise that the Government has made considerable efforts to counter discrimination in the last ten years. For example:

- improving provision on discrimination in relation to gender, race and disability
- extending protection to religion or belief and sexual orientation in the fields of employment and training, as well as in the provision of goods and services
- extending protection against age discrimination in the employment field
- introducing the Human Rights Act 1998

However, these various efforts have been introduced in piecemeal fashion which has resulted in a complex and contradictory web of legislation. Often this is difficult to access and interpret for employers, businesses and individuals alike.

In June 2007, the Government set out detailed proposals for a Single Equality Act in “A Framework for Fairness” - a consultation exercise developed as a result of the Discrimination Law Review (DLR).

Remit

Despite this unprecedented opportunity, in our view, the Green Paper (which is the first public consultation on reformation of the existing discrimination framework) fails to measure up to its terms of reference. These are:

- A consideration of the fundamental principles of discrimination legislation and its underlying concepts, and a comparative analysis of the different models for discrimination legislation.
- An investigation of different approaches to enforcing discrimination law to enable consideration of a spectrum of enforcement options
- An understanding of the evidence of the practical impact of legislation – both within the UK & abroad – in tackling inequality and promoting equality of opportunity.
- An investigation of new models for encouraging & incentivising compliance
- Consideration of the opportunities for creating a simpler, fairer and more streamlined legislative framework in a Single Equality Act.

Clear, comprehensive and effective equality legislation is vitally important to inject new momentum into the battle for real equality for everyone. Our view is that the Green Paper should set out proposals for an equality law which is fit to address the challenges and embrace the opportunities of 21st Century.

Although the Green Paper addresses to some extent the issue of simplification, our view is that it fails to put forward any substantive improvements in securing compliance, or achieving better methods of enforcement. In addition we believe there is limited discussion on incentives not to discriminate. In particular, there are no plans to address the continuing failure of the private sector to tackle discrimination, or embrace equality.

As the Government considers the opportunities for creating a more consistent, clearer and simpler discrimination law framework with equal protection against discrimination for all strands and which produces better outcomes for people experiencing disadvantage and discrimination, a Single Equality Act provides a unique opportunity to prohibit discrimination and streamline the current legislative framework.

In light of the previously outlined complexities within the current legislative framework, the Government's commitment to review and simplify the law into a single Equality Act is extremely welcome.

### **The Discrimination Law Review; A Framework for Fairness**

However, we are concerned that in some places the consultation's proposals would weaken existing provisions. We are also concerned that in some parts of the document the

intention is unclear, and that in some parts there is a clear case for going further than is proposed.

We also believe that the proposals fail to address some of the gaps in protection and deep seated problems regarding the way in which equality laws work. For example:

- ignoring multiple discrimination and intersectionality
- failing to address issues of compatibility with other existing pieces of legislation
- failing to address the persistent and damaging effects of systemic and institutional discrimination.

This response focuses on **6 key themes** which are the need for:-

1. **A fundamental analysis**; a clear and strong statement of purpose and principles in a single Equality Act in order to give it overall coherence;
2. **Improved provision for the private sector** to take responsibility for equality including public procurement;
3. **Consideration of enforcement and access to justice** issues including whether more discrimination cases can be dealt with by the tribunal system and removed from Sheriff Courts;
4. **An improved public sector equality duty** entailing no regression in respect of the existing duties and addressing the limitations of the current duties / alternatively a robust single public sector equality duty that covers all grounds
5. **Clarity on the scope for positive action** (balancing) measures
6. **Provisions to explicitly counter strand anomalies.**

## **1. A Fundamental Analysis**

Purpose, principle and justification

The development of the Single Equality Act promises to be a once in a lifetime opportunity to:

- harmonise equality legislation “upwards”
- establish consistency in definitions, tests and exemptions
- empower the CEHR to produce codes of practice and guidance to public bodies
- provide everyone with a right to equality

However this right to equality is not clearly articulated within the Discrimination Law Review. The need for purpose and basic principles to be explicit. Because anti-discrimination law (by the very nature of discrimination) gives rise to many issues of principle, the DLR should include:

- a clause setting out its purpose and basic principles
- an opening statement that is explicit on the spirit of the act and includes a positive vision of equality (that it matters to everyone and is not merely a minority issue)
- a qualitative definition of “equality” as a right not a privilege.

We believe this would aid understanding, provide clear legislative guidance on application and interpretation, and provide a framework for the DLR’s specific provisions and complexity of exceptions.

A clear purpose clause would also give the Act an overall coherence. It is crucial that the Single Equality Act establishes equality as a fundamental human right and that this in turn creates an expectation of equality by and for all -that if not achieved - is recognised as an infringement. Such a clause would also set out the objectives and goals of the Act and provide guidance to those seeking to interpret the Act, (for example courts and tribunals, employers and service providers).

This would be particularly useful when/if the Single Equality Act comes into conflict with another piece of UK legislation vis a vis legal precedence and interpretation when one piece of legislation disagrees with another.

As such we would propose that a review exercise should be conducted on existing legislation to ensure that it is compatible with the Single Equality Bill and that, wherever possible, any subsequent provision should be interpreted in line with the proposed purpose clause.

The Discrimination Law Review (DLR) suggests that such a purpose clause should be

adopted for the equality duties. However, we can see no reason why this should be limited to the equality duties alone. We would prefer the approach of a purpose clause for the whole Act which would then also apply to the equality duties.

The purpose clause and basic principles could build on the best aspect of existing legislation. For example:

1) The General duty Chapter 3, Section 3 of the Equality Act 2006

2) "...to encouraging and supporting 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."

3) The Scotland Act which has a far wider in scope than the specific definitions of discrimination under UK law.

" the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions."

## **Justification**

Our view is that the Green Paper should also articulate the justification for initiating proposed changes in legislation. We would suggest that this includes:

- Articulating the moral case
- Acknowledging the current hierarchy of equality rights and the need to harmonise legislation upwards, unless there is good reason not to
- Strengthening existing equalities legislations and duties
- Recognising that there are more than 6 'strands' that suffer form discrimination e.g. carers

- Acknowledging that people face multiple discrimination
- Articulating the business case and engaging the private sector in working for equality
- Bringing UK legislation in line with EU directives

The Equal Opportunities Commission, Disability Rights Commission and the Commission for Racial Equality have written papers in support of a purpose clause within the Single Equality Act, saying that it would “greatly aid public understanding” and provide “an important statement of basic principles”. The organisations involved in this response endorse and support the principles within these submissions.

## Analysis

The document presented is limited by the lack of analysis and acknowledgement of systemic discrimination. Whilst there is some acknowledgment that racism is systemic and institutionalised, that understanding is not reflected across the other groups facing institutional or systemic discrimination.

The DLR fails to articulate the relationships [intersections] between different discriminated groups. For example, it fails to recognise caring as a predominantly gendered issue or that heterosexism, homophobia and transphobia are aspects of sexism. There is little point in having a Single Equality Act if it continues to use an analysis that addresses issues ‘strand’ by ‘strand’. The Act needs to articulate an analysis of the systemic relationship between the different inequality ‘strands’ and other people facing discrimination, and the common experience and manifestations of the misuse of power to discriminate and oppress.

## Loss of ground

The DLR implies that special public duties could be rolled back. Whilst it is understood that there will be a need for an integral public sector duty to widen the scope of The Act beyond those strands it is also important to ensure there is no loss of ground covered in existing equalities legislation. Indeed it was anticipated that the DLR would take these forward, such as establishing a more robust approach to action by private sector. This has not however been achieved, and the DLR relies on the spread of good practice across the private sector rather than legislation and compliance.

## **2. A private sector equality duty?**

The discrimination law review rejects the idea that the current public sector duties on equality should extend to the private sector. The basis of the Government’s argument is that consumers can choose other providers within the private sector. Because this is

usually impossible in the public sector and that a private sector duty would constitute too high a regulatory burden and therefore cost.

From our perspective there are several problems with these arguments. First, there is a growing divide between the rights of private sector and public sector employees in respect of equality. Second, it is not always possible for consumers to 'go elsewhere' if they are purchasing from a monopolistic provider (this could be the local shop or the local train service). Third, this argument is in contradiction with the Government's (and most equality groups') assertion that good practice in equality and diversity is good for business.

We accept that it would be difficult at this stage to make a private sector duty work in practice. However, we would ask the Government to explore in more detail how it could achieve better equality and diversity outcomes in the private sector and suggest the following measures for consideration.

#### Alternative measures

It may be possible to create some of the effect of a private sector duty and therefore energise equality and diversity activity in the private sector in different ways – obviating the need for a duty per se. Some of this could be done by devolved governments. For example the Scottish Executive could suggest a benefit in submitting a "mini-response" to the Executive outlining what we expect of them in this area.

#### Equal pay

Equal pay reviews are not compulsory for the private sector but are for the public sector in Scotland. The EOC points out that only an equal pay review can ensure that an organisation is providing equal pay and has a sound basis for gender equality in the workplace. Duty or no duty for the private sector, this seems like a self evidently necessary measure which could be reported on as part of a companies audit process.

#### Workforce monitoring

For good reason the CRE expects public employers to monitor their workforce on the basis of race. The DLR rejects extending this to the private sector and rejects across the strand reporting on workforce composition. Whilst monitoring can be very useful (especially over time) to check if an employer really does reflect the world it works in and does not sustain barriers to entry for any group it can also be done in a damaging way.

A number of employers (that Stonewall Scotland, for example, have worked with) are

intending to monitor on the basis of sexual orientation and are encouraged to do so with a number of provisos. Namely that the activity is part of a wider equality and diversity effort, that the exercise has been discussed and explained to staff and that it is anonymous, confidential and voluntary.

When these features are not in place staff will mistrust the exercise and distorted results (usually under-representation of employees in any given group) are obtained.

To make a very imperfectly used tool compulsory now would be unproductive and do little to achieve equality in the private sector. This may be an area where encouraging good practice rather than regulation is more effective.

However we do recognise that workforce monitoring provides the basis for some degree of public accountability and monitoring of progress towards equality. It will also enable the CEHR to be better able to monitor the progress that is being made towards real equality in practice.

### **Public sector procurement**

The Equalities Review argued that public agencies should require their suppliers to adopt the same principles they operate under and we support this. However our view is that stronger measures will be required to address those businesses that fall foul of these principles.

The DLR rejects mandatory disqualification. However it does point out that EU Procurement Directives allow disqualification from tendering for a contract on the grounds of misconduct, supported by the facts, and at the discretion of the public authority – in other words the public authority could already act as regulator. In this case the Government could clarify what public authorities can and should be doing. Our view is that there are 3 main reasons for this;

- Public money should be spent on contracts that promote equality and not on those that entrench discrimination.
- Embedding equality in public procurement ensures high quality services for members of the public, whatever their diverse needs.
- Preventing discrimination in the selection of contractors enables all businesses to compete for business on an equal footing and stimulates competition amongst businesses. It prevents businesses with poor equality practices being able to undercut their competitors.

We note that the CBI agrees that further public procurement provisions could be an appropriate way to improve equality practices in the private sector. In welcoming the Green Paper they commented:

“Public bodies have considerable spending clout, and employers believe that procurement could be a highly effective tool for encouraging equality, as long as contracts focus on results and not on box ticking.”

#### Private sector employers: taking action

Currently an employment tribunal can require the respondent to take action to address discrimination they have been found to support but only when this is linked to its effect on the individual claimant. If the claimant is no longer working for the same employer then no action can be required. Equally, broader action which addresses the underlying discrimination would be beyond the remit of the tribunal.

In our view employment tribunals have become knowledgeable in terms of equality and diversity and are more accessible to individuals than sheriff courts. The potential for broader action to be required – effectively enforcement – therefore exists and could be tied to a reporting element much like the public duties.

A further development, if sufficiently well funded, could add power to this mechanism. If, as in Eire, these tribunals were reformed into ‘Equality Tribunals’ additionally considering goods and services cases (perhaps with an across the board ‘6 month rule’) the combined effect could be one equivalent to the imposition of aspects of a ‘private duty’ reported upon to the tribunal and regulated against by the potential for increased fines. At the same time the CEHR might, in some cases, be able to undertake an investigation and potentially require action.

With reform to allow for representative and class actions this could provide a more effective remedy to private sector intransigence where it occurs and encourage the adoption of good practice as the Government suggests. It would also not constitute an “unnecessary burden” as the Government fears, as only ‘bad’ companies would be subject to a burden as a result of being required to address the endemic discrimination they have allowed to persist.

#### Equality Standard

The DLR suggests the possibility of independently assessed accreditation for the private sector which could be used as evidence of compliance with discrimination law when bidding for public contracts. Alternatively a non-accredited self-assessment standard is

proposed. How the former would be assessed or by whom is not specified and could be crucial. Such a standard (or Equality Charter) would need to be robust, but in principle could be useful, particularly if elements of public duty requirements were incorporated into it as suggested by Michael Rubenstein in a paper he wrote for the Greater London Authority.

In responding to the DLR, our view is that the Government should outline how public authorities (including the Scottish Government) could develop an Equality Standard or Charter clarifying legal standing and enforcement measures available.

Excluding a bidder because they did not sign up to the charter would appear to be legal and therefore should be used by public authorities. Pre-qualification, whereby companies could demonstrate the outcomes that an equality charter demands, could be more effective, and contracting authorities should require membership by larger suppliers. Such a system might also be popular as the supplying companies then do not have to demonstrate equality and diversity contract compliance each time they bid.

#### Beyond contractors

Well-being powers are currently available to local authorities. We believe these should be used to confine financial grants to those with evidence of compliance with equality and diversity principles. Again, the Government should clarify the legal standing of such a measure to local authorities.

The Government should also clarify the position with regard to ethical investment for public authorities. Although impossible to direct publicly invested funds in any particular direction, we believe the Government could afford public authorities more latitude to invest ethically and provide guidance as to the best ways to do this. For example investment could be steered away from countries where homosexuality is illegal.

#### Moving forward

Whilst the DLR could have gone much further in regulating the private sector in terms of equality and diversity it does highlight the possibility of making better use of existing law, with the Government acting to make clear what public authorities can and should do to promote equality and diversity beyond their immediate operational boundary. Matched with better enforcement via 'Equality Tribunals' this could affect a step change in private sector attitudes towards equality and diversity without trying to regulate a full private sector duty.

## **3. Access to Justice**

The organisations preparing this response share a number of concerns around access to justice under the equality legislation.

### A clear principle of accessible justice

The protection provided by anti-discrimination law, and its effectiveness as a deterrent, both depend on reliable access to justice. Accessible and effective remedies need to be available to individuals alongside positive equality duties placed on public authorities, in a two-pronged approach to equality. As noted elsewhere, we favour the inclusion of a purpose clause in the Single Equality Bill, and we believe that that clause should explicitly refer to the principle that accessible remedies must be available to individuals.

Access to justice for people facing discrimination is not solely a discrimination law issue. Discrimination and prejudice lead to inequality of safety, harassment, gender-based crime and other hate crime. Other areas of the law, including criminal law, are involved here, but inequality of safety is a key equality issue, which should be considered in the development and application of discrimination law.

### Representative and class actions

The Commission for Equality and Human Rights already has powers to take certain kinds of legal action in its own name. We would like to see the CEHR have the power to take representative action in discrimination cases. Like all its functions, the CEHR would exercise this power in a strategic way, and so we do not think that this would lead to a 'litigation culture' (as suggested in paragraph 7.29 of the consultation paper).

We would also like to see the CEHR have the power to take class actions (where it is not necessary to name the individual victims of the discrimination). This would allow action to be taken where it is very difficult for named victims to come forward because for example they want to retain anonymity about their disability, transgender status etc, or where victimisation is likely.

The use of representative or class actions can be a cost effective way of tackling systemic discrimination. The Equalities Review has identified a number of persistent inequalities in our society to permit representative or class actions would be to provide one step towards eliminating these. We would ask the DLR to reconsider this.

## Multiple discrimination/intersectionality

We do not think that the current system deals well with cases where someone is discriminated against because of an intersection of grounds. Discrimination against, for example, a Muslim woman, can be different from the sum of the discrimination experienced on grounds of religion and sex separately.

Current discrimination law requires the claimant in cases of intersectional discrimination to separate out the different aspects of their identity, and to pursue their claim on the basis of comparators constructed against one characteristic of their identity. This does not reflect the lived experience of those who experience intersectional discrimination or harassment on intersectional grounds.

We would like to see discrimination law follow the South African model on multiple discrimination, where discrimination is prohibited 'on one or more grounds, including...' (article 9(3) of the SA Bill of Rights).

## Access to legal aid

The cost of legal action is a significant deterrent, and there is no access to legal aid for Employment Tribunal cases. There is also a lack of easily accessible information about the availability of legal aid.

Parts of Scotland are an 'advice desert'. While trade union members may get help from their union, the quality of support varies. The 2007 Institute of Employment Studies research, 'The experiences of sexual orientation and religion or belief discrimination employment tribunal claimants', found that, across GB, people who were not trade union members found it difficult to get advice on the merits of their case. We do not think that the CEHR will have the resources to fill this gap.

The respondent in a discrimination case usually has access to far greater resources than the claimant. The claimant is usually inexperienced in litigation, and the IES study quoted above found that claimants overwhelmingly found the experience a negative one. Enduring mental and physical problems were reported, particularly those relating to depression and anxiety. In these circumstances, it is not surprising that claimants expressed a strong need for information, advice, support and representation.

For these reasons, legal aid should be extended to Employment Tribunal cases, and this should be well advertised and easily accessible.

## Time limits

We believe that the three month time limit for commencing action in employment cases is too short. The disruptive effect of discrimination on people's lives, the personal distress caused by the discrimination, and the difficulty, in many cases, of rapidly accessing effective advice and support, mean the current time bar can deny people justice. We would like to see a consistent time limit for employment and goods and services cases, set at no less than six months.

## Effective handling by the courts

We welcome the proposal to 'improve the accessibility, efficiency and effectiveness of procedures for resolving discrimination cases'; however, we do not agree that discrimination disputes outside the employment sector should be resolved through the Sheriff Court system.

The geography of Scotland, and the relatively small number of goods and services cases, mean that in practice it will be very difficult to establish enhanced expertise in goods and services discrimination law at the sheriff court in many sheriffdoms (as suggested in paragraph 7.24 of the consultation paper). Further, the courts may be seen as intimidating by many and this may in itself present a barrier to someone pursuing their legitimate claim.

Whilst we welcome the proposal to enhance discrimination expertise within the Sheriff Courts, we do not consider that this would be sufficient to alleviate the problems experienced by discrimination claimants. Employment Tribunals already have expertise in discrimination law, and effective training is in place. Given the similarities between employment and goods and services discrimination law, we believe that it would be more effective and better value for money for the Tribunals Service, and specifically, the Employment Tribunals, to handle goods and services discrimination cases also. The variety of issues that the Tribunals Service already deals with (including disability discrimination issues in education in England and Wales) demonstrates that the Service has the flexibility to take this on.

We do not agree with the argument advanced in the consultation paper, that this would create difficulties where a goods and services discrimination claim was combined with another claim, for example for breach of contract, which would be heard in the sheriff court. The number of such combined claims is small, and we note that they already occur in employment cases, for example where claims for breach of contract and discrimination are made at the same time. In such a situation the sheriff court case is usually stayed until the

Employment Tribunal decision is reached.

## **4. Public Sector Equality Duties**

### Regression

We agree that 'public authorities are uniquely placed to make a difference to the life chances of people from disadvantaged groups' and so we consider that the public sector equality duties play a key role in countering discrimination and promoting equality. We want to see a general duty that is robust and covers all the prohibited grounds. We consider though that the inclusion of age would be considerably less effective without the extension of protection from discrimination in the area of access to goods, facilities and services.

We recognise that an integrated equality duty would carry both efficiency gains and be able to address multiple discrimination; however, this should not be at the price of any diminution of the strength of the existing duties.

There is considerable concern that the proposed changes to the Public Sector Duty will weaken it. The Public Duties on race, gender and disability represented a significant move forward for disadvantaged groups, in that it brought equalities issues to the fore, and in the case of disabled people a voice, a role in service design and enabled them to hold public authorities accountable.

The public duties present a real opportunity to promote cultural change and reduce inequality. The stipulation that public bodies have a written Disability Equality Scheme as well as race and gender schemes has been of great benefit, providing a structure with which to address inequalities.

While we have had 7 years with which to see the effects enabled by the Race duty, The Disability Equality Duty and the Gender Duty has only been in place for a short time. The organisations involved in drafting this response feel it would be better to wait until the full effects have become apparent rather than implement change too quickly. The DLR has provided no real justification for some of the proposals, many of which are seen as regressive.

For example the Scottish Disability Equality Forum, a large membership organisation, many of whom have been involved in creating Disability Equality Schemes. This process

has revealed that many public bodies struggle to recognise inequality, are not committed and have yet to develop the skills to monitor, evaluate and impact assess on equalities issues. Removing the elements that public bodies do badly is not seen as an improvement.

## Elimination of Discrimination

However, we would cautiously support the adoption of a single equality duty across all the grounds, including the elimination of unlawful discrimination and unlawful harassment and the promotion of equality of opportunity.

The positive language that expands on equality outcomes, that of “equality of opportunity to counter disadvantage, treat people with dignity and respect, to meet different needs, involve excluded or under represented groups in employment and decision making processes” is welcomed. However, a single Duty should carry the requirement that public bodies eliminate unlawful discrimination, rather than have “due regard” to do so.

A new Single Equality Duty embracing the six equalities strands would represent progress in pursuing equality for all recognised groups facing discrimination. This would continue to put equalities issues at the heart of public services and would provide an administrative gain in terms of reduced bureaucracy and shared timescales. Not including all equalities strands would create an equalities hierarchy. This would not be consistent with the aims of the proposed Bill and would create added confusion. The new Duty should apply to all public authorities.

The Equalities Review recognised the weaknesses in the General Duty, in terms of actions required and outcomes, that left too much to a public authority’s discretion.

The general duty should include promoting participation of people from defined groups as well as promoting positive attitudes and good relations between people of different groups and between members of groups and others.

There could then be additional more specific duties which would apply to specific grounds defined by subclauses across all the recognised strands. These would include: in the case of gender, a duty to promote equal pay between men and women; in the case of disability to take account of disabled people’s disabilities, even where that involves treating disabled people more favourably than others.

At present, public bodies have to give “due regard” to a number of steps when promoting disability, gender or race equality. However, the proposal to replace “due regard” with “equality objectives” that a public body only needs to take proportionate action over is seen

as a weakening of the idea behind public sector duties, in particular the disability equality duty. Equality objectives can be used to strengthen the present duty rather than dilute it. It is preferable that a public body be required to take “reasonable steps” rather than give “due regard”.

### Proportionate Action and non-enforceable principles

The proposal that public bodies need only take proportionate action to achieve the equalities objectives is too vague and is unacceptable. It undermines what has already been achieved and moves away from mainstreaming equalities issues.

The new proposals could be also interpreted to mean that the Duty would not cover all of a public body’s functions, only those that had been prioritised. To be effective the general duty must apply across all the functions of the authority – rather than, as proposed in the green paper, require the setting of specific equality objectives. This will mean that equality will be mainstreamed across all the organisation’s functions.

Proportionality also infers that there is no need to exempt smaller organisations on the grounds of an unnecessary burden.

Plans to replace the Specific duty with non-enforceable principles. including removing the requirement to make its evidence and progress public, to involve and consult, and to monitor. We see this as a retrograde move. Principles are difficult to put into practice, enforce and question.

The real strength of the Disability Equality Duty was the requirement to have a written scheme and action plan, created with the involvement of disabled people. Not only did this produce a structured approach it laid down specific actions and timescales. The removal of the requirement to show evidence of progress and involve and monitor is of great concern. Again it would be difficult to challenge a public body on this basis. Public bodies will have to provide “ready access” to information, perhaps in business plans and annual reports. This represents dilution of the current duties and is rejected. It would also make it very difficult for the public to challenge public bodies on their performance and for inspectorates and the CEHR to monitor and enforce compliance.

### Impact Assessment and Involvement

The requirement for a public body to impact assess its activities represented a useful tool for people to hold an organisation to account. Impact assessment should be based on

robust evidence gathering and built in to a new single duty.

The possible loss of involvement is of particular significance to disabled people as it was instrumental in promoting disability equality and ensuring that service delivery fully reflected the concerns of people with disabilities.

Priorities, compliance and enforcement issues

The new proposals allow public bodies to prioritise. An organisation might identify a priority but might never get around to taking action. Additionally, clear analysis of differential need is required. Priorities should reflect evidence on inequality and not be determined by legal restriction.

Although in its current form it is recognised that the race, gender and disability duties may lead to a process driven rather than outcome focussed approach the current proposals do not improve on this.

Experience of the existing Duties indicates that compliance and enforcement would be an issue for a new single public duty. Reporting arrangements need to be more robust and rigorous.

The role of the CEHR as the single enforcement mechanism will leave individuals and groups with no leeway to challenge a public body and unable to hold an authority to account. The removal of the right for individual and class action is unacceptable. Public Service Inspectorates have a clear role in ensuring equalities issues are included in performance monitoring.

There could be a role for specialist voluntary sector organisations in assisting public bodies with equality schemes. However, there is a requirement for more resources to be provided to support the work of these groups.

The CEHR should continue the work of the previous Commissions in providing high quality guidance on the proposed Single Equality Public Sector Duty. More detailed guidance on public sector procurement would help embed equalities at the heart of a public body's activities. At present there is still some confusion around how far the Duty extends and this should be clarified. The proposals regarding the new Single Duty state that the model "would help public authorities to focus on how their public procurement functions are relevant to the achievement of their priority equality objectives". This is not seen as an improvement.

## **5. Positive Action**

We are concerned about the nature and degree of entrenched persistent disadvantage described in the Equalities Review, as well as in other studies. We therefore support steps being taken for such further positive action (or 'balancing measures') to counter inequalities as is permissible under European law.

The DLR proposes extending the law 'to adopt wider balancing measures to allow employers and others to make more rapid progress towards redressing under-representation' However; it is not clear from the Green Paper what specific measures are being proposed.

Currently very limited positive action is permitted; however, the conditions to be met differ between the different grounds for discrimination. This adds to the complexity and inaccessibility of the law and so is likely to discourage its use by employers and training bodies. It focuses on training and preparation for work. The Sex Discrimination Act talks about 'under-representation' of the sex in question, while the Race Relations Act refers to there being no persons or a small proportion of persons of that racial group. However, evidence of under-representation does not need to be shown when positive action for religion or belief, sexual orientation or age is concerned. Instead, it must be shown that this positive action should 'prevent or compensate for disadvantages linked to religion or belief/sexual orientation/persons of that age' among the relevant section of people who would benefit from this positive action.

We would propose that positive action provisions should:

- not be limited to preparation for employment and training,
- should be necessary, proportionate, target lead and time limited
- the conditions for permitting positive action should be simplified and harmonised across all the grounds,
- not require approval from the CEHR,
- be supported by a Code of Practice prepared by the CEHR,
- be expressly permitted to recognise and respond to the intersection of different grounds,

## **6. Strand specific anomalies**

We do not agree that it is right to exclude children and young people from the context of this legislation. They too experience unjustifiable discrimination and it is no more acceptable for them than for other members of the community. However, it is clearly necessary that the provision of goods and services to children and young people can be tailored to meet their needs.

We also believe that specific legislation to cover carers is required. The argument put forward in this paper which suggests that current legislation provides adequate protection is not borne out by the recent findings of the equalities review or by information gathered by the equal opportunities commission.

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