

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

### ***Citizens Advice Response***

**September 2007**

# **Discrimination Law Review - Citizens Advice Response**

## **Introduction**

### **The CAB service and equality.**

The CAB service is a network of 430 independent Citizens Advice Bureaux that provide free, independent and impartial advice from more than 3,000 locations in England Wales and Northern Ireland. Bureaux currently handle over 32,000 discrimination advice enquiries every year. The majority of these concern sex, disability and race discrimination, although the numbers of discrimination enquiries relating to age, religion and belief, and sexual orientation are growing. Discrimination cases handled by the national Citizens Advice specialist support equalities and employment rights team have shown a rise from 518 cases in 2005 to 622 cases in 2006, a 20% increase.

The Citizens Advice service also has a strong track record in providing services to disadvantaged communities. In parts of London, some 70 per cent of bureaux' clients are from black and minority ethnic groups; in areas such as Birmingham, Coventry and Oldham the figure is over 40 per cent. In 2005/06, bureaux dealt with over 500,000 enquiries about disability benefits. Around 100 bureaux run projects to provide advice to people with mental health problems, and over 100 are racist incident reporting centres.

Equality is a fundamental principle of the CAB service. The CAB service is independent and provides free, confidential and impartial advice to anybody regardless of race, gender, disability, sexual orientation, religion, age or nationality. It recognises the positive value of diversity, promotes equality, and challenges discrimination. CAB services and campaigns address the many reasons why individuals or groups may be discriminated against or excluded, for example poverty, rural isolation, race, ethnicity, disability, mental health, sexual orientation, age, religion, nationality, and gender.

### **The Review**

Citizens Advice welcomes the opportunity to respond to the discrimination law review Green Paper. This is an opportunity to tackle the inadequacies of the current framework, to build on the Government's legislative achievements in extending rights to vulnerable groups, to equip the new Commission on Equality and Human Rights to operate effectively and to provide greater coherence to the piecemeal development of anti-discrimination law. Citizens Advice were the first national consumer body to call for a single Commission and a single Equality Law. We therefore endorse the fundamental aims of the review to create a clearer, more effective and streamlined equality legislation framework which encourages compliance and produces better outcomes for those who experience disadvantage. In particular

- The codification of prohibited grounds and the harmonised approach to exceptions and justifications.
- The move towards a single public sector equality duty
- The proposal for National Government to set strategic equality objectives
- The emphasis on positive action to improve workforce representation from different groups
- The proposal that Ombudsman may have a role to play in dispute resolution concerning discrimination issues.

### **The importance of a Single Equality Act**

We agree with the Select Committee's conclusion that we have a once in a lifetime opportunity to get legal framework and policy objectives right.<sup>1</sup> Despite legislative activity over the past thirty years, and many of this Government's achievements such as civil partnerships, public sector duties and community cohesion initiatives, inequality remains deeply embedded in our society. Indeed, on current rates of progress, it will take until 2085 for the gender pay gap to be closed and until 2105 to close the gap in ethnic employment rates. With increasing social and workforce diversity, it is vital that we take robust action to support social mobility and life chances for all groups; however this will require a major step change in public policy. There are many concerning patterns of inequality that need to be addressed:-

- **Poverty.** Recent Joseph Rowntree research has shown that the poverty rate for Britain's minority ethnic groups is 40%, double the 20% amongst white British people, and that forms of slavery are still common in the UK economy, including under-16s coerced into prostitution, and violent, illegal practices in jobs markets such as crop picking, factory work, nursing and catering.
- **Justice.** A recent parliamentary report showed how young black people are over-represented in the criminal justice system, representing 2.7 per cent of the population aged 10–17, but 8.5 per cent of those of that age group arrested in England and Wales. As a group, they are more likely to be stopped and searched by the police, less likely to get unconditional bail, more likely to be remanded in custody and likely to receive more punitive sentences than white young offenders.
- **Vulnerability.** There is a high level of vulnerability amongst the older population, about 1.2 million older people are excluded on three or more indicators of social exclusion, with one in three people over 80 being excluded from basic services. Around 16% of pensioners are 'persistently poor' and 70% of people aged 65 or over reportedly have a long-standing illness. A quarter of those over 80 have a 'serious disability'. Of those over 90 years old, 27% need residential or nursing home care.

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<sup>1</sup> Communities and Local Government Committee *Equality* Sixth Report of Session 2006–07

- **Access.** Seven in ten (73%) disabled people with mobility and sensory impairments in Great Britain say that they have difficulty accessing goods and services.
- **Parity.** The average full-time, hourly wage for a man is £14.08, and for woman is £11.67. The hourly gender pay gap for women is 17%, but for part time women it is 38%, and women's average income in retirement is only 57% of the average for men. The average net weekly earnings of Bangladeshi men is half that of white men. Disabled people are 30% more likely to be out of work compared to non-disabled people

## Issues of concern

This is a detailed review with several welcome proposals for improving and consolidating the law. However many organisations, including Citizens Advice, would like to see the legislation go further in several crucial respects. Issues about information, transparency of legal rights, access to advice and redress, and effective enforcement and remedies tend to be the most critical for our clients. In these respects, the review lacks insight into the difficulties and barriers that many people face in understanding and accessing their rights. Our key concerns with the content of this review can be summarised as follows:-

1. **Integration of discrimination and human rights legislation.** The proposals for reform of discrimination legislation should be positioned more clearly within a policy framework where human rights legislation and principles are overarching. Not to do so seems to us to be a missed opportunity to establish a new, more integrated and effective system of human rights and discrimination law which will be fit for purpose for decades to come. At present the proposals for reform appear to have been made from a collection of policy silos, without reference to the human rights context, which may, in some situations, offer a more effective remedy or driver for change.
2. **Effective duties.** The proposals to harmonise public sector duties appear weak and ineffective. First we think that public authorities should have a general duty to promote equality and tackle discrimination within which all strands have equal weighting. By proposing an approach for a single duty in relation to a collection of priority areas the Government risks weakening the public sector positive duties, and enabling public authorities to cherry-pick the bits of equality they feel comfortable with and disregard the rest. This legislation should be seeking to 'level up' rather than 'level down'.
3. **Parity.** The review does not take the opportunity to achieve parity between strands, age discrimination is not given parity with other strands, for example in access to goods and services – this in itself fails to recognise the important problem of ageism, the role of older people both as private consumers and the needs of older people as public service users.

4. **Dispute Resolution and Enforcement.** Key issues such as the respective jurisdictions of courts, tribunals and ombudsmen, and the transparency, accessibility and effectiveness of dispute resolution and enforcement are not fully addressed in the review. In particular the potential role of regulators in driving up equality standards is scarcely mentioned. There is little in the proposals which could improve access to enforcement remedies, there needs to be a fast track for example, for obtaining non-discrimination notices.

The review focuses on tidying up existing law rather than reaching for new standard and vision of equality. A higher degree of integration is required between discrimination legislation, the Human Rights Act and institutions established under the Equality Act. As the Select Committee has recently concluded, the new Commission for Equality and Human Rights cannot proceed successfully in the absence of a clear and robust legislative framework, and the cautious approach of this review therefore adds to concerns that the Commission may not be fully ready to take on its new work from October 2007. We agree with the Select Committee that the planning blight over discrimination law reform could set back the whole equality agenda by decades.<sup>2</sup>

### **Improving the Law.**

We hope that the review will be seen as the beginning rather than the end of a process to improve equality and rights legislation. Unless fundamental principles are addressed, this could be missed opportunity to go beyond the traditional piecemeal legalistic approach to discrimination rights and protection, and to achieve greater legal clarity and certainty within a framework of values associated with rights, fairness, citizenship, equality and diversity.

We would therefore urge the Government to look again at the challenge of how to achieve a workable, fair, straightforward and effective single equality law, and to address our concerns about compliance, enforcement and sanctions and the changing context of discrimination. In particular we have the following key recommendations

- There should be a comprehensive public sector equality duty applicable to all grounds, backed by robust monitoring and enforcement mechanisms.
- There should parity and transparency across all strands, underpinned by a general prohibition equally applicable to all strands and all consumer and employment sectors.
- Access to information, advice, advocacy and representation needs to be built to the resolution and redress regime; this should engage the Community Legal Service through lifting current restrictions on tribunal

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<sup>2</sup> Communities and Local Government Committee *Equality* Sixth Report of Session 2006–07

representation funding, particularly if enforcement of discrimination and equality legislation continues to rely substantially on individuals taking action against either employers or traders.

We also recommend that further work needs to be undertaken on the following issues:-

- Statutory and regulatory mechanisms for driving up equality standards the private sector, including options for co-regulation
- Jurisdiction for dealing with equality cases and the respective case handling roles of courts, tribunals and ombudsmen.
- Compliance and enforcement mechanisms that will be operated by the CEHR working in partnership with relevant inspectorates, ombudsmen and regulators.

## **Detailed Response**

### **Part 1 - Simplifying the law**

#### **Chapters 1-3: Definitions, simplification and harmonisation of the law**

We endorse the strategic aim of the review to ‘Simplify the law’. This will benefit employers, service providers, advisers and the public alike, however the Green Paper has shortcomings in this respect. The Green paper is legalistic, repetitive, and focused on definitions contained in existing legislation rather than broader public policy issues, objectives and outcomes. No clear picture emerges as to what a single equality law and framework might look like. To address this, we consider that the draft legislation will need a clear overarching purpose clause.

The review seeks opinions and evidence on number on a several specific issues on how existing and proposed definitions and tests may work and apply in practice:-

#### **Comparators**

The review proposes to maintain the existing requirement for a comparator. Whilst there needs to be an objective test for discrimination on particular grounds, the comparative approach does not always work. Appropriate comparators can be hard to identify, and in some cases employment tribunals have all but given up trying to establish “like for like” comparisons. In no other type of civil claim is a comparator thought to be necessary; a civil liability claim for personal injury for example does not require that the victim be compared to someone similar who has not been injured. Discrimination occurs from prejudiced reactions and is often more complex than like for like comparisons. Furthermore, as the courts have unhelpfully ruled that the comparison can only be with a single characteristic it leans heavily against any concept of multiple discrimination. The following case illustrates these points. For example –

A CAB on Cheshire reported that their client with OCD was subjected to harassment by her work colleagues. The bureau adviser represented the client at tribunal with assistance from Specialist Support. The client was awarded £170,000. However on appeal the decision was overturned on an issue about who was the correct comparator. The DRC have agreed to fund the case to the Court of Appeal.

#### **Harmonised definitions.**

We agree that there should be a single definition of discrimination for the different grounds, and therefore the problem of multiple definitions should be addressed. However, the review should also address the definition of disability more widely to meet concerns that the current definition is limited, and instead propose a definition which protects anyone who experiences discrimination on

the grounds of disability or impairment on a similar basis to other strands. We agree with the DRC that the Disability Discrimination Act's definition of disability should be altered to one which give protection from discrimination to everyone who has (or has had or is perceived to have) an impairment without requiring the effects of that impairment to be substantial or long-term. This would enable, for example, protection of people undergoing treatment for cancer, depression, or other impairments where people have no problems continuing in employment or accessing services on a day to day basis, but are at risk of experiencing discrimination and prejudice.

### **Indirect Discrimination, Perception and Association**

We would like to see a definition of indirect discrimination applying across all grounds and compatible with EU law, and are therefore disappointed that the review rejects the idea of extending indirect discrimination provisions much beyond the existing grounds of race. Including a robust provision on indirect discrimination is a necessary step; employers can often for example introduce new shift pattern, without considering the difficulties that might be raised on grounds of gender or religion, they need to be encouraged to examine more reasonable ways re-organise work. For example

A West Midlands CAB reported that their client is, a married 33 year old woman, who was working full time for a utility company. She had a baby, has had maternity leave and is now on additional maternity leave. The client has asked her employer if she can return on a part-time basis. After 2 weeks, she was told they "could not find anything suitable". The client became worried that if she cannot return to work part time, she will have to repay her maternity pay. Her maternity notes from the company state she is liable to pay any contractual maternity pay back.

In respect of 'perception and association', the current legislation is uneven, as the prohibition against discrimination by way of perception and association applies in the context of race, religion or belief and sexual orientation but not to sex, disability or age. We would recommend that the new legislation should use a formulation which extends the prohibition against discrimination by way of perception and association to all prohibited grounds. Extending protection to people who are perceived to be old or disabled, or who associate with disabled people, would potentially benefit carers and many others.

### **Reasonable Adjustments.**

We are disappointed that the review does not consider how the concept of a duty to make a 'reasonable adjustment' or 'reasonable accommodation' could potentially be used for other grounds of discrimination and not limited to the field of disability so as to provide better access to services or employment than would otherwise be the case. Some case-law already refers to reasonable accommodation in other grounds, and concepts of adjustment or accommodation are commonplace in the equality legislation of other

jurisdictions (eg Canada). However, care needs to be taken in examining how the concept might apply more widely as reasonable adjustments should not be used as a cop-out for compliance with general equality duties or absolute legal requirements.

### **Exceptions and justifications**

We agree in principle that there should be a unified approach based on Genuine Occupational Requirement (“GOR”) and a Genuine Service Requirement. A complex detailed table of exceptions should not need to be spelt out in the new legislation and there should be no blanket exceptions. However, there is a risk that the proposed genuine service requirement could be too open-ended and would have the effect of allowing direct discrimination by service providers to be justified by relying on a vague ‘genuine service requirement’. These issues are primarily a matter for the Code of Practice to explore, but we hope that the approach taken by the Code of Practice is minimalist, ie that the acceptable exceptions to the legislation should be kept to a minimum.

### **Victimisation and harassment**

Effective protection against victimisation as a distinct type of aggravated discrimination is important if statutory prohibition of discrimination is to have any real value. Research within different employers or sectors consistently shows that the overwhelming majority of people who have experienced discrimination or harassment do not complain; the three main reasons are that they will not be believed, that the discrimination or harassment will only get worse or that they will lose their job. The following case illustrates the importance of having robust legislative measures on victimisation and harassment.

A West of Scotland CAB reported the following case. Their client, a woman not known to be on any benefits has a 7 year old daughter and is a single mum. The client took a job with a large store, after induction training she started working on the information desk at a specific store which she enjoyed, dealing with clients on the phone and in person. Some 4 weeks ago she was moved to a more administrative job which she found too difficult. Her manager in the new job was bullying and constantly swearing at her to the extent that she was very unhappy going in to work. She asked to be moved but was told there was no possibility of a move. She was given notice. Her probation period was for 6 months with 1 week notice.

We hope that the victimisation provisions of the legislation will be strengthened along the lines of a simple test of ‘adverse treatment’ (Article 9 of the Racial Equality Directive). We agree that victimisation cases should not require a comparator.

We consider that the legislation should be comprehensive and we recommend that new legislation should provide equivalent protection against harassment on all grounds across all activities within the scope of the legislation. It is our experience that harassment on all of the prohibited grounds occurs in all of the situations covered by discrimination legislation, that is in employment, training, education, housing, in accessing and enjoying publicly and privately provided facilities and services and in the way public authorities carry out their other functions. For example

A Yorkshire CAB saw a client who had been subject to harassment on grounds of race and religion which ended up with him being provoked into fighting with a colleague as a result of which he was threatened with dismissal. The bureau intervened and raised grievance about the harassment which led to client only being given a warning, the harassers being disciplined and the company reviewing its equal opportunities policy and conducting training to promote it. Our client was very happy with outcome and particularly that his job was preserved.

The review tries to make a distinction in harassment cases (in Chapter 13) between chosen (eg religion and sexuality) and unchosen (eg race and gender) grounds. There is a risk of engaging in too much legal tautology over this issue. Harassment concerns violating another person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her. There is no need to break down the definition further or subject it to differentiation on different grounds. This protection is balanced against other well established human rights and norms such as the freedom of opinion, expression and free-speech rights. We therefore consider that it is important that all grounds are protected from harassment, including religious belief.

The review also suggests a distinction between acceptable and unacceptable behaviours in 'open and closed' environments; however we do not consider this distinction to be appropriate in legislation. Each case needs to be looked at individually and words such as open and closed will simply cause problems of interpretation. Given the growing problems of 'Islamophobia', and community incohesion it is important that the measures are at their most robust in the public sphere. For example:-

A Central London CAB reported that a Muslim woman wearing a headscarf attempted to board a London bus hours after the London bombings on 7 July 2005. She was subjected to a torrent of racial abuse from the bus driver who falsely alleged that the client was carrying a bomb. This resulted in all the other bus passengers fleeing in panic. The police were subsequently called, and they confirmed that the allegation was unfounded and offered an apology. The client was extremely upset by the experience, particularly when the police were called as she feared she could be shot. She felt embarrassed in front of the other passengers and has since suffered from stress

## **Equal Pay**

The persistence of the pay gap between men and women 32 years after the Equal Pay Act came into force is something to be widely decried. Equal pay reviews should therefore be part of the equalities process of implementing equality schemes and strategies. We would therefore like to see equal pay reviews mandatory for both private and public employers over a certain size.

## **Part 2 – Effective Law: Chapters 4-8**

### **Balancing measures and positive action**

We have a particular interest in this area as bureaux need to represent the communities which they serve, and sometimes need to take positive action to better reflect the characteristics of the local community. We agree with the review that there should be a broader framework for ‘balancing measures’ which can redress chronic problems of under-representation and systemic discrimination through positive action. The review however, is vague about just what such measures might entail and how they may fit into the legislative scheme. The only new provision which is expressly proposed is fast tracking to training of under-represented groups from an equally qualified pool, and this is aimed specifically at police forces. This would not apply to most employers who recruit directly to vacant positions.

Whilst we agree that the voluntary approach should be encouraged, and that organisations should be able to adopt a wider range of positive action measures, the review comprehensively rejects any idea of targets, goals or monitoring to achieve change. Simply allowing positive action measures may be insufficient.

Firstly, it is important to spell out what kinds of steps would be legal, and examples of good practice need to be spelt out in a Code of Practice. Secondly, further consideration is required of what incentives could encourage change, for example workforce reviews under Northern Ireland’s equality legislation.

The Commission for Equality and Human Rights should have the power to initiate positive action where appropriate, following its ordinary powers of undertaking investigations and agreeing action plans. Whilst it would clearly be impossible and unrealistic for the Commission for Equality and Human Rights to have to ‘sign off’ individual positive action programmes, the Commission should be encouraged to develop guidance on when and how such measures can be used.

### **Public Sector Equality Duties**

We agree in principle with the proposals for a single public sector equality duty, underpinned by a clear statement of purpose, and covering all the different strands. It should not though be limited to race, disability and gender as

proposed. It should be a positive duty which requires that organisations promote equality and diversity and human rights in all aspects of their work, in a manner which involves employees, employers and service-users alike. We would like to see a proactive approach, with an emphasis on achieving results backed by enforcement mechanisms and the measurement of outcomes.

We are therefore concerned though about the proposals to formulate the duty in terms of a 'identifying priority objectives' in race, disability or gender, identifying 'priority areas' and taking 'proportionate action' towards their achievement. This could and is being interpreted to mean that the duty would not apply across all of the authority's functions, only those areas of its work which had been identified as a priority. This could result in the weakening of the public sector positive duties, and enable public authorities to take on the bits of equality they feel comfortable with and disregard the rest. If this is what the Government intends, it could seriously weaken, not strengthen, the general duty. It is also unclear whether the duties would apply to all public authorities. Only a strong and clear general duty will both ensure that fairness for all sections of the community is sufficiently high on the authority's priorities and shift the focus from procedural compliance to equality outcomes across the authority's functions.

The consultation paper also fails to spell out how it might strengthen the general equality duty beyond the current requirement to pay 'due regard' to the need to eliminate unlawful discrimination and promote equality of opportunity. Overall the proposals as formulated risk replacing all of the specific duties currently in place with non enforceable principles, including removing the requirement to make its evidence and progress public, to involve and consult, and to monitor.

A further omission from this section is that the review does not consider how duties under the Human Rights Act could be integrated under the single Equality Duty. This would make sense given the operation responsibilities of the new Commission for Equality and Human Rights (CEHR).

**Citizens Advice recommends that the duty should be framed for Public Authorities to consider equality and Human Rights in all their work, and that reporting and monitoring requirements should be central to the operation of this duty.**

### **Enforcement of Public Sector Duties**

There is clearly a lot of work to do to achieve compliance with the public sector duties, so the monitoring and enforcement mechanisms need to be robust, particularly in being able to strike down blanket policies which may breach not only a particular provision, but also the public sector duty. For example:-

CAB in Surrey reported the case of a dyslexic client who was going to Job Centre Plus to attend 3 monthly interviews but had his wife

accompanying him to help him with form filling and reading documents. Although this had not caused any problem in the past they were informed that a management decision was in effect preventing overcrowding in the summer holidays. Therefore relatives and friends of clients had to wait outside. Though it was a very hot day and there was clearly plenty of available seating space in the air conditioned office, the wife's client and his daughter had been forced to wait outside. And despite his protests, the staff were totally impervious and the client had to attend the interview on his own in a deeply distressed and aggravated state. He was not able to fully understand the interview and the decision to which he agreed to namely agreeing to apply for a minimum of one job a week and provide evidence of this. He would not have agreed to this had his wife had been present. The management decision took no account of disability and was aggravated by totally inflexible and uncaring staff who seemed incapable, or unwilling, to accommodate the client needs.

We strongly believe that there should be inspection-based enforcement of compliance with equality duties. This works for example with the regime associated with the National Minimum Wage. The public service inspectorates could have a role in working directly with CEHR on equality on monitoring equality duties, enabling the commission to issue compliance notices.

## **Procurement**

We do not intend to comment on the questions relating to public sector procurement procedures. However, clearly another route towards ensuring the best reach for public sector equality policy and maximising equality outcomes in the private sector is through contracts between the public sector and the private sector. The inclusion of Equality as criteria within the public sector procurement process has undoubtedly been a powerful incentive for private and voluntary sector providers to put in place equality policies. This practice, established in response to the public sector equality duty, should be encouraged and strengthened.

## **Equality standards in the private sector**

Would like to see the Government take a more ambitious approach both to action by the private sector; and to promoting good practice across all sectors. We routinely come across cases of discrimination in the private sector both in employment and goods and services cases, for example

A disabled client, with a substantial hearing impairment and communicating through a British Sign Language Interpreter visited a CAB in Wales after having been unable to fully access the advice services of her bank. The client had been a customer of the bank for a number of years although mostly corresponding with them in writing through a BSL interpreter. The client had received an appointment with

the bank for which she was refused the services of a BSL interpreter, leaving her therefore unable to make any informed decisions regarding her account.

A CAB in Derbyshire saw a client who informed them that he had witnessed employment discrimination by an agency. First the agency had not paid him holiday pay though he thought it was due to him. He also advised the agency would refuse to take on black workers because they could not complete a writing test, though there were people in some workplaces who did not complete such a test. Also, by speaking to some colleagues, notably from Poland, he learnt that some got their jobs by paying a fee to the employer (up to £500). Finally, he added that the housing could be supplied by the employer, who requested a deposit and then would put ten to fifteen workers in one house.

The idea of introducing of positive equality duties in the private sector is rejected as entailing a 'significant regulatory burden' and the review adopts a purely voluntary approach. The review does not explore other options such evidence from the market that some private sector employers have recognised the business case for change which has centred on attracting and retaining a diverse workforce, which has potentially opened up new markets and improved stakeholder and corporate social responsibility ratings of the firm. However the effect, in practice, of some firms taking considerable steps to ensure diversity and equality is achieved by them is that there is a growing gulf between those firms who do and those who do not. The time may have come to consider a wider variety of tools to bring the worst up to the standards of the best, including fiscal incentives such as tax credits for 'good' employers from a diversity perspective. Such measures have been used to encourage employers to invest in workforce development and management and similar tools could be used to bring greater compliance with equality and discrimination legislation, and broader public policy goals.

Another option that should be considered is the role of market regulators such as the FSA, Ofcom, Ofgem, OFT and even local trading standards services in improving fair treatment and equality standards in the private sector markets, both in consumer and employer markets. The Commission for Equality and Human Rights could have a statutory role in working with regulators, and introducing equality and fairness indicators as part of their regulatory criteria and functions. This in effect is the model of co-regulation.

### **Enforcement of Private Sector Standards**

Ultimately what is needed is a clear and simple framework, with a power for the CEHR to enforce pro-actively, where bad practice has been identified by an inspectorate, regulator or ombudsman, through its own investigations or work with community organisations. In particular, the CEHR needs a framework for tackling the practices of rogue employers. As the Hampton report has

emphasised, “enforcement, which impacts on the ‘rogue’ end of any industry, is not the same as ‘more regulation’, which impacts on all”.

We have some sympathy for the view, expressed forcefully by employer organisations, that the current system of ever more comprehensive and complex Regulations, backed by recourse to an Employment Tribunal, can place a heavy ‘compliance burden’ on the majority of essentially ‘good’ employers whilst failing to tackle adequately the minority of rogue or simply unscrupulous employers. In the words of one employer, quoted in the CBI report *Lightening the load*, “legislation is never going to impact on bad employers as they don’t care about compliance in the first place”. This is a point that we have made repeatedly in a series of policy reports, such as *Birth rights* (March 2001), *Somewhere to turn* (October 2004), *Still wish you were here* (December 2004), and *Hard labour* (November 2005).

The CEHR therefore needs to work pro-actively with other regulators, licensing bodies and inspectorates such as the Health and Safety Executive, as well as industry bodies to improve standards, disseminate good practice and eradicate bad practice.

### **Effective dispute resolution**

We welcome the emphasis on early resolution and ADR. Conciliation, mediation, arbitration and other mechanisms work well where there are disputes between individuals but outcomes are, not surprisingly, individualistic. ADR is not always appropriate though for tackling structural patterns of discrimination, and in relation to public functions ADR is totally inappropriate, without collective condemnation of the underlying discrimination. Disputes can arise because the discriminator does not have equality practices or policies in place, or fails to apply the policy, and offending acts may reflect of structural discrimination embedded into the culture of the organisation. We would not want to see justiciable routes of redress removed. In some sectors, for example with rogue employers, resolution may only be achievable through legal action.

The review only scratches the surface in addressing different case handling roles and powers of ombudsmen, tribunals and the courts, and does not make any recommendations for dealing with disputes in the workplace in light of review of employment disputes by the Department for Business, Enterprise and Regulatory Reform (DBERR) ‘the Gibbons Review’. We agree with the Gibbons review that measures are needed to improve access to Employment Tribunals, including:-

- a redesigned application process so that potential claimants can access the redress system through a helpline and receive advice on alternatives when doing so,
- simplifying current claim and response forms, removing requirements for unnecessary and legalistic detail, eliminating the ‘tick box’ approach to specifying claims and encouraging claimants to give a succinct statement or estimate of loss.

- A free early dispute resolution service, including where appropriate mediation

## **Courts and Tribunals**

The review might have been expected to consider whether claims concerning goods, facilities and services could be transferred to a tribunal jurisdiction. The division in jurisdiction for discrimination claims between the employment tribunals and the county courts was originally based on differences in expertise. The county courts have jurisdiction over non-employment matters because of their ostensible expertise in contract issues. However, there have been consequences of this division. Whilst employment tribunals have developed considerable experience and expertise in matters relating to discrimination in employment, far fewer goods, facilities and services discrimination claims are brought before the county courts, so accordingly there is less discrimination expertise and case law (in the broadest sense) to indicate to firms what the law means in practice. This has resulted in unpredictability and decisions of variable quality. Court procedures and costs are also an important disincentive to bringing claims. The Government's own estimate is that across the strands there are only 50-100 claims of discrimination in the provision of goods, facilities and services brought each year.

**We recommend that further work should be undertaken on the most appropriate jurisdictions for deciding different kinds of cases brought under streamlined and ideally integrated system of equality and discrimination legislation. As it stands the Review has not yet made satisfactory or sufficiently forward thinking proposals for individuals to secure redress on discrimination, or human rights questions, in relation to goods and services of all kinds.**

## **Ombudsmen and Regulators**

We agree with the proposition that greater could use be made of existing Ombudsmen. They are independent, non-adversarial, and more cost-effective than the courts, have powers to investigate matters, and involve less pressure on the individual, as well as being able to make recommendations and sometimes rulings, which are usually acted upon. Currently, the remit of ombudsmen is usually restricted to dealing with complaints on particular matters, e.g. banking, insurance, pensions, local authority services, conduct of estate agents. However, Ombudsmen are becoming increasingly aware of equality and human rights issues. They may be able to deal with discrimination issues if equality standards become part of their regulator's role or are clearly expected of a public body that comes under the remit of an Ombudsman. The Financial Ombudsman Service comes to mind for example as it has wide powers to order compensation for breaches of customer service standards set law and regulation.

The proposition should be recast into considering what role of Ombudsmen *and Regulators* might be able to play in dispute resolution and enforcement on where discrimination issues arise. Ombudsmen are often acutely aware of discrimination, but have limited powers and sanctions to address such situations; regulators on the other hand have powers to force regulatory compliance although do not seem to have a general legal role in respect of discrimination issues. There needs to be a mechanism whereby CEHR can expect market regulators to ensure that the markets and firms they authorise and oversee are not discriminating unfairly, or acting in ways that contravene individuals' human rights.

### **Access to Justice**

Most importantly though the review does not address the wider question of access to justice. Access to justice originally fell within the Review's terms of reference, but was taken out when issues concerned with the tribunal system were split off to be addressed by the Gibbons Review. Although the review has made some helpful proposals, we are concerned that neither DBERR nor the DLR has yet brought forward proposals to address some of the fundamental weaknesses in current arrangements regarding access and representation. For example:-

- **Lack of support and funded representation.** Government's reasoning is that because there is some legal help through the Community Legal Service, CEHR should only have a limited role in supporting individual cases. However, not only are the criteria for public funding very strict, the current reforms in public funding also means that many providers are less likely to take cases with discrimination issues due to the constraints of fixed fees (from October 2007 the Legal Services Commission is limiting the average funding available for employment discrimination cases to 4.5 hours on a fixed fee basis), and there is no public funding for independent representation before the tribunals. There is significant evidence to suggest that claimants cases' are adversely effected where they do not receive legal advice and support.
- **Accessibility.** Very few claims ever make it to the first stage, and many will miss their time limits. There is overwhelming evidence that, faced with a deliberately exploitative or determinedly non-compliant employer, using the Employment Tribunal system to enforce their rights is simply not a credible option for many low paid and non-unionised or who are too afraid of victimisation or dismissal to even raise the matter with their employer, or who know only too well that they will simply be ignored.

Therefore there needs to be further consideration of what measures are necessary to improve access to advice, as well as public awareness about employment rights. **We would take the opportunity here to restate our long**

**held policy position that tribunal representation should be within the scope of civil legal aid funding.**

## **Enforcement**

The review also does address critical issues concerning the enforcement powers of tribunals. Tribunals are unable to make enforceable general recommendations even where the evidence warrants it. Whilst employment tribunal chairmen have the power to make recommendations on policies or practices, but only if such recommendations would benefit the claimant; there is no such power to address underlying practices. Extending the power to make general recommendations would give the tribunals a greater role in facilitating the remedial action necessary to avoid future disputes arising.

Tribunal awards are often difficult to enforce in practice. In September 2004, a Citizens Advice report, *Empty justice*, set out evidence from the advice work of Citizens Advice Bureaux relating to the non-payment of Employment Tribunal awards, and the immense legal and financial obstacles that claimants' face when trying to enforce such unpaid awards in the civil courts. We also conducted a survey which found that each year, the CAB Service in England and Wales deals with some 700 cases of non-payment, suggesting that the problem is widespread – and more so for unrepresented clients.

**We therefore recommend a mechanism should be introduced for automatic enforcement of compensation awards.**

## **Representative Actions**

Finally, we are disappointed that there is little consideration in the review of multiple claimant cases, representative actions or class actions which can be a cost effective way of tackling systemic discrimination. **Courts and tribunals should have enhanced powers to simplify the management of so-called 'multiple-claimant' cases where claimants are pursuing the same dispute with the employer.**

## **Multiple Discrimination**

The review seeks evidence on the question of whether to introduce a concept of multiple discrimination into law. We regularly come across cases where intersection discrimination occurs, where one ground may trigger discrimination on another ground, for example:-

A Central London CAB reported the case of a client, suffering from migraine, heart problems, stomach pains and depression, and currently on the Higher rate mobility component and the middle rate of care component of the DLA, who felt he had been discriminated by his EMP doctor. The client had been previously in receipt of Income Support until he went for a medical and this was stopped: he was told by the EMP

doctor that he would fail him as he did not like anyone from the area where he was from in Iraq. The client case was then under appeal and a discrimination case was also taken out against the doctor. The client was without benefit for quite some time and was now on the reduce rate of income support which affected him financially.

A CAB client in South Wales with a history of stress and depression suffered a barrage of homophobic abuse after she came out as a lesbian at work. Although her employer was aware of the harassment, nothing was done to stop it. She went on long-term sick leave and was subsequently dismissed. With support from her bureaux, she filed claims for unfair dismissal, sexual orientation discrimination and disability discrimination. After a pre-hearing where the respondent unsuccessfully tried to have the client's unfair dismissal claim struck out, the case was settled. The bureaux was also able to assist their client to make a DLA claim.

A CAB in Wales reported the case of client, white female, Polish national, married with one child who had come to the UK as Worker, who though she had been sexually discriminated by her employer. She was "employed" (through a local agency) to work for another local company in a job which required heavy lifting. The work was described as "temporary" but involved full-time hours (37.5 per week) over a ten month period. The client became pregnant and informed her "employers" of this in February 2007. Her hours of work were gradually reduced over the preceding weeks to one day per week. The client was eventually dismissed on grounds of her pregnancy (she could no longer do any heavy lifting). The client consequently suffered a detriment in terms of loss of income through regular employment and her low level of English language skills may have had an impact upon her future employment prospects.

A client in her early 60s who had worked for her employer for 15 years had been dismissed and replaced by a younger man. Tribunal claims for sex and age discrimination together with unfair dismissal were submitted. The case went to a hearing and the parties agreed to a settlement of £10,000.

Evidence abounds that discrimination intensifies where two or more grounds are involved. For example, evidence from the EOC's general formal investigation into Black and Minority Ethnic (BME) women's experiences of employment shows that many BME women believe they are more vulnerable to sex discrimination than white women. This investigation, along with other recent research, suggests that BME women are discriminated against on a combination of grounds, namely sex and/or race and/or religion.

**We would like to see multiple discrimination expressly recognised and permitted in discrimination claims.**

## **The grounds of discrimination: Chapter 8-11**

One of the major defects of the legislation dealing with particular grounds or personal characteristics is that it can be overly complex and legalistic in the way it deals with straightforward principles, and the categories are not comprehensive.

There is a clear need to simplify how the definition of disability works for example, and we have dealt with this in an earlier answer. It is disappointing that the review does not favour bringing carers into the scope of the legislation, who would benefit from improved protection.

One approach to removing such anomalies consistent with the European Convention (Article 14) would be to add the words 'other status' which go beyond the prohibited grounds of discrimination law and have been held to cover, among other things, sexual orientation, illegitimacy, marital status, trade union membership, transsexualism, carers and imprisonment.

### **Age discrimination**

We strongly agree with the position of Age Concern and others that the age strand should have parity with other strands, and we regularly see cases where older people are targeted by service providers often resulting in detriment and financial abuse, or have difficulty accessing mainstream services so we are strongly of the opinions that there needs to be robust legislation with respect of goods and services. Also we do not agree that it is right to exclude children and young people from the operation of this legislation. They too can 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.

### **Gender reassignment**

We agree with the Review's proposals on the extension of discrimination prohibition on grounds of gender-reassignment. There needs to be robust protection for trans-gendered people, and we are also finding that access to goods and services is an issue for trans-gendered people. For example:-

A CAB in Wales reported that a group of trans-gendered people were turned out of a pizza restaurant, having been told that they had sold out of Pizza.

A Hampshire CAB reported the case of a client who got into various debts which he felt were partly due to the discrimination he had endured being a transgender. He informed that it was for this reason he was falsely accused and consequently lost his taxi driver licence which made

him unable to pay his mortgage. The landlady threatened him that she would claim physical assault with one of the other tenants as a witness if he did not move out, leaving him highly distressed and homeless.

**We would therefore argue for the prohibition of discrimination against people who are transgendered to apply to access to goods and services.**

### **Pregnancy and maternity and scope of gender directive**

We consider that pregnancy and maternity need to be taken more seriously as grounds of discrimination in its own right. Our report, *Birth rights*, based on case evidence from CABx throughout England, Wales and Northern Ireland - reveals that tens of thousands of women are still sacked illegally or threatened with dismissal just because they are pregnant.

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

We do not have any specific evidence on this, but agree with the DRC that 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.

### **Harassment: Chapter 14**

See answers to earlier questions

### **Costs and Benefits: Chapter 15**

It is important that this process includes a legal aid impact test.

### **Conclusion**

We have welcomed many of the improvements to the law recommended by the review, including the harmonisation of equality duties and codification of the law across different strands.

The review document though is largely inaccessible to anyone without highly specialist expertise in discrimination law. The package of legislative changes to be introduced in a Single Equality Bill set out in this consultation will maintain much of the inconsistency in current anti-discrimination legislation. The effect of this inconsistency is to create a hierarchy of protection within the equality legislation, emerging from the different levels of protection given to the different forms of discrimination, with the highest levels of protection given to discrimination on racial grounds.

Finally, it is disappointing that so much of the document dwells on definitions, with reference to how the legislation might be interpreted in tribunals and by public bodies. It must be remembered that at least half the purpose of legislation is normative, to change the way we think and to set new standards, which are accepted without the need for litigation. On the long view it can be

said that both the Race Relations Act 1975 and the Sex Discrimination Act 1975 have had some success in doing this. The real challenge for the Single Equality Act is to change hearts and minds.