Introduction

The *Equalities Review* made no recommendations for improvement to current mechanisms for enforcement and remedies other than to say that the CEHR 'needs to play a more dynamic role in enforcement' and that it should 'oversee enforcement.' Although not expressly stated, these recommendations appear to relate only to the enforcement of the public sector equality duties.

Similarly, the DLR Green Paper contains very few recommendations for improving procedures for enforcement and remedies. Instead the focus of the Green Paper (the GP) is on the use of Alternative Dispute Resolution (ADR) in the non employment field and on improvements to the civil courts. There are no recommendations for enforcement and remedies in the field of employment because, the GP argues, this has been addressed in another government consultation paper.

The Discrimination Law Review (the DLR) Proposals

The DLR proposals for effective dispute resolution are set out in part 2, chapter 7 of the consultation document (pp. 115 to 122). In short the GP makes two recommendations:

- Greater use of ADR and early resolution of disputes.

- Enhancement of discrimination expertise in the courts to provide for a more efficient and effective handling of cases relating to goods, facilities and services, premises and the exercise of public functions

Disputes in the Workplace

The DLR does not make any recommendations for dealing with disputes in the workplace. Instead the DLR referred the issue to the Dispute Resolution Review (DRR) undertaken by the Department for Trade and Industry. The DLR considered it appropriate for the DRR to review two areas which included:

- Measures to simplify the management of groups of similar claims brought in the employment tribunals.

- Consideration of whether to enable employment tribunals to make recommendations about discriminatory policies and practices for the benefit not only of the claimant but also others who may be affected by the acts of discrimination proved in the case, with a view to helping organisations comply with the law and avoid future claims.

The DRR made no recommendations on the first point but gave as an example the use of 'test cases'. No mention was made of representative action as an option. On the second point the DRR dismissed any proposals for widening the power of employment tribunals to make formal recommendations. It considered the best way to achieve the aim of promoting compliance with the law or avoiding future claims would be through advice and guidelines.

The CRE's Response

The CRE is disappointed that the DLR shifted these issues to the Dispute Resolution Review (DRR).

We deal with the first point - measures to simplify the management of multiple claims – in our response to recommendations for representative actions, set out below.

On the issue of widening tribunal powers, the CRE considers that the powers of employment tribunals should be extended to enable them to make recommendations which have a wider impact than on merely the individual claimant.

At present employment tribunals are restricted by the Race Relations Act 1976 to make recommendations which directly touch on the individual[1]. Consequently, the power can only be exercised practicably if there is a continuing employment relationship - often this is not the case -, which means that other employees affected by discriminatory practices will not necessarily benefit. Respondents may also find such a recommendation useful to persuade management and staff of the need to comply with the law.

Take for example the case of *Singh v The Chief Constable of Nottinghamshire Constabulary*[2] in which, following a finding of discrimination, the constabulary invited the tribunal to make recommendations to assist them in avoiding discrimination. The tribunal was prevented by the law from doing so. This is unsatisfactory.

[1] Section 56(1) of the Race Relations Act 1976 permit employment tribunals to make *'a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates'*.
[2] Cited in the CRE's Second Review of the Race Relations Act 1976, A Consultative Paper (991)

Promoting early resolution of disputes

The GP proposes the greater use of ADR and asks:

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

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

The benefits of ADR are said to be:

- Discrimination cases involve sensitive issues, which might be easier to express in an informal and non-adversarial setting.
- The complexity of discrimination cases means that ADR would offer opportunities for saving time and costs.
- Some discrimination cases are of modest value but are pursued on a point of principle; ADR may offer a more suitable forum for addressing issues of principle.

The DLR sees early resolution occurring through a number of mechanisms:

- Internal complaints procedures.
- Increasing the role of existing ombudsmen in ensuring compliance with discrimination law.
- Court service mediation services.
- The CEHR conciliation service

The CRE's Response

In general, the CRE's view is that wherever possible matters should be resolved early without the need for litigation.

The CRE is acutely aware of the difficulties which face individuals who have suffered discrimination: lack of legal representation, complex discrimination laws, lack of knowledge of judicial rules and procedures.

Whilst the CRE welcomes proposals for alternative mechanisms for resolving disputes, ADR is not and should not be the answer to these obstacles which hinder access to justice.

ADR works well where there is a dispute between individuals but outcomes are, not surprisingly, individualistic: it is not appropriate for tackling structural patterns of discrimination. In relation to public functions (e.g. a discriminatory stop and search) ADR would be totally inappropriate. The reasons are:

- Disputes arise often because the discriminator does not have equality practices or policies in place or fails to act if staff do not apply the policy to all racial groups consistently.

- The offending act may be reflective of structural racism whereby racism is embedded into the culture of the institution or organisation.

- ADR procedures require collective condemnation of racism and discrimination to be successful. This does not always exist in wider society. In fact, some establishments and organisations encourage racist behaviour –'the canteen culture'. Such reactions inspire little confidence that complaints of discrimination will be handled effectively and taken seriously by management.

- Individuals may take cases on a point of principle but this should not be so easily dismissed: they do not want others to suffer the humiliation and embarrassment they have suffered. They may also want public condemnation of the offending behaviour which can only be obtained through the courts.

It is proposed that greater use be made of existing Ombudsmen. They are independent, non-adversarial, and more cost-effective; have powers to investigate matters; and involve less pressure on the individual; as well as being able to make recommendations, which are usually acted upon.

However, there are a number of significant drawbacks to ombudsman services which might make them totally inappropriate for disputes involving discrimination.

First, 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. Secondly, the process is lengthy, it is necessary to invoke internal complaints procedures before complaining to the relevant ombudsman service – this may impact on time limits (six months) for issuing proceedings in discrimination cases. Thirdly, decisions are not binding on the parties so individuals may still have to go to court. Fourthly, ombudsmen are unable to make legal decisions which will be binding in other similar matters e.g. whether a group is a racial group. Finally, ombudsman services can take a long time to reach a conclusion on a matter because of the investigative process, which can only add to the distress of victims of alleged discrimination.

Improving the Handling of Discrimination Cases in the Courts

Some organisations have suggested that all discrimination cases should be heard in the tribunal service by Equality Tribunals. The DLR rejects this proposal.

Instead, the DLR proposes to:

- Retain the jurisdiction of the civil courts for all non-employment matters.
- Improve the specialist training for judges on discrimination.
- To increase the use of expert assessors.
- To expand the use of designated courts to deal with discrimination cases.

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

The CRE Response

In its Second Review of the Race Relations Act 1976 the CRE recommended that a discrimination division within the industrial tribunal system should be established to hear both employment and non employment race cases. The reasons for this recommendation were:

- The number of race cases in the designated civil courts was low.

- The delays in the system, the need for legal assistance and low potential award for damages acted as a considerable disincentive.

- The cases tended to be refusal of services in pubs and clubs and were simpler than cases dealt with by the tribunals.

This recommendation was dropped in the Third Review of the 1976 Act (1998) partly because the Government had announced its intention to prohibit discrimination in the exercise of public functions and the CRE decided to see how this new area of law would develop.

Although, the CRE has dealt with very few claims of discrimination in the exercise of public functions, the CRE has had some successes particularly in cases establishing Gypsies and Irish Travellers as ethnic groups. In addition, in recent years the CRE has seen an increase in multiple jurisdiction claims (non employment discrimination cases with additional civil claims in statute, contract or tort e.g. housing, education). It was always envisaged that such multiple jurisdiction claims would be heard in the civil courts and we continue to argue that public functions cases should also be heard in the civil courts.

The problems with the civil courts remain and the number of civil cases remains low. Court fees and risk of costs order act as powerful deterrents together with the formality of the courts and procedures, stricter rules of evidence and ineffective sanctions– the average compensation for discrimination cases in county courts is £1000. Even where the claim is small a discrimination case will automatically be treated as complex. There are also now problems with employment tribunals: the introduction of costs orders in the tribunals, albeit in exceptional cases, is having a chilling effect on potential applicants: respondent solicitors will routinely threaten costs orders against applicants.

The CRE considers that wherever the venue, the starting position must be:

- Easy access to justice and to publicly funded independent legal advice and assistance where appropriate.

- Procedures for enforcement should be simple, effective and efficient.

- Sanctions must be effective, proportionate and dissuasive.

The CRE is concerned that these principles are being eroded in both the civil courts and increasingly the employment tribunals, and through Government proposals for reforming legal aid.

In addition, we consider that, as equality and non discrimination are overarching principles and valuable social objectives, all courts and tribunals should be equipped with the necessary skills, training and expertise to hear a discrimination case or argument. Enhancing equality expertise in employment tribunals does not dispense with the need for courts to be experts in discrimination law.

The CRE agrees therefore with the proposals for enhancing expertise in discrimination cases through specialised training for judges and increasing the use of expert assessors and expanding the use of designated courts in race cases to deal with discrimination cases across the six strands.

In relation to assessors, more clarity is needed on their role and the weight of their views: in the case of *Ahmed v Governing Body of the University of Oxford* [3] the judge decided that he did not have to consider the views of the assessors if they conflicted with his own even where the assessors were in agreement. The Court of Appeal considered the judge had erred in this decision.

The appointment of assessors should also be a transparent process, and efforts made to ensure diversity of assessors.

[3] [2001] ICR 847.

The CRE also recommends that there be a duty on the court service to serve the CEHR with notices of discrimination claims and copies of judgments. There is a duty on claimants and their representatives to notify the CRE when they issue proceedings under Part III of the Act (non-employment matters) but very few do.[4] It is also our experience that court officers do not themselves appreciate that discrimination cases are dealt with by designated courts and have been known to give claimants inaccurate advice about issuing proceedings.

Representative actions

The DLR completely dismissed proposals for representative actions in all claims involving discrimination – both in the GP and in DRR.

The CRE is aware that there are some cases in which several individuals decide to take legal action in respect of the same respondent or on similar issues. Under the current court and tribunal rules and procedures each claim has to be considered and adjudicated upon separately.

The exception to this is where in county court proceedings the rules allow for the issue of a Group Litigation Order (GLO). The GLO sets out the issues which the applications have in common and then deals with them in one go. However, each party is represented separately.

The CRE supports representative actions because they are an effective tool for dealing with multiple claims of discrimination against the same respondent and / or on similar issues. Representative actions permit a body or an organisation such as the CRE or trade union to issue proceedings on behalf of a number of individuals who have allegedly suffered discrimination. The action may be on behalf of named individuals (representative actions) or the action may allow a group of individuals who have similar issues to seek a remedy in a single action (class actions). The decisions are binding on all parties except in class actions where the decision is not binding if an individual in the class opts out of the proceedings.

The Commission firmly believes that the SEA should include provisions which allow for representative actions.

Own name proceedings

The GP does not give any consideration to the notion of ‘own name’ proceedings. Own name proceedings allow bodies such as an equality commission or trade union to issue own name proceedings in situations where for example, there is clear evidence of a discriminatory practice but there is no identifiable victim. Examples of the potential benefits of own name proceedings include:

[4] County Court Rules 49 O 12(2)

- Estate agents refusing to take Asians to view properties in particular areas.

- Word of mouth recruitment where all employees are of one racial group.

- A club where the rules of membership state that new members shall be proposed and voted for by existing members and the membership is exclusively White.

The Equality Act 2006 enables the CEHR to bring 'own name' proceedings[5]. The CRE considers that this power should be extended to allow other bodies such as trade unions to also bring 'own name' proceedings.

Conclusions

In summary the CRE:

- Considers that there are benefits to be gained from ADR procedures in resolving disputes about discrimination. However, careful consideration needs to be given to the unique nature of discrimination in deciding which ADR methods would work best.

- Is disappointed that the DLR has shifted the matter of disputes in the workplace to the DRR and considers that it should be brought back into DLR.

- Does not consider that the existing ombudsman service is the way forward for resolving discrimination disputes in non-employment matters.

- Firmly believes that the DLR should reconsider its decision on representative actions for discrimination cases, as well as give consideration to 'own name proceedings'.

[5] Section 24 of the Equality 2006 allows the CEHR to apply for an injunction to restrain unlawful acts of discrimination.