

Introduction

The Government launched their consultation for a new Single Equality Act, on 12th June 2007 ('the Discrimination Law Review'). They set out their ideas and proposals for new legislation across the various equality strands in the consultation document, 'A Framework for Fairness: Proposals for a Single Equality Act for Great Britain.' This can be accessed at <http://www.communities.gov.uk/index.asp?id=1511245>. The consultation ends on 4th September.

Macpherson and Institutional Racism

Equality Duties are a recent addition to British equality legislation. Their origins can be traced from the landmark report of Sir William Macpherson into events surrounding the tragic murder of the Black teenager, Stephen Lawrence, which reported in 1999.

The Government's direct response to the report was twofold: (a) an acceptance that Macpherson was right that institutional racism was a daily experience for ethnic minorities in Britain; and (b) that the law can help tackle this, through the pioneering race equality duty.

The Government's Response: the Race Equality Duty

The then Home Secretary Jack Straw MP said when introducing the race equality duty:

'The Macpherson report made it clear that there is institutional racism not only in the police service but in a large number of other public authorities and some private bodies. The [Race Relations Amendment] Bill would not be necessary if there were not institutional racism in a wide variety of public bodies.'

The race equality duty has two parts: the general race duty that most public bodies in Britain have had to pay 'due regard' in carrying out all their functions, to the following:

- The elimination of unlawful racial discrimination.
- The promotion of equality of opportunity.
- The promotion of good race relations.

The second part is the race equality schemes, policies & employment monitoring that support major public services in delivering on the general race duty. These were designed to provide clear support for public authorities on how to deliver

better policy, fairer services and law enforcement, and intelligent employment using the best of all talents.

Rationale for Race Equality Duty

There are at least four reasons for having the race equality duty:

- For public authorities to be pro-active in challenging race discrimination and institutional racism and through the support of the law, to genuinely learn from Macpherson.
- For public bodies themselves to take the responsibility for identifying race discrimination and disadvantage, rather than race equality being an optional extra.
- To achieve this responsibility through 'mainstreaming' that is public services and law enforcement bodies embed, proportionately, race equality into all their work.
- To see the race duty as a framework for good policy and fairer public services & law enforcement generally: a prerequisite for better regulation, and not a burden.

Why We Still Need a Race Equality Duty in 2007

The CRE thinks that race discrimination and disadvantage continues to blight Britain. Almost decade on from Macpherson and the pioneering race equality duty, it is true that:

- Black students, and White Working-Class boys chronically under-attain in school education, needlessly depressing the skills base, and upward social mobility.
- There is labour market disadvantage for many ethnic minorities, such as those of Bangladeshi & Pakistani heritage, preventing employment of the best talent.
- The general over-representation of ethnic minorities at each stage of the criminal justice system, especially Black groups impeding life chances and social trust.
- Racial profiling by police and other criminal justice agencies especially of Black groups, Asians, and Muslims; undermining efforts to enhance community cohesion.

- The stereotyping and vulnerabilities of Black groups in mental health decisions, as highlighted by the report of the death of David ‘Rocky’ Bennett in 2003.
- The emerging exploitation of and discrimination against new migrants from Central Europe in employment and in overcrowded housing.
- The pervasive stereotyping suffered by Gypsy & Traveller communities throughout their lives in diverse areas: education, planning, housing and evictions.

What the Discrimination Law Review Says

The Government’s proposals on a new cross-equality duty are set out in chapter five of ‘A Framework for Fairness’. The CRE is very concerned about the apparently regressive proposals on equality duties and we set out why in the next section.

However to set the context for our critique the Government propose the following new equality duty that will comprise mainly four parts:

Part 1

- Replace current goals of eliminating unlawful discrimination and promoting equality of opportunity and good race relations with the following aims:

- (a) To address disadvantage.
- (b) To promote respect for different groups and foster good relations.
- (c) To meet different needs whilst promoting shared values.
- (d) To promote equal participation.

Part 2

- Replace the race, disability and gender duties that apply to all that a public body does, with a duty to take proportionate action only towards a limited number of equality priorities. This constitutes a break with the principle of mainstreaming that embeds equality, proportionately, into all that a public body does.

Part 3

- Replace the current race equality schemes, policies and employment monitoring duties with four 'statutory principles' designed merely to underpin action for meeting the above narrow set of equality priorities.

Part 4

- Replace the current enforcement regime for the race, disability and gender duties with a 'single enforcement mechanism' confined to the CEHR, thereby removing individual or group litigation on the new equality duty.

What the CRE Thinks, and Why

The CRE is extremely concerned about the Government's proposals for a new single equality duty. We think they regress entirely unnecessarily from the Macpherson Report and constitute a piecemeal approach to addressing discrimination and promoting equality.

Whilst there is agreement that public bodies should prioritise action on their most significant policies - namely those that involve potential discrimination, impede life chances and threaten good community relations – the CRE knows that this is achieved by building on, not scrapping, the existing race, disability, and gender models.

Replicating the five parts of the Government's proposed equality duty, the CRE calls for:

Part 1 – Retain Unlawful Racial Discrimination & Good Race Relations

What the CRE Thinks

- Introduction of a general equality duty that also explicitly recognises discrimination and poor race relations as major causes of disadvantage and community tension.
- The new equality duty must adopt a fuller idea of equality by requiring public bodies to (i) eliminate unlawful discrimination and harassment, (ii) address disadvantage, (iii) promote equal dignity, life chances, and participation, and (iv) secure good, respectful community relations (especially race relations).

Why the CRE Thinks This

- Racial discrimination is first unlawful and second leads to chronic racial disadvantage. Race-blind policy is just as discriminatory in effect as overt racism is in impact. Macpherson recognised this as institutional racism. The general race duty must then have a distinct limb requiring public bodies to eliminate unlawful racial discrimination and harassment.
- Example (1) National & local data consistently tell a story of Black boys' particular vulnerability to school exclusion¹. Discrimination, stereotyping and racism are part of this story. The new equality duty must then tackle this by expressly requiring educationalists to monitor and act to close the race-exclusions gap. This is vital for maximising our talent, and not wasting it.
- Good race relations are a pre-condition to, and expression of community cohesion. It genuinely cross-cuts Government policy, be it as policies around Britishness and national solidarity, or in crime prevention, localism, or through housing strategies in rural areas involving site provision issues.

Example (2) The race equality duty, precisely because it includes a distinct obligation to secure good race relations provides a vital standing framework for dialogue between local councils and others agencies, and between the indigenous and Gypsy & Traveller communities.

Our inquiry report 'Common Ground' noted this potential of councils' intelligently using good race relations for securing mutual understanding between Gypsies and Travellers and local communities. Although it needs emphasising that the report also lamented the chronic ignorance of many public bodies towards how the good relations framework can enhance community cohesion².

Part 2 – Retain 'Mainstreaming' and Tackle Institutional Racism

What the CRE Thinks

- Mainstreaming, probably more than anything else, is what gives a real edge to the race equality duty. It is born out of Macpherson, that institutional racism is fact of modern public services and law enforcement in Britain. Without mainstreaming – which involves public bodies embedding equality across all they do – it is near impossible to identify never mind challenge assumptions, attitudes, and ways of working that act to disadvantage ethnic minorities.

- Often race involves the 'harder' edge of discrimination with devastating consequences for life chances and community cohesion. These 'harder' edges are precisely those areas where many public bodies prefer not to go to. One can think about stop & search and racial profiling; to the vulnerabilities of Black people in mental health decisions; onto the susceptibility of Gypsy & Traveller communities to eviction; as well as to the treatment of immigrants in detention centres. These 'harder' edges need duties more than anywhere else.
- There are other edges here, as is well known: if mainstreaming is lost then the very real phenomena of rural racism for example could be rendered invisible just years after being acknowledged as one face of racism in Britain today. Mainstreaming is a prerequisite to identifying such 'newer' forms of racism highlighting the need for it to animate any new equality duty.
- Mainstreaming also enables the right priorities to be identified and acted on. It is very important to be clear that there is no tension at all between mainstreaming - embedding equality proportionately into all you do - and setting equality priorities. In fact the former informs the latter and ensures that the chosen priorities are the most relevant and right ones for tackling discrimination, serving diverse communities, and adopting fair law enforcement. In fact mainstreaming is one necessary condition for realising the good policy = better regulation rationale inherent to an equality duty.

Why the CRE Thinks This

- It is clear that if the current duties are replaced with a limited duty to take action only towards certain equality priorities then a swath of important public services and law enforcement will proceed without any legal regard to race equality. This is clearly regression from the race equality duty and is unacceptable.
- Example (1) Under the race equality duty, because of mainstreaming, a police force is obliged to pro-actively eliminate discrimination from its stop and search practice; as are mental health trusts required to eliminate stereotyping from their sectioning practice; as are local authorities when making their planning permission decisions on Gypsy & Travellers.

If the Government's proposals were to become law, however, then these areas won't necessarily be subject to an equality duty. Rather to be caught they would have to be one of the limited set of priority equality objectives. This is regression in theory and in practice.

- Example (2) Rural racism is one of the many faces of racism in modern Britain. However it hasn't always been recognised as such, and pioneering research such as 'Needs not Numbers'³ gave it national prominence. Recent ethnicity migration trends – the dispersal of asylum seekers from London and especially the new migrants from Central Europe – if anything increase the need for councils and police forces to keep an eye on rural racism. However rather than requiring local authorities to absolutely do this, these new duties would, for example, enable already-pressured to prioritise more visible and less isolated groups & issues to the detriment of addressing the 100% impact of rural racism on isolated minorities.

Part 3 – Support Delivery of Equality Duty through Clear Action, not Principles

What the CRE Thinks

- The CRE thinks the new equality duty would benefit from a group of essential steps specifying activities that are really just part & parcel of good policy and better regulation generally. These would apply generally to policies, providing public bodies with the clarity on the activities necessary to addressing discrimination and disadvantage, and improving community relations.
- There are six cyclical steps: (a) every three years to review performance on equality through a 'state of the authority' report; (b) gather, improve and use evidence on equality in all functions, particularly in developing and implementing policy; (c) involve and consult the public and staff in developing an annual equality action plan; (d) implement this action plan, and (e) publish progress on it; and (f) implement an equality employment duty covering recruitment, progression and retention information and issues.

Why the CRE Thinks This

- The CRE thinks that there are strengths and weaknesses in the present supporting regulations in the race, disability and gender models, and the latter two place a welcome emphasis on active processes, rather than merely 'arrangements'. Including only essential and active processes is critical as these aren't in anyway unclear or burdensome, but rather are merely part & parcel of good policy, removing the need for regulation later.
- The CRE is clear, as we think most public bodies are, that there is even more of a need in a cross-equality duty, to specify in legislation the steps or activities that public authorities should implement

proportionately throughout their work. Clarity is essential, and we don't think the Government's proposal for only four 'statutory principles' provides it; rather they are merely to underpin action, whatever that may mean. At best the 'statutory principles' are a recipe for confusion, and at worst permission for inaction.

- Example (1) The CRE and Parliamentarians including Keith Vas MP through PQs have been monitoring central government's work on race equality impact assessment for a number of years now. One message of concern is that a group of influential government departments responsible for major national policy have been failing to undertake race risk assessments on many or any of their proposals.

Aside from the legal risks inherent in this, more importantly this means that a series of new legislation hasn't been race assessed either adequately or at all. This constitutes a serious 'missed opportunity' to use the race equality duty as it was intended and indeed required: to improve policy and services for ethnically diverse communities across Britain. It also highlights why we need to offer clear statutory support for central government in the future, and not regress to the pre-Macpherson malady that often ignored race issues altogether.

- Example (2) The CRE like many others support the Government's Sure Start programmes to support very young children and their families through a range of universal social provision, ranging from early education, to healthcare, through to general family support.

However we noted with real concern the recent critique that Sure Start is failing many ethnic minorities in certain areas, as set out in a recent national evaluation of Sure Start and race equality⁴. This concern was compounded by the fact that the cause for much of the failings lay in not taking precisely those actions required by the race equality duty, reflecting its good policy rationale.

The authors concluded that gathering and using ethnic monitoring data, involving and consulting communities in their schemes, running pro-active outreach work, and developing core services that respect and meet ethnicity-based differences were all conducive to good and equally accessible services⁵.

Part 4 – Enforcing the New Equality Duty

What the CRE Thinks

- The CRE is concerned that the Government's proposals on equality duties will render them pretty well unenforceable. There are two aspects to this worry. First is that the proposed 'statutory' principles

with their role merely to underpin and not be themselves the necessary action fails to specify a clear standard of compliance that groups, the CEHR and public bodies themselves can assess and compare performance against.

- With no knowledge of compliance, there can no idea of non-compliance, and without that there can be no enforcement. It is far clearer and better for all that the legislation specify the actions required to meet an equality duty: equality assessments, involvement, monitoring, action plans etc. The distinction between underpinning action and action itself is, at best, unhelpful and confusing and, at worst, a recipe for an unenforceable equality duty. The real question emerges of whether the Government's proposal is a legal duty at all?
- The second aspect informing the CRE's concern on the enforceability, or otherwise, of the duties is the proposal to create a 'single enforcement mechanism' confining enforcement to the CEHR, and jurisdiction to the lower civil courts. This would mean that the High Court in England & Wales, and the Court of Session in Scotland would have no remit for enforcing the proposed equality duties.
- This would also remove an important principle in enforcing the current duties that is that those directly affected by poor and unfair practice from a public body will not be able to themselves take action, arguing that the duties haven't been met. In effect only the CEHR Legal Committee will sanction, or not as the case may be, enforcement of a new equality duty, thereby significantly narrowing its regulation in the future.

Why the CRE Thinks This

- The first concern for the CRE is whether the Government amounts to a legal duty at all. If it is not enforceable then it isn't a legal duty and if that were the case this regresses again to the pre-race equality duty world where equality really was only an optional extra.
- The CRE is clear that public authorities will benefit from six clear cyclical actions, set out in the legislation, that enable them to play their part towards equality. Helpfully these six actions can also provide the CEHR with a clear standard of compliance so that they may enforce against those that willfully neglect the duty.
- Example (1) The second issue is the proposal to effectively to remove an individual or community's right to appeal to the duties in their own legal actions against discriminatory and unfair public services and / or law enforcement. This is a very important legal principle that holds that

those directly affected by inappropriate public acts should be able to challenge them through, amongst other things, equality duties.

It would mean, for example that the Gypsy & Travellers' groups couldn't use the duty to challenge their eviction from Dale Farm; or the mainly Bangladeshi Brick Lane community in relation to the Crossrail project in their area; or Trade Unions in challenging staff redundancy and re-locations following the recent Lyons Review of civil service jobs; or the Black Solicitors' Network in defending legal aid / fee arrangements from the recent Carter Review proposals - these are all cases that the CRE also are or have been involved in.

¹ 'Permanent and Fixed Period School Exclusion from Schools and Exclusion Appeals in England 2004/05', Department for Children, Schools and Families; and 'The Education Experiences and Achievements of Black Boys in London Schools, 2000-2003', Education Commission, London Development Agency, September 2004.

² 'Common Ground. Equality, Good Race Relations and Sites for Gypsies and Irish Travellers', Report of a CRE Inquiry in England & Wales, May 2006.

³ De Lima, P., (2002) 'Needs not Numbers'.

⁴ Craig, G., et al, (2007) 'Sure Start and Black and Minority Ethnic Populations', National Evaluation Survey, Department for Children, Schools and Families.

⁵ Ibid.