Discrimination Law Review

‘A Framework for Fairness: Proposals for a Single Equality Act for Great Britain’

Commission for Racial Equality

Response

September 2007

INTRODUCTION

1 The Commission for Racial Equality (the Commission) has a statutory duty to work towards the elimination of racial discrimination, and to promote equality of opportunity and good relations between people of different racial groups. It also has a duty to keep the working of the Race Relations Act under review and to submit proposals for amending it to the Secretary of State, either when required to do so or when the Commission thinks it necessary.[1]

2 The Commission's response to the Government's consultation document *'A Framework for Fairness'* is set out in this paper. It has been prepared in the light of the Commission's duties, outlined above, its experience of operating the Race Relations Act 1976 (the RRA), as now amended by the Race Relations (Amendment) Act 2000, and its understanding of the Race and Employment Directives.

3 The Commission's response covers mainly the following areas:

- The social and economic context for equality legislation.
- The need for a constitutional guarantee of equality.
- The grounds, definitions and scope of new equality law.
- An integrated public sector equality duty.
- Procurement.
- Balancing Measures.
- Private Sector.
- Enforcement and Remedies.
- Statutory Exceptions.

4 The Commission addresses the questions raised in the consultation document where it considers that it has competence to do so, although not necessarily in the order they appear in the response form. It also raises further points which either arise in the consultation document but for which there is no corresponding question, or which the Commission considers need to be included in equality legislation.

5 SOCIAL CONTEXT AND THE SEA[2]

6 It is a fact that Britain, in 2007, has never been more diverse. Some commentators have described this as hyper or super-diversity and it is clear that within the doubling of ethnic minority Britons between 1981 and 2001 there has been a spreading of ever-greater ethnic diversity, with newer more diverse migration flows from sub-Saharan Africa states from former Yugoslavia, onto Afghanistan and Iraq, and also from the Philippines.[3]

7 This trend then is both vertical and horizontal: the former in that numerically there are more ethnic minorities; the latter in that within these communities there is unprecedented ethnic diversity, especially through the relatively high number of A8 migrants now moving throughout Britain.

8 This fact of ethnic diversity blends with other broad changes, including the unprecedented globalization of capital and labour, persistent income and wealth inequities, and a changing demographic structure and a shrinking in the current working-age population, to create a quite different socio-economic Britain, than that in 1981 or 1976.

9 The law generally must keep pace with social change: the key to having a rounded perspective of the law and its contribution is to frame it with a sound understanding of the social and economic policy context. Below we set out five social and economic challenges present in Britain today.

10 *Race Discrimination, Stereotyping, and Persistent Disadvantage*

11 Persistent racism, whilst not entirely peculiar to 2007, remains a challenge which reflects the durability and breadth of race discrimination, stereotyping and disadvantage in modern Britain, and its unnecessary deleterious socio-economic impact.

- It is 'super-diversity', amongst other things, which translates into pervasive racism across education outcomes, employment, and perhaps most uniquely, in the discharge of law enforcement. For example:

- Black students and white working-class boys chronically under-attain in school education, needlessly depressing the skills base, and upward social mobility.[4]

- There is labour market disadvantage for many ethnic minorities, such as those of Bangladeshi & Pakistani heritage, preventing employment of the best talent.[5]

- The general over-representation of ethnic minorities at each stage of the criminal justice system, especially black groups impeding life chances and social trust.[6]

- 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.[7]

- The emerging exploitation of and discrimination against new migrants from Central Europe in employment and in overcrowded housing.[8]

- The pervasive stereotyping suffered by Gypsy & Traveller communities throughout their lives in diverse areas: education, planning, housing and evictions.[9]

12 *Material Inequality & Ethnic Diversity*

13 The second challenge is the close relationship between race and material deprivation in Britain. Inequities in the allocation of resources can hinder or even eliminate any prospects for the upward social mobility which is essential for challenging inequalities within and across class, gender, race and other aspects of identity.

14 Unfortunately, the current picture is of less upward social mobility[10], thereby shutting the door of equality of opportunity for many deprived groups, ranging from white working-class communities decimated by structural economic change (manufacturing to a service-based economy) to also many ethnic minority groups that suffer not only material disadvantage but from deep-seated racism also.

15 By way of illustration, almost three-quarters of Britons of Pakistani or Bangladeshi heritage live in poverty[11]; Indian and black households are more likely to be deprived than the average household; Muslims are up to four times more likely to be unemployed than Christian[12]; and some of the newer migrants from outside the EU are less likely to get employment[13] for a variety of factors, including racist stereotyping.

16 Inequality needs to be viewed in the round and not simply as an issue of income or wealth, but also of race, gender, disability etc separately as well as how they intersect to deepen disadvantage. The problem of persistent poverty and disadvantage is complex requiring a sophisticated legal and policy framework.

17 Equality legislation can respond to this challenge through a comprehensive and powerful set of equality duties on the public sector to address persistent disadvantage grounded in material inequalities both distinctly racial and cutting across ethnicity, gender, disability and / or geography. Such duties must be designed to set a clear 'good policy' legal framework within which public bodies can develop better policy, public services, and fairer law enforcement, through gathering and using evidence ('monitoring'), speaking to ordinary people, as well as explaining to the public the action they have taken to address persistent disadvantage and improve community relations.

18 The legislation can also challenge material inequalities and unequal opportunities in its provisions to compensate for or prevent disadvantage through the use of positive action.

19 *Broader Equality & a New Policy Approach*

20 The challenge of ethnic diversity will and already is being most acutely felt in public services. It simply makes sense that unprecedented diversity means that traditional policy approaches and public service delivery will have to change. This may be unsettling for some, especially perhaps in areas of Britain not used to ethnic difference, but nonetheless improvement is essential.

21 However it is also important to recognise that underlying ethnic diversity is the fact that all ethnic groups share common ground: most people want a

good job, decent education, access to quality healthcare, to live and feel like they live in a safe area etc. This commonality is simply a social fact and it should be reflected in any new equality duty framework in the SEA.

22 Moreover, the move towards an integrated concept of equality adds to the challenge for traditional policy approaches in the delivery of public services and functions. There needs to be an explicit recognition that equality should not only be a core constitutional legal value, but that it is actually also a broad public policy principle. This should be easier as we move closer to a SEA.

23 This new perspective should translate into a re-conceptualisation of public policies including the *New Deal*, the planned acceleration in the social housing stock, and the *Sure Start* initiative for what they actually are, that is mainstream 'equality' policies. Further, this re-conceptualisation should not be confined to public policy but also be situated within the new equality duty in the SEA, expressing in the law the movement of equality into the mainstream.

24 However, this challenge demands that mainstream equality policies, like *Sure Start*, do actually reach all communities in need, and not solely those that traditionally access core public services. Here, the experience of *Sure Start* is instructive: a recent national evaluation has demonstrated that many of local programmes are failing to reach certain ethnic minority communities because they are not adopting precisely those actions required by the race equality duty.[14]

25 Specifically, the evaluation 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 essential to ensuring race equality in accessibility to *Sure Start*.

26 These conclusions point to the final aspect of this challenge that is sophisticated consultation and evidence is required to animate this fresher understanding of equality. Specifically, an effective policy approach fit for a diverse Britain will build, analyse and take action based upon disaggregated data and qualitative evidence.

27 Greater ethnic diversity spread across Britain necessitates this approach, with any old approaches no longer in themselves fit for purpose. An equality duty in the SEA can and should be an important lever for fleshing out and embedding this broader idea of 'equality' into public policy generally and fairer public services and law enforcement, especially.

28 *Ethnic Diversity and 'Parallel Lives'*

29 A fourth challenge, which the Commission has sought to articulate in recent years, is the thorny question of whether and to what extent Britain is a divided, segregated society. We recognise that there is disagreement on whether Britain is segregated, and if so whether this is a problem. However, it is the CRE's belief that in those regions where communities live apart there are problems, which include social tensions and persistent inequality.

30 Many groups, including white communities, tend to cluster together and this congregation expresses itself in at least four different ways: socially in friendship networks; residentially in where people live; in school and university communities in education; and to some extent in employment. Congregation is not inherently problematic but it becomes so if it is the result of racial discrimination, harassment, mutual ignorance and suspicions across communities in our society.

31 The Commission recognises that whereas segregation is not pervasive, it is real in certain parts of Great Britain and in certain sectors. To illustrate, the DCLG study, *'State of the Cities'* published in 2006, highlighted segregated cities by residence and elsewhere, especially between whites and Asians and particularly in the north-west of England.[15]

32 Also, recent ESRC research suggests it vital that primary schools, as far as possible, be racially mixed as this has powerful impacts on the diversity of friendship networks when children move into secondary school. Both examples highlight a real phenomenon of different racial groups in certain places living 'parallel lives', at the same time as implying that this division isn't inevitable or desirable.

33 Segregation is neither inevitable nor desirable: the goal of social cohesion, like equality, should be integral not only to future public policy but also within the SEA itself. Again, we envisage the new equality duty as an important lever for encouraging public bodies to consider cohesion issues when developing policy and making funding and other decisions. For example, we envisage local councils, in part through the equality duty, to have equality and cohesion issues at the heart of their education, housing, planning, regeneration, and public spaces strategies.

34 All these areas are relevant to equality and cohesion issues, but if left untouched, can condone segregation. Seemingly race-neutral decisions about whether to locate a leisure centre, or a new park, or more obviously a new school are actually very relevant to race equality and social cohesion, especially in places where communities really do live 'parallel lives'.

35 *Tackling Extremism*

36 The fifth challenge presented by Britain's diverse society lies in political extremism manifested either by the growing support especially in local elections for far-right movements such as the British National Party or politicisation of some forms of religious fundamentalism.

37 This challenge is complex and not amenable to simple short-term solutions. That said it would be folly to ignore the real potential of deep material and political marginalization to translate itself into support for extremist movements. It may be that the SEA can do no more than make a contribution to the prevention of the growth of extremism, but it is vital to recognise that the legislation has a role tp play.

38 First, existing race relations and public order legislation have historically interacted to tackle criminal acts such as incitement to racial hatred. We would hope and expect that this will continue in the SEA, especially with regard to how public bodies implement the race and possibly also any religion / belief, limbs of any equality duty.

39 The Commission has been consistently pro-active in monitoring incitement to racial hatred and has worked closely with the police and prosecuting authorities. Moreover, it has always sought to provide clear guidance to public authorities on how they can themselves act appropriately, using the race equality duty, in dealing with extremist politics that involve racist stereotyping and the promotion of racist attitudes. Our recent guidance, *'Defeating Organised Racial Hatred'* available at http://www.cre.gov.uk/about/sci_index.html, is the latest example of this pro-active approach.

40 Second, public bodies should, in implementing the new equality duty, be pro-active in addressing extremist views. This is particularly so for racism and any extremism based on or towards religion. Of course there is a fine balance between legitimate freedom of expression and association on the one hand, and causing deep offence and / or incitement on the other.

41 Nonetheless, public bodies are well-placed to ensure that they act in an inclusive manner that respects certain ground rules of equality, fairness, mutual respect and civility.

42 *Conclusions: Ethnic Diversity v Social Solidarity*

43 Our concluding remarks on these five challenges can be approached by answering the proposition that there is a necessary tension between enhanced ethnic diversity, and any prospect of sustaining social solidarity. Whatever one may think of this debate, whether it is a false or, conversely, a very real one, it nonetheless reflect a perception on the durability of socially unified Britain.

44 Specifically applied to race equality this challenge gets to whether one can maintain widespread support for common social institutions across different racial groups, or have things become simply too diverse.

45 The Commission is clear that there is not at all a necessary tension between enhanced ethnic diversity on the one hand and social cohesion on the other hand. Rather there is or at least should be a symbiosis between the two in, for example, the delivery of key public services.

46 The SEA can contribute here through innovative frameworks like public sector equality duties that, as argued above, should provide the policy approaches and monitoring analyses that provide local public bodies with a

better understanding of the ethnic spread of those they serve, of the interactions therein, and of the common and / or distinct needs of the diverse communities.

47 The SEA will make a difference generally in that it is based on an integrated and broader conception of equality that, by definition, involves the majority and not only minorities. Its existence, supported by flexible prohibited grounds that protect against intersectional discrimination on the one hand; and on the other hand via equality duties that tackle multiple disadvantage, should combine to debunk and transcend the artificial polarisation between ethnic diversity and social solidarity.

48 SOCIAL COHESION AND THE SEA

49 The Commission has always taken a close interest in the nature and extent of cohesion in Britain. Over the past few years this interest has translated itself in the warning by our former Chair, Trevor Phillips that Britain was in danger of ‘sleepwalking into segregation’. This led the Commission to offer its vision of the good integrated society organised around three key principles of equality, interaction and participation.

50 This is not just a moral concern: objectively, there is a strong case for a cohesive or integrated society. This has recently translated itself into a consensus across on the one hand specialist panels such as the Equalities Review, the Commission for Integration and Cohesion, and on the other hand in the Government, and in Parliament also.

51 In their different ways all of the above have argued that an unequal society is a fragmented society. The Equalities Review stated thus:

'The links between equality and social cohesion are well documented. Violence, conflict, insecurity and political instability are all more likely to occur in more unequal societies. In the poorest areas of unequal societies, the quality of social relations and the social fabric are stretched to breaking point.'[16]

52 In light of this, the Commission has sought to remedy the chronic policy gap between measuring equality and measuring social cohesion. This has led us to develop a set of integration indicators. This model seeks to place integration or social solidarity as a key national policy aim, and critically specifies a set of specific outcomes and indicators designed to enable public bodies to identify aims and track progress towards meeting these.

53 We hope and expect that any new equality duty will require public bodies to works towards good community relations and greater social cohesion. This is necessary not least as it would reflect the symbiotic relationship between greater equality and greater integration.

54 With this is in mind, we recommend our integration model as a good starting-point for illuminating good community relations and measuring progress on the same. We hope and expect that it will start to de-mystify this sometimes unclear area, particularly useful for the myriad of public authorities implementing the SEA's new equality duty.

55 **ECONOMIC CONTEXT AND THE SEA**

56 The Commission also thinks there is an objective economic case for more equality and deeper integration. Many have pointed to the correlation between equality and prosperity. The Equalities Review noted this, and cited not only the objective case for a more socially cohesive Britain, but for a fairer economy also.

'There are substantial benefits to be gained from living in a more equal society. Gaps in educational attainment, employment rates, or other opportunities impoverish us all. Research shows that not only does absolute poverty in itself reduce our productivity; so does the size of the gap between those at the top of society and those at the bottom. On several measures, that gap creates a drag on economic performance.'[17]

57 The Commission knows that such gaps – in employment, in education attainment, in skills – often have a racial flavour. To illustrate this we need only look to how the ethnicity employment gap suffered by many ethnic minority groups remains significant and stubborn; or consider the persistent education attainment gap for not only many white working-class boys but for black students also and, especially, for pupils of Roma Gypsy and Irish Traveller heritage[18]; and finally to note the race and class gaps for some ethnic minority groups in enjoying basic literacy and numeracy skills.

58 Each of these areas – education, employment and skills – are vital not just to the individuals' life opportunities, but also at a more general level to securing fair social mobility and greater equality, social stability and economic prosperity. The SEA undoubtedly has a role to play here: consider how positive action-type steps can help reduce the race-employment gap, or how implementing the new equality duty can prompt a school or college to act in tackling attainment or skills gaps

59 **LEGAL CONTEXT AND THE SEA**

60 There is clearly a legal imperative for dealing with discrimination. It should not be forgotten that in the 1976 White Paper *'Racial Discrimination'* the Government of the day stated:

'Legislation is capable of dealing not only with discriminatory acts but with patterns of discrimination….But the legislative framework must be right. It must be comprehensive in its scope and its enforcement provisions must not only be capable of providing redress for the victim of individual injustice but also of detecting and eliminating unfair discriminatory practices.

'When Parliament legislated ten years ago to make racial discrimination unlawful, it involved for this country a pioneering and novel use of the law to deal with a new social situation which had arisen as a result of the settlement of immigrants from the …Commonwealth and of the difficulties they encountered. The experience of the intervening years has confirmed that the use of the law to secure equality of treatment and to provide an individual remedy has lost none of its relevance.'[19]

61 This view of the legislation still holds true today. We would add however two new characteristics:

- The legislation should include a guarantee or constitutional right to equality and protection from discrimination.

- The legislation should provide for a proactive model for securing equality which complements the complaints-led model.

62 We consider therefore that the structure of progressive and modern equality legislation requires a set of principles to guide the drafting of legislation and its implementation. These should include:

- Clarity, coherence and, wherever possible and appropriate, consistency in protection and duties across and between all the protected strands.

- Simple, effective and efficient procedures for enforcement.

- Access to justice and fair hearings must be guiding principles for people seeking individual legal redress for acts of discrimination. This shall include access to publicly funded independent legal advice and assistance where appropriate.

- Sanctions must be effective, proportionate and dissuasive.

- Wide dissemination of information and advice on the future single equality act.

63 *A Constitutional Right to Equality*

64 One fundamental issue, not addressed in the Green Paper, is the status of the SEA. Currently, while the scope of the RRA is comprehensive it is not a superior or constitutional rule of law. The RRA does not prevail over other legislation, whether passed before or subsequently; nor does it provide a legal right to equality or a general prohibition on discrimination, and there are many exceptions within it.

65 This subordinate nature of the RRA is secured in statute in the exception for acts done under statutory authority (s.41) and in case law for example in the decision of *R* v*. Cleveland County Council ex parte* CRE [1992] LGR 139.

66 Section 41 provides that if an act of discrimination on grounds of colour or nationality is done in pursuance of other statutory law in the field of employment, education, goods facilities or services, education or social advantage then the act is not unlawful under the RRA.

67 Section 41 also provides that an act of discrimination on any racial ground is not unlawful if it is done in pursuance of other statutory law on public

functions which do not fall within the above categories (e.g. enforcement such as stop and search)

68 An act is done 'in pursuance of' other statutory law only if it is specified in that law and not in the exercise of a power or discretion: *Hampson v Department of Education and Science* [1990] IRLR 302 HL. For example, charging higher tuition fees for foreign students is lawful provided it is expressly authorised by statute.

69 The effect of s.41 is that many discriminatory and controversial acts cannot be challenged under the RRA. For example, the challenge to the indefinite detention of foreign nationals under the Anti-Terrorism Crime and Security Act 2000 was made under the Human Rights Act, not the RRA.[20]

70 The status of the Race Relations Act 1976 was affirmed in the case of *R v. Cleveland County Council ex parte CRE* [1992] LGR 139. Here, a White parent of a mixed heritage pupil in a majority non-White school expressed a preference for her child to be educated at a majority White school.

71 This preference triggered the local education authority's duty under education legislation to comply with parental preference, despite the fact that the reasons behind the preference were racial. The CRE's principal argument in the case, that the non-discrimination & non-segregation provisions in the RRA qualified the local education authority's duty to comply with parental preference, racial or otherwise, failed.

72 The Court of Appeal ruled that the provisions of the Education Act 1980 requiring local education authorities to comply with parental preferences in the allocation of school places took precedence over the 1976 Act, even though this required local education authorities to give effect to choices based on race.

73 In 1998 in our Third Periodic Review of the RRA, the Commission recommended a number of measures which would accord race equality permanent priority status: one was the public sector race duty. However, the current race equality duty cannot rescue the *Cleveland* situation: the duty, while extremely important, is of a second order in that it can only bite on the way in which public authorities exercise powers and discretions: it cannot modify any statutory duties that a public authority is under.

74 We also recommended that equality legislation include a mechanism or procedure for pre-legislative scrutiny and audits, a recommendation which we continue to support.

75 *Pre-Legislative Scrutiny and Compatibility Statements*

76 Articles 14 and 16 of the Race and Employment Equality Directives respectively impose an obligation on Member States to take the necessary measures to ensure that:

77 Any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

78 Any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit making associations, and rules governing the independent professions and workers' and employers organisations are or may be declared null and void or are amended.

79 We submit that effective implementation of Article 14(1) of the Race Directive requires, at minimum some form of monitoring or audit of laws, regulations and orders once passed and, at best, a mechanism or

procedure for pre-legislative scrutiny for compliance with the principle of equal treatment as defined in the Directive and audits of proposed legislation and policies. A precedent for conducting pre-legislative scrutiny exists in s.19 of the Human Rights Act - ‘statements of compatibility’.

80 The Commission recommends that, following the Human Rights Act model, when new legislation is proposed, the Minister responsible should be expected to certify that the new measure is consistent with and does not conflict with the principle of equal treatment in the Directive.

81 Where the Minister cannot so certify then he or she would be expected to explain in a Memorandum attached to the Bill why the new measure should be enacted in its proposed form and Parliament should only be asked to approve such a measure when it has been given a satisfactory explanation for the conflict with the principle of equal treatment.

82 The obligation to abolish laws, regulations and orders which are contrary to the principle of equal treatment may be interpreted to imply that there is a positive right to equal treatment between persons irrespective of racial or ethnic origin relation to any activity which is within the scope of the Race Directive. We consider that Article 14 provides the legal basis for the inclusion in the 1976 Act of a statement of such a positive right to equality.

83 Again, this is consistent with the Commission’s previous recommendation in the Third Review that, in relation to activities to which the Act applies, there should be a positive statement in the Act affirming the right of all persons not to be discriminated against on racial grounds. We repeat this recommendation.

84 *Statutory Purpose Clause in the SEA*

85 We recommend building on this positive right to equality by including also in the legislation a clear purpose clause setting out the substantive goals of the law. These would develop the positive right to equality, and accompany the five more technical principles that we have recommended should guide the drafting of the new act.

86 Our discrimination jurisprudence is littered with cases that, if anything, illustrate why a statutory purpose clause is necessary. Rather than lessening it should enhance legal certainty by promoting purposive and consistent decisions not only in the higher echelons but critically throughout the lower levels also.

87 We set out four reasons for why a statutory purpose clause would add value to the new legislation and beyond. The first reason is that a purpose clause that sets out the objectives of the legislation is an express declaration of public policy on equality and anti-discrimination. This would be an innovation in domestic equality law.

88 In effect this declaration would sets the minimum standards that government, public bodies, employers, service providers and individuals must adhere to as well as those standards that inform respectful individual relations generally. It would also be the basis for useful public education work on single equality legislation.

89 The Commission has always held the view that the law can and should act as a lever for progressive social change. It is less than forty years since our

cities were disfigured by job advertisements and ‘rooms to let’ signs which said ‘no Blacks’ and by slogans demanding that “niggers go home”. It is also relatively recently that public figures as well as political extremists could tolerably call for the repatriation of all non-White groups.

90 Today, few people would use such language and if and when they do they are often met with widespread criticism. One of the reasons for this change is the existence of the RRA, as well as criminal incitement legislation that render overt forms of racism unlawful both in civil and criminal law.

91 The second reason for having a purpose clause is that may be an important aid to legal interpretation. There are two examples from current practice that highlight this interpretative benefit.

92 First is the case of **Redfearn v Serco Ltd., t/a W.Yorkshire Transport Service [2005] IRLR 744** where the applicant, a bus driver and BNP candidate for local council elections was dismissed from employment when his candidature became known. The reason given was health and safety because of fear of violence or anger by employees and the feared reaction of Asian customers. The applicant successfully brought proceedings for discrimination on racial grounds based on a line of cases including **Showboat Entertainment Centre v Owens [1984] IRLR 7 EAT**. To rebut successfully the allegation of discrimination the respondent had either to restrict the interpretation of ‘racial grounds’ which the CRE would not support or argue that the Act was not intended to protect persons such as the applicant.

93 The Court of Appeal overturned the decision of the Employment Appeal Tribunal by reading in the purpose of the RRA, but the point to note is that it had to get to the higher courts for this to happen.

'The self-evident aim of the race relations legislation is to promote an anti-discrimination policy.'[21]

'His [Mr Redfearn's legal representative] proposition covers cases that would produce consequences at odds with the legislative aim. Taken to its logical conclusion his interpretation of the 1976 Act would mean that it could be an act of direct race discrimination for an employer, who was trying to improve race relations in the workplace, to dismiss an employee, whom he had discovered had committed an act of race discrimination … I am confident that that is not the kind of case for which the anti-discrimination legislation was designed.'[22]

94 It may of course be argued that the judgment of the Court of Appeal negates the need for a statutory purpose clause but we draw a somewhat different conclusion, namely that with a purpose clause proceedings would probably not have been issued and the RRA would not have been abused for political reasons.

95 Second it is not just that the focus of the legislation has been on formal equality but also on what we might traditionally regard as the justiciable rights of individuals and not 'group' rights or positive duties. Litigation in the area of positive duties such as the Race Equality Duty is new and unfamiliar territory. In our opinion, the narrow judicial interpretation of equality of opportunity was illustrated in the case of **R (Elias) v Secretary of State for Defence [2005] EWHC 1435 (Admin)**.

96 The case concerned a scheme to make ex-gratia payments to former civilian internees in Japanese prisoner of war camps during the Second World War but only to those with a British parent or grandparent. The CRE in an intervention sought to argue that the Ministry of Defence needed to ensure that there was a) equality of access to the scheme and b) no adverse impact in its implementation. This was rejected by the judge.

'*[I accept of course that] in principle it is necessary for the Secretary of State to pay attention not only to what might be termed the negative aspect of eliminating unlawful discrimination in subsection (a), but also the positive obligations under the section found in subsection (b), namely, to promote equality of opportunity and good relations between persons of different racial groups. Mr Pannick contended that in a letter to the claimant from the Secretary of State, when responding to an alleged breach of section 71, he did not refer to this obligation at all. Similarly in the Summary Grounds for Contesting the Claim, there was no apparent recognition that the subsection was relevant.*

'I do not think that there is any merit in this particular argument. In my opinion the obligations imposed by subsection (b) had no real relevance in this case. At any event, to the extent that they did, this was only insofar as they are entailed within subsection (a). The aim of the scheme was to distribute money, and the obligation in relation to this scheme was to eliminate unlawful racial discrimination. This was not intended to be a scheme directed to promoting equality of opportunity or good relations between persons of different racial groups.'

97 Again, a purpose clause would have explained from the outset the aims and objectives of the legislation and of the positive duties contained within it.

98 The third reason relates to special measures to tackle under-representation - positive action. The condition for positive action is that there is under-representation as defined in ss.37 and 38 of the Race Relations Act 1976. Under-representation has often become a statistical fact looked at in isolation and sometimes with minimum regard to historical disadvantage or even to the objectives behind positive action itself. A purpose clause might make clearer the justification behind positive action.

99 Finally, a purpose clause may illuminate the rationale behind the single equality act by infusing its provisions with transparency and accountability. In cases such as **Redfearn v Serco Ltd.,** it would be very clear from the outset why certain persons are not protected. Similarly, the goals behind a programme of positive action or measures to comply with positive duties would be much clearer to all concerned.

100 *Access to Justice*

101 Another important and overarching theme is access to justice, effective sanctions and remedies which we address below. The Commission was disappointed that this formed no part of the Green Paper and regard this as a serious omission.

102 Again, it is worth referring to the 1976 White Paper on *Racial Discrimination* which recognised the importance of the individual right to legal redress.

103 *'Where unfair discrimination is involved, the necessity of a legal remedy is now generally accepted. To fail to provide a remedy against an injustice strikes at the rule of law. To abandon a whole group of people in society without legal redress against unfair discrimination is to leave them with no option but to find their own redress. It is no longer necessary to recite the immense damage, material as well as moral, which ensures when a minority loses faith in the capacity of social institutions to be impartial and fair.'*[23]

104 Strong words, but they are as relevant today as they were in 1976 given the erosion of public funding for legal advice and representation, the potential strategic approach of the CEHR and the obstacles which face victims of discrimination in the courts and tribunals.

105 There is a duty on the UK under article 7 of the Race Directive to ensure access to justice, which is set below.

106 *'Member states shall ensure that judicial and / or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.'*

107 Similar provisions are included in article 9 of the Employment Equality Directive; article 6 of the Amended Equal Treatment Directive and finally article 8 of the Equal Treatment in Goods and Services Directive.

108 The Commission shares the concerns raised by practitioners about the indirect impact discrimination law advisers of the current changes to public legal aid. The changes through the Preferred Supplier scheme that are being introduced by the Legal Services Commission in England and Wales will probably mean that equality law advisors can only devote an average of five hours to any one discrimination case.[24]

109 This area of law is universally regarded as both specialised and complex. We are clear that five hours is an inadequate length of time to devote to such matters. The likely indirect impact of these changes are at least twofold: first they will provide a strong disincentive for many practitioners to work on SEA cases as they require specialist expertise, and the new funding arrangements are slanted towards providers that mix general non-complex advice with advice on niche areas like equality law.

110 Second those who are most likely to suffer discrimination and harassment – the stereotyped and those in socio-economic disadvantage – will be far less likely to get advice on their complaints. This creates a perverse situation where those that need advice most cannot get it, thereby condoning persistent discrimination and disadvantage, whereas those in better socio-economic circumstances, will be able to get advice private. For a single equality act to be effective it needs to be underpinned by the

sufficient provision of public funding for legal advice, strong enforcement, remedies and sanctions.

111 HARMONISING AND SIMPLYING THE LAW

112 The Commission was disappointed to note that the fundamental question of the purpose of equality law received only cursory attention in the Green Paper and that it was placed in the middle of the document, on pp.60-63. We were also concerned that there was little serious discussion and invitation for comment on the relationship between equality and human rights law, and connected to this there was similarly little consideration of the status of the SEA.

113 We agree that our equality law should mainly be about tackling unfair discrimination, as well as promoting equality. However this is not all that it is about: we would highlight that it must also aim to make a contribution to better community relations and social cohesion, something especially relevant to race equality and mutual respect for religions and beliefs.

114 GROUNDS OF UNLAWFUL DISCRIMINATION

115 We note that the Green Paper proposes the retention of a closed list of the following protected grounds: race, sex (inc., gender reassignment), disability, sexual orientation, religion or belief (or lack of), and age. We think these are a reasonable starting-point, but there will be need to more discussion on whether newer grounds should be included. That said there is one absolutely essential improvement which is needed in the grounds of discrimination in the new SEA.

116 **INTERSECTIONAL DISCRIMINATION**

117 This caveat is intersectional or as it is sometimes called, multi-dimensional discrimination. We were surprised at best and disappointed at worst that the consultation devoted only a page to this vital area, and moreover that it was apparently conceived as a merely a practical issue, reflected through its placement at the end of the chapter on 'Effective Dispute Resolution'. In point of fact this isn't merely an issue of whether someone can get a legal remedy or not, although that is important, but actually gets to the meaning of unlawful discrimination itself.

118 The Commission proceeds here from this position that is when one looks at issues of multi-dimensional or intersectional discrimination, one must start from first principles on discrimination itself. We provide, of course, our answers to the two questions posed on p.123 of the Green Paper, but we seek to go beyond these and set out why we think with CEHR on the horizon that it is sensible and necessary to protect individuals from the reality of intersectional discrimination in modern Britain.

119 The Commission recognises the fact of diversity and multiple identities. We all have an ethnicity, an age, a gender and a sexual orientation. We may be born with or choose a religion or core belief, or become disabled in some way. Identity is context-specific, so in one setting one's ethnicity or national origin will come to the fore (when in a different country); whereas in others different and intersecting aspects will be prominent (in practicing certain religions). So long as the identities in such varied settings are chosen, there isn't a problem. Unfortunately we know that certain identities, single or intersecting, are vulnerable to stereotyping, discrimination and other social ills.

120 These stereotypes are real and we can all think of them at a moment's thought. Consider (a) the sexualised stereotypes around young women (age-gender); (b) views on young Muslim men and terrorism (age-faith-gender, and sometimes race); (c) particular views on so-called 'aggressive' Black men (race-gender); (d) gendered stereotyping of gay men, as opposed to lesbians (sexual orientation-gender); and (e) patronising views on the independence of older, disabled people (age-disability).

121 Stereotypes whilst distasteful at best and violent at worst have real effects on those at the sharp end of discrimination, harassment and violence. As a matter of principle the SEA must first recognise the fact of multiple identities; second realise its close relationship with stereotypes generally; and third provide decent protection for those that suffer from them. This is the only fit approach for addressing real-life intersectional discrimination; anything else is limited and won't work.

122 *The Reality of Multiple Disadvantage*

123 The Commission welcomes the recognition in the Green Paper of multiple disadvantage as a fact of life in Britain. We all know that there are not only correlations between persons' multiple identities and stereotypes, but that these often translate into persistent socio-economic disadvantage. In the discussion on the rationale and benefits of the proposed single equality duty, the Paper in part recognises this, stating that an integrated duty will 'make it easier to address the needs of groups facing multiple discrimination'.

124 The fact of multiple disadvantage and by implication of multiple discrimination is well-documented. Purely by way of illustration the Commission points to five pieces of research, some of which the Green

Paper referred to; some of which it didn't. These provide just a snapshot of the plethora of work available.

125 First is the EOC's excellent research earlier this year, 'Moving on Up?' on the status and experiences of certain ethnic minority women in the labour market in England. Second was the Fawcett Society's work in 2005, 'Black Minority Ethnic Women in the UK', that looked broadly at the position of ethnic minority women in modern Britain. Third is the work published in July this year by the DRC on the position of ethnic minority disabled persons in Scotland, 'Creating an Alternative Future'. Fourth was the pioneering work from 2004 by Dodds et al., on the stereotyping and discrimination suffered by Black African gay men in the UK – 'Outsider Status'. Finally the Equalities Review in its final report in February 2007 pointed to the reality of multiple disadvantage in employment.

126 *Intersectional Discrimination and Harassment*

127 Despite the fact current equality law is unable to contemplate, never mind protect against intersectional discrimination and harassment, examples abound of its reality and the deleterious impact it has on individuals. This is unsurprising given the social fact of multiple identities, multiple disadvantage and multiple stereotypes. Against this backdrop it is inevitable that people will complain about intersectional discrimination and harassment, precisely because that is what they suffer.

128 Before illustrating the reality of intersectional discrimination, it is necessary to explain succinctly what precisely it is. As the name implies intersectional treatment refers to discriminatory or harassing conduct that exists at the intersection between equality grounds. One infamous example illustrates intersectional harassment in action.

129 The case of **Burton and Rhule v De Vere Hotels**[25] concerned two black waitresses who suffered a unique form of racialised-sexualised abuse and harassment during a private function at a hotel, both from the 'comedian' Bernard Manning and certain diners also. The harassment was unique to their multiple identities as black women and wouldn't have been suffered by either white women or black men.

130 This distinct discriminatory experience was not just about race or sex but rather existed at the intersection between race and sex, thereby reflecting a real social stereotype of black women. Perversely but predictably neither the RRA nor the SDA could comprehend this reality of intersectional stereotyping.

131 This caused the two applicants to make a demeaning tactical choice between the two acts; ultimately plumping for the apparently stronger ground of race. The point is that they should never have had to make this choice in the first place. The law should protect against real discrimination and harassment, and not the other way round. The SEA must transcend such perverse 'choices'.

132 Aside from the Burton case, the Commission is clear that there is a continuing unmet legal need for those that suffer intersectional discrimination or harassment. Whichever way one looks at it, it makes little sense not to give equality legislation the flexibility to accommodate and protect against these experiences. In fact if the point of the law is to protect against real discrimination and harassment and to order effective remedies, then current equality law fails. This is both nonsensical and inefficient.

133 This leads us to qualify the Paper's request for information and evidence of 'any difficulties of gaining legal redress in cases of multiple discrimination'. The starting-point in any answer to this question has to point

to the fundamental difficulty of not being able to bring an intersectional case in the first place. Given this it is hard to see how anybody can provide clear evidence of actual cases in the employment tribunal or civil courts of 'any difficulties': the problem is much more fundamental than that.

134 The Commission is clear that aside from the powerful ethical arguments for protecting against intersectional discrimination, this is complemented by a water-tight efficiency case. Put simply it is in no-one's interests that victims, advisors, representatives, tribunal chairs or judges are hamstrung into not being able to analyse facts as intersectional facts, or make remedies that tackle and seek to prevent a repetition of intersectional discrimination or harassment.

135 More specifically it is far more sensible for all in a case to be able to draft or analyse statements, issue or consider responses to questionnaires, or generally undertake case analyses, on the basis of the actual events complained of. Put simply if the facts are intersectional, they should be presented and analysed as such, and a decision made on this basis. To do otherwise is simply inefficient and actually directs all concerned away from the real problem; towards trying to craft a case to meet the limitations of the law in the hope of just getting a remedy.

136 This aspect of the efficiency argument for protecting against intersectional conduct is illustrated graphically through the Court of Appeal's logical but disheartening censure of the employment tribunal in **Bahl v the Law Society**.[26] There the tribunal had attempted to go beyond the straightjacket of existing equality law, and look in the round at the facts and thereby more efficiently at the actual events complained of.

137 In contrast the Court of Appeal in Bahl set out the only permissible approach that, essentially, requires one to try and craft only certain facts –

and presumably drop unhelpful ones - to meet the law, as opposed to having the law respond flexibly to all of the allegations.

138 In Bahl, Elias J said of the only correct approach in multi-dimensional cases, that tribunals or courts must:

> *'identify what evidence goes to support a finding of race discrimination and what evidence goes to support a finding of sex discrimination. It would be surprising if the evidence for each form of discrimination was the same … In our judgment, it was necessary for the [employment tribunal] to find the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it was making the inference which it did … It failed to do so, and thereby, as the EAT correctly found, erred in law'.*

139 The other aspect of the efficiency argument concerns the relevance and hence effectiveness of any remedies awarded in multi-dimensional matters. A basic aim of equality law is to prevent unlawful discrimination, and this is hampered if an employment tribunal or court, after much thought and deliberation, are prevented by unnecessarily rigid legislation, from making the best remedies.

140 We consider that the correct approach to dealing with intersectional protections is initially to remove the statutory requirement for a comparator. We support the recommendation by JUSTICE for a clause drafted as follow:

> *'A prohibited ground means one or a combination of the following:*
>
> - *Race, Colour, Ethnic Origin, National Origin, and Nationality (including Citizenship)*
> - *Sex (including Gender Re-Assignment)*

- *Disability*
- *Sexual Orientation*
- *Religion or Belief (or lack of)*
- *Age*

For greater certainty, a discriminatory act or practice includes an act or practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.'

141 The Commission thinks this a simple step to take. We recommend a broader and more flexible definition of 'prohibited ground' that works within the existing set of equality grounds and which would apply to unlawful direct and indirect discrimination generally.

142 **DIRECT DISCRIMINATION, LESS FAVOURABLE TREATMENT, AND THE ROLE OF COMPARATORS**

143 The Commission is disappointed that the Green Paper proposes the retention of the statutory comparator as an essential element to any finding of unlawful direct discrimination. We think this reflects a failure to grasp the essence of unlawful discrimination.

144 As the Equality Commission of Northern Ireland (the ECNI) has said 'a comparator is evidence of discrimination but not the essence of discrimination'.[27] We agree: there is a careful distinction to be drawn between on the one hand statutory comparators, and on the other hand, evidential comparators, as outlined by Lord Scott in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ITLR 285 HL** where the court shifted its concentration from 'arid and confusing disputes about the appropriate comparator' to the reasons why the applicant was treated as she was.

145 Presently s.3(4) in the RRA gives statutory status to comparators in that one must identify an actual, or construct a hypothetical person, that in all the 'relevant circumstances' is not 'materially different' from the complainant, aside from being of a different racial group. In effect regardless of the facts of the case, a comparator must always be found or created.

146 In the past a strict interpretation of s.3(4) of the Act has resulted in decisions which appear to undermine the principles of both formal and substantive equality. For example:

147 **Wakeman v Quick Corporation [1999] IRLR 424 CA**: there was no discrimination against British workers who claimed that Japanese counterparts were being paid more than them. It was held that the Japanese workers were secondees and the British workers were domestic workers. There was no like with like comparison.

148 **Dhatt v MacDonalds Hamburgers Ltd [1991] IRLR 130 CA**: there was no discrimination in circumstances where the applicant (an Indian national) was asked whether he needed a work permit. The CA held that the correct comparator was another foreign national and not a UK or EU national.

149 We note that no other EU country has an equivalent to the RRA's statutory comparator under its s.3(4), reflecting the fact that removing a statutory comparator is, in fact, entirely consistent with respecting EU equality standards.

150 We recommend the following definition of direct discrimination:

'A person ('A') directly discriminates against another person ('B') if, for a reason related to one or more of the prohibited grounds,

- *'A' Treats 'B' less favourably than 'A' treats, has treated, or would treat other persons; or*

- *Subjects 'B' to a detriment.'*

151 We think this definition meets the challenges of focusing on all of the evidence in a case, which often will include an evidential comparator, and allowing for intersectional claims.

152 **INDIRECT DISCRIMINATION**

153 The CRE welcomes the commitment in the Paper to harmonise the definition of unlawful indirect discrimination. The RRA currently has two co-existing definitions of indirect discrimination, depending on which racial grounds are in play. This inconsistency stems from the transposition, in 2003, of the EU Race Equality Directive, and is a classic illustration of the kinds of inconsistencies that need to be sorted out in the new SEA. We are glad the Government plans to do this.

154 In addition the CRE urges harmonisation with the definition of indirect discrimination in the Race Directive under article 2 which provides that:

'Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice <u>would put</u> persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

155 However, the Race Regulations 2003 states:

'(1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but:

- *Which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons;*

- *Which puts that other at that disadvantage; and*

- *Which he cannot show to be a proportionate means of achieving a legitimate aim.'*

156 The Race Directive's definition of indirect discrimination at minimum requires proof only that the provision, criterion or practice would put persons of a particular racial or ethnic group at a particular disadvantage. Article 2 provides for individual redress after an act of discrimination has occurred and it provides for policies or practices to be challenged at an early stage before they have had any or little impact: what we call anticipatory actions.

157 The transposition of article 2 into the 1976 Act is such that a legal challenge to indirectly discriminatory provisions, criteria or practices may only be made by a victim who has suffered a disadvantage as subsections (a) (b) and (c) above are a cumulative test, and not separate tests. It provides for a right to an individual remedy only where a person has actually suffered a disadvantage.

158 There are situations where the operation of the provision, criterion or practice is by definition exclusionary and is never, in practice, applied to a 'victim,' for example in a word-of mouth recruitment policy or in applying for membership to a club where applicants have to be nominated by a member.

159 Depending on the composition of employees or members such policies may be indirectly discriminatory but there could no challenge unless an applicant *had applied* and *failed*. It seems to us that that article 2 was intended to cover the situation where the person did not apply because he or she was deterred from making an application by the discriminatory provision, criterion or practice. We recommend that anticipatory actions be possible in the new legislation by giving full effect of article 2 of the Race Directive.

160 *Objective Justification*

161 The issue of objective justification in the tort of indirect discrimination remains contentious. We note that the Government intends using the same test for justification on all the grounds; something we welcome. However, we recommend that in order to give full effect to EU standards, that 'appropriate and necessary' replaces proportionality, so that the 'means' part of the test should read as 'the means of achieving that [legitimate] aim are appropriate and necessary. (our insertion) This would make it absolutely clear what the justification threshold is and as we say render it consistent with EU legislation.

162 Finally we think it important to highlight the unique and thankfully predictable interaction between an equality duty and public bodies' that wish to use the objective justification defence to render what is indirect discrimination as lawful.

163 In Secretary of State for Defence v Elias in 2006, Mummery LJ noted how a failure to implement the race equality duty under s.71(1) of the RRA will be material evidence that can undermine a party's efforts to use the objective justification defence.

'*Thirdly, this court must give effect to section 71 of the 1976 Act, which placed on the Secretary of State a statutory duty which he has failed to perform. I think that this adds to the difficulties of the Secretary of State in now attempting to justify the imposition of the birth link criterion. He has to justify an act of discrimination committed in the carrying out of his functions when, in breach of an express duty, he failed even to have due regard to the elimination of that form of unlawful race discrimination.*'[28]

164 **VICTIMISATION**

165 We concentrate on two issues here. The first has two aspects: (a) the proposal to align protection against victimisation with general employment law standards; and (b) how this proposal relates to the Commission's proposed definition of victimization. The second distinct issue relates to the apparent anomaly whereby the new burden of proof standard under s.54A (employment cases) and s.54ZA (non-employment matters) appears not to apply to cases of unlawful race victimization.

166 *A Better Definition of Unlawful Victimisation*

167 Taking the first matter, the Commission welcomes the Government's intention to align unlawful victimisation in the SEA, with general employment law standards. We recommend the Government build on this, and formulate a definition of victimisation that combines the current breadth of 'protected acts' under s.2(1) of the RRA, with this welcome move away from comparators being necessary to establishing victimisation.

168 Specifically we recommend the following as a possible definition of unlawful victimisation in the SEA:

'A person victimises ('the victimiser') another person ('the victimised person') in any circumstances relevant for the purposes of any provision of this Act if he subjects the victimised person to any detriment, and does so by reason that the victimised person has either already, intends to, or is perceived to have, done any of the following:

- *Brought proceedings against the victimiser or any other person under this Act.*

- *Given evidence or information in connection with proceedings brought by any person against the victimiser or any other person under this Act.*

- *Otherwise done anything under or by reference to this Act in relation to the victimiser or any other person.*

- *Alleged that the victimiser or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act.*

- *This section doesn't apply in respect of detrimental treatment of a person by reason of an allegation made by him if the allegation was false and not made in good faith.'*

169 *New Burden of Proof Must Apply to Victimisation*

170 The second issue relates to the seeming anomaly that the new burden of proof arrangements in the RRA don't apply to unlawful race victimisation. We hope and expect that this is an oversight, but nonetheless are currently

intervening in an appeal against the Employment Appeal Tribunal's decision that they didn't so apply in Oyarce v Cheshire County Council.[29] We recommend that any anomaly here is rectified in statute through the SEA.

171 **HARASSMENT**

172 We welcome the Green Paper's coverage of the broad and sometimes controversial issue of unlawful harassment. We concentrate on three issues. First we note and recommend that removal of an apparent anomaly around the scope of unlawful racial harassment to public functions.

173 Second we consider the Government's proposals on the one hand on perhaps extending the tort of unlawful harassment to the 'newer' equality grounds in non-employment matter; and on other hand whether there is actually a cogent argument to create a higher threshold for unlawful harassment in the area of religion or belief.

174 Finally we consider the complex matter of ensuring that employers' and perhaps service providers' have proportionate liability for the harassing acts of third parties.

175 First, the free standing provision for racial harassment in s.3A only extends to those public functions covered under article 3 of the Race Equality Directive: social security, healthcare, any form of social protection and any form of social advantage.

176 As a consequence, there is express protection from harassment on racial grounds in the exercise of some public functions, law enforcement and regulatory functions in particular. We expect the Government to address this anomaly by extending the free standing harassment provision to all regulated activities.

177 *Extending Protection against Religion / Belief Harassment to Non-Employment*

178 Second the Government has raised the question of whether or not legislation should be introduced covering harassment on grounds of religion or belief outside of employment: in education, the provision of goods facilities and services, the disposal and management of premises and in the exercise of public functions. In so doing they have are concerned that such protection may undermine the right to freedom of expression and the display of religious icons.

179 We note that when the Equality Bill was introduced into Parliament in May 2005 there were draft clauses prohibiting such discrimination in similar terms as the current religious harassment provisions in employment under the Employment Equality (Religion or belief) Regulations 2003. However due to concerns raised in the House of Lords, these draft clauses were removed. We disagreed with this, arguing that freedom of expression was adequately protected.

180 We are clear that it is misconceived to think on the one hand that any provisions on religious harassment outside of employment would infringe the right to freedom of expression with regard to religions; or that on the other hand that there is any cogent case for introducing a more stringent test for this ground than in other grounds, such as race or sex, if such provision with introduced.

181 *The Need for Protection and the ECHR*

182 Under the European Convention on Human Rights as incorporated by the Human Rights Act, everyone has a right to freedom of expression. This is a fundamental principle of democratic societies and as the European Court of

Human Rights has commented, includes the right to express opinions that ‘offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society’.

183 However that right is not absolute and can be subjected to restictions and conditions where necessary, for example, to protect the rights of others. This also applies to the limits of the right to freedom of religion under article 9(2).

184 Article 17 of the Convention specifically states that nothing in the Convention may be interpreted as implying any right of a group or individual to destroy the rights of others. For example, restrictions on the expression of ideas that incite racial or religious hatred may be lawful.

185 In our view, protecting the rights of persons not to be discriminated against on religious grounds is such a situation where restrictions on freedom of expression may be justified, but this will have to be determined on a case by case basis. Further, it is important to distinguish between legitimate criticisms of a religion in general terms - which we agree should be lawful - and engaging in unwanted conduct directed at an individual that has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

186 The Government has only referred to the general notion of the need to balance the right to freedom of expression, but it has provided no evidence of cases where such legislation - if drafted in the same terms as religious harassment in employment - would or could infringe a person’s right to freedom of expression.

187 The Paper refers to the aim of not constraining freedom of expression in areas such as plays which touch on religious themes or academic or critical enquiry and debate particularly in educational settings. We agree that such expression should be protected but note that those situations are very different from harassment that is conduct directed at individuals because of their individual identity.

188 Examples of situations in which harassment on ground of religion can occur include:

- A school that fails to take action to prevent bullying by several students of another student on grounds of them being a Muslim.

- A landlord harassing a Hindu family who are tenants by repeatedly threatening them with eviction because of their religious practices.

- In relation to the provision of goods, facilities and services, a gym that has employees that repeatedly comments on or verbally abuse a Muslim woman that wears a veil during exercise.

- In prisons, harassment by staff and other prisoners of other prisoners on the grounds of the latter's religion.

189 A Home Office research study, published in 2001, 'Religious Discrimination in England & Wales'[30] contains examples from interviewees of behaviour which could amount to unlawful harassment on the grounds of religion.

190 In addition, consistent with our submissions on other issues, there is already protection from harassment on grounds of race outside of employment and there will be shortly similar protection against sexual

harassment. In this context it is appropriate to level up protection between the different strands of equality, unless there is cogent evidence of a need for no protection or for a different test.

191 Further, the failure to legislate in this area would create differences in levels of protection between religious groups. For example, as Jews[31] and Sikhs[32] have been recognised in RRA case law as racial groups they would be protected from racial harassment outside employment. However, Muslims and Hindus are not racial groups and if no legislation were introduced they would not have the same level of protection. This would be unacceptable.

192 *Exceptions to the Principle of Non-Harassment*

193 We do not believe there is any evidence to indicate a need for any exceptions to this principle in respect of any of the following fields: in education, the provision of goods facilities and services, the disposal and management of premises and in the exercise of public functions.

194 In our view the reasonable consideration aspect of the test for harassment provides a sufficient safeguard in determining whether in the particular circumstances an act constitutes religious harassment, and s.3 of the HRA anyway ensures that courts would have regard to the right to freedom of expression when considering such matters.

195 *Definition of Unlawful Harassment of Grounds of Religion and Belief*

196 In our view the same definition as exists for religious harassment in employment should be used for religious harassment in non employment areas. The Employment Equality (Religion or Belief) Regulations 2003, s.5, states:

'5(1) For the purposes of these Regulations, a person ("A") subjects another person ("B") to harassment where, on grounds of religion or belief, A engages in unwanted conduct which has the purpose or effect of:

- *Violating B's dignity; or*

- *Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

(2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.'

197 The Government has suggested this disjunctive test be replaced with a conjunctive one: that the conduct has to violate dignity and create an intimidating, hostile etc., environment. The need for consistency in the legislation far outweighs any benefits to be gained from adopting this suggestion.

198 The definition in the Regulations covers behaviour where the perpetrator intends to harass a person and where he or she does not, but the effect of the behaviour is to violate dignity or create an intimidating etc. environment. Again, it is suggested that the definition be altered to cover only intentional harassment.

199 We consider this to be inappropriate; it is an incorrect approach to complaints of harassment as it focuses on the mind of the perpetrator rather than the effect of his/her actions on another person. We consider that the

correct emphasis should be given to the nature of the conduct and its effect on the victim.

200 It seems indefensible to permit unwanted conduct which does violate dignity or create an intimidating environment simply because the perpetrator did not intend it. We consider that the 'reasonable consideration' test in s.5(2) provides an adequate safeguard.

201 Also, a purely intentional test would create a higher burden of proof for complaints of religious harassment in non-employment areas but where similar issues may be in question: whether a person has directed unwanted conduct against a person on grounds of their religion.

202 There is also a danger of adopting the criminal approach to civil wrongs. Incitement to religious hatred provisions in the UK are criminal provisions and therefore - as for most criminal sanctions - require an intention to commit the offence. This is appropriate given that the sanction may be imprisonment.

203 On the other hand, to prove discrimination it is not necessary to prove that the discriminator intended to discriminate, whether for direct or indirect discrimination or for harassment. Equality legislation comes under civil not criminal law, and the tort of unlawful harassment rightly first looks to the subjective impact of the conduct, but then also second to whether this perception is objectively reasonable.

204 In our view it should be left to a court to determine what was reasonable in all the circumstances and that as part of that balancing process it will consider the right of individuals to freedom of expression about religions generally. Indeed under s.3 of the Human Rights Act, there is a requirement for primary legislation to be read and given effect in a way which is

compatible with Convention rights. This will apply to the SEA as it does to all domestic legislation.

205 The reasonable consideration test would allow a court to examine the particular facts of a case and determine what was mere discussion or criticism of a religion in general terms and properly protected under the right to freedom of expression, and unwanted conduct specifically directed at an individual, because of their religion or belief.

206 *Closed and Open Environments*

207 We do not believe that drawing a distinction between harassment in a closed and open environment serves any useful purpose, and in fact it is wrong in principle: what is relevant is the conduct of the perpetrator and its effect on a person. In fact it is a cause for concern that some argue that the element of choice - as to whether or not to enter a shop, restaurant etc., - should lessen or remove the need for protection. If anything this implies a lack of commitment to eliminating unfair discrimination and harassment.

208 For example, if a Muslim woman dressed in the hijab goes to her nearest cornershop and is repeatedly spoken to in a derogatory manner in connection with her religion and its manifestation by way of her wearing the hijab, we believe this should amount to unlawful religious harassment: she should have the right not to be harassed irrespective of whether or not she exercised a choice to enter the shop; it may be the only shop in her area.

209 We make three recommendations. First we advocate the extension of statutory protection from harassment on all grounds in non-employment. Second the same test should be used for unlawful harassment on the grounds of religion and belief as that used in the other grounds. Finally

there should be no exceptions to this coverage in respect of religion and belief.

210 *Liability for Harassment by Third Parties ('Third Party Liability')*

211 The Commission welcomes the inclusion of this complex subject in the consultation. We feel that statute, and not only case law, is the best solution to an issue of much legal uncertainty.

212 Before getting to the crux of this debate, it is helpful to start from first principles as to why protecting persons against harassment by third parties is important. The rationale is twofold.

213 The first aspect is that new definitions of unlawful harassment are premised upon the desirability of employers achieving dignified and respectful workplaces, as opposed to hostile and intimidating environments.

214 The second is that this can only be achieved through employers being clear that their responsibilities extend beyond internal harassment, to also that committed by third parties, be they customers, clients, contractors, or other general visitors to a work space.

215 For us the main question is: in what circumstances and for what reasons should employers be liable for the acts of harassment of third parties? We fully expect that these 'circumstances' will include employer-employee relations, as well relationships in the context of public service delivery and law enforcement and control.

216 However, we also think that 'circumstances' extend also to relationships that the Government describe as 'open' and rooted in some degree of

choice. Examples here include shops, pubs, cinemas, health clubs, and generally commercial environments involving some form of service.

217 Essentially, the principled and appropriate way to approach 'third party liability' is not to draw a fault line between 'closed' and 'open' environments, with the former being covered, and the latter not so simply due to their being 'chosen' in some way. Rather the proper approach is set down clear criteria, ideally within the law itself, comprising the conditions that give rise to an employer being liable to their employee for the harassing act(s) of a third party, in an 'closed' or 'open' environment. We set out our recommended criteria later.

218 *Types of Liability: Three Relationships*

219 Before specifying our criteria, it is necessary to be clear on the three relationships relevant to the issue of liability to unlawful harassment. These are (a) employers' liability for the unlawful conduct of their employees towards one another in the workplace (this is covered via vicarious liability); (b) employers' liability for direct harassment suffered by their employees from third parties i.e. customers, clients, contractors or general visitors; and (c) in circumstances when the employer acts or fails to act in such a way and in effect condones harassment between third parties in their workplace, such as a manager permitting racial stereotypes and abuse in a public leisure centre or in a cinema.

220 We welcome the commitment in the Green Paper to provide statutory protection on the grounds of sex for employees that suffer regular or periodic harassment from third parties, such as from clients or customers. More specifically we note how this commitment is based on the judgment this year in *Equal Opportunities Commission v Secretary of State for Trade and Industry*[33], which stipulated that if an employer knows of periodic or

regular harassment against staff and they fail to take protective action then they will be liable for unlawful harassment under the SDA.

221 We further welcome the proposal to extend this protection to other grounds where there is evidence of a problem. We think it unlikely that harassment by third parties is confined to sex only. In fact the 1976 Act case law is moving in this direction anyway with such liability being admitted earlier this year in the matter of *Gravell v London Borough of Bexley*.[34] We recommend general protection against and employer's liability for severe, periodic or regular harassment committed by third parties.

222 *Statutory Criteria for Third Party Liability*

223 Finally, we respect that every case is different and that often in law, context is everything. With this in mind but recognising the need for as much legal certainty as is possible, we recommend statutory criteria that convey the considerations that give rise, or not as the case may be, to third party liability. Such criteria may include knowledge of the third-party-induced harassment; frequency and regularity; nature and severity; control, which gets at the ability of the employer to do something about the harassment, including preventing it in the first place.

224 **THE SCOPE OF THE LEGISLATION: VOLUNTEERS**

225 We were disappointed that this issue was not raised in the Green Paper. Currently, for example, it isn't always clear whether a volunteer is covered by the employment protections in the RRA. There appears to be no obvious reason, in principle, for not making express protection in single equality legislation for volunteering, although of course there should be some proper discussions on what this would entail in practice, as volunteering clearly

doesn't always mirror other regulated fields in terms of established legal relations and obligations such as is the case in, say, employment.

226 That said the Commission notes the emerging cross-party consensus on the benefits of volunteering and of the Third Sector generally. Aside from the simple ethics of protecting volunteers from race discrimination or harassment, there is a further argument that if more people are volunteering then they all should enjoy the right to protection from prejudice and racism.

227 We recommend the Government proceed on the assumption that volunteering be covered as a protected field unless and until particular and cogent arguments for omitting certain activities and sectors are forthcoming. This burden of proof should be especially onerous when volunteering resembles employment, whereas it may be a little less taxing perhaps when the activity is one-off, or doesn't involve relations of control or dependence between parties.

228 **EQUALITY DUTIES**

229 The Commission welcomes the opportunity to respond to a number of issues and questions raised in the chapter five of the Paper: 'public sector equality duties'. However we should point out that we were very concerned with much of the discussion, and felt that it generally betrayed the proper understanding of the rationale, proper design and real opportunities offered by equality duties.

230 In this section of our response we concentrate on ten issues that are central to the future for equality duties. We offer a range of recommendations designed to assist the Government to realise the proper potential of a new cross-strand equality duty. We hope and expect that

these will be considered carefully not only by the Government, but also in Parliament and of course within the new CEHR.

231 *Equality Duties: Ten Issues*

232 For us the ten issues that should frame debate on the new equality duty are: (a) the origins of equality duties in UK; (b) the rationale of an integrated equality duty; (c) its goals or 'statement of purpose'; (d) its scope or application across all a public body does, rather than it being confined to limited 'priorities'; (e) how best to frame or align an equality duty with national outcomes and other national drivers for equality; (f) how best to support delivery of equality duties, is it via essential activities and actions, or perhaps through more discretionary 'statutory principles'; (g) the role and responsibilities of public service inspectorates vis-à-vis an equality duty; (h) how best to embed equality duties into public procurement practice; (i) issues around the best way to define liability to the duty; and finally (j) looking towards the most effective arrangements for enforcing the new obligations.

233 *Issue 1: Origins of Equality Duties in the UK*

234 Our starting-point on any discussion of equality duties in the SEA must be to trace it back the original race equality duty, and in fact it's more limited predecessor obligation on local authority to pay regard to race equality. The notion of positive equality obligations has been around for some time in both domestic approaches that sought to mainstream gender equality into public policy, onto the innovative cross-equality duty that emerged from the Good Friday Agreement in Northern Ireland in 1998[35], as well as through their being a general policy instrument in international fora, such as in the European Union and with the United Nations.

235 Equality Duties are a relatively recent addition to British equality legislation. Although it should remembered there was a pro-active duty on councils to make arrangements towards race equality in the RRA from 1976. The more recent comprehensive race duty, however, 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.

236 The Government's direct response to the report was good and 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.

237 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.'*

238 The race equality duty has a clear two-tier structure comprising a superior general race duty that requires most public bodies in Britain 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.

239 This general duty is in turn supported by a second part that is the race equality schemes, policies & employment monitoring that support major public services in delivering on the race obligations. These were designed to provide clear support for public authorities on how to deliver better policy, fairer services and law enforcement, and intelligent employment that uses the best of all talents.

240 *Issue 2: Rationale of the New Equality Duty*

241 This rationale has four aspects. First equality duties should empower and require those arguably best-placed to prevent discrimination and inequality – public bodies – rather than expecting individuals to reactively tackle it in a rather piecemeal way, via litigation. The responsibility for tackling and achieving equality lies with us all, and certainly can't just sit with the victims. As in many areas of public policy, we need to better support victims and in anti-discrimination that means introducing equality duties.

242 Second is that the Macpherson Report stressed only eight years ago that to effectively tackle institutional racism, sexism, homophobia etc one needs to embed equality across all work, achieved through the animating practice of equality mainstreaming. Again by way of a marker we are seriously concerned that the Government's proposals on duties constitute a stark break with mainstreaming and all the good that comes with it. We will say more about this a little later.

243 Third and unique to a cross-equality model is that public bodies should recognise and tackle multiple discrimination and disadvantage. This multiple perspective has too often been sidelined in British equality legislation or in fact not even thought of. Arguably this has contributed to a needless marginalising of equality issues from their proper home in the mainstream. We hope and expect that the new duty can help move equality and fairness

back centre-stage, and are pleased the Paper reflects the Government's agreement on this.

244 The final aspect is probably the least well-known. However more than anything else it expresses the objective benefit of public bodies getting things right and delivering on the duties. It is above all a framework for simply good policy and fairer public services and law enforcement: a prerequisite for better regulation, and not a burden.

245 Lessons have been learnt from the race equality duty, reflected in part by the gender & disability models that followed it. Specifically we recommend below that key to realising this good policy framework is to set out a clear, proportionate but action and outcome focused duty.

246 In summary we agree with the Government that a cross-equality duty is both desirable and the only practical way forward. That said we are anxious to ensure that strand priorities, such as good race relations aren't lost. More fundamentally in the move to integrated equality there can't be any regression neither in the duty's quality nor its scope.

247 *Issue 3: 'Statement of Purpose' or Equality Goals*

248 The Commission shares the Government's desire to set out clear goals and outcomes within the legislation itself. Further we note the proposal for a four-aim 'statement of purpose', comprising the following:

- To address disadvantage: taking action to counter the effects of discrimination on groups, towards securing greater equality between communities.

- To promote respect for the equal worth of different groups and fostering good relations with and between groups: involving steps to treat persons with dignity and respect, as well promoting understanding of diversity, which is cited as a pre-requisite for cohesive communities.

- To meet different needs whilst promoting shared value: described as taking steps to accommodating difference simultaneous with delivering policy in ways that emphasise shared values and provide opportunities for sustained interaction within and between groups.

- To promote equal participation: through action to address involvement gaps in key areas including employment and in decision-making, with a view to engendering equal citizenship.

249 We don't disagree with any of these aims; in fact we would recommend them all albeit we would set them out a little differently. The purpose of the equality goals in the new duty is more than anything else to guide public bodies in implementing their action plans and delivering on their priority issues. Moreover they must be sufficiently generic to be capable of applying to the myriad of functions that many public bodies are responsible for.

250 The three imperatives that underlie any of these goals are clarity, generality but most importantly that the goals are the appropriate ones. Before we set out our recommended equality aims, we must point to one omission, and one weakness in the Government's proposal.

251 The omission is the absence of a duty to eliminate unlawful discrimination and harassment, and the weakness is the possible dilution in the goal of good race relations.

252 To the Commission if discrimination and harassment are deemed unlawful then they must be reflected as such within the new equality duty. This is also true for equal pay, as unequal pay for work of equal value is similarly unlawful. Basically it is bizarre, illogical, and nonsensical for an equality duty in the SEA not to require effort towards that which is unlawful elsewhere in the legislation.

253 We recommend the first limb of a general equality duty require public bodies to take steps to eliminate unlawful discrimination, harassment and unequal pay. Our view is based not simply on the fact discrimination and harassment is unlawful, but simply because discrimination remains a real barrier to individuals' life chances and experiences.

254 Race-blind policy is just as discriminatory in effect as overt racism is in impact. Macpherson recognised this as institutional racism, and the equality duty has to recognise it also. Anything less would regress to the pre-Macpherson world of optional race equality.

255 To illustrate the continuing impacts unlawful and institutional discrimination, we can point to the chronic race disadvantage in school exclusions. National & local data consistently tell a story of black boys' particular vulnerability to school exclusion.[36] Discrimination, stereotyping and racism are part of this story. The new equality duty has to tackle this by expressly requiring policy-makers and educationalists to monitor and act to close the race-exclusions gap. This is vital for maximising our talent, and not wasting it.

256 The Commission has for over 30 years had a duty itself to promote good race relations. This indicates the historical and indeed persistent potential for community tensions to coalesce around race. It is known that since the Second World War racial tensions have all too often reared their ugly head,

be it in Notting Hill in 1957, in Handsworth and Brixton in the early 1980s, to Bradford, Burnley and Oldham at the turn of this century. Today Britain has never have been more diverse; with good race relations and community relations never having been more important.

257 To illustrate the importance of good race relations in a new equality duty one can look to its impact on Gypsy and Traveller communities over the past five years. The race equality duty, precisely because it includes a distinct obligation to secure good race relations has provided a vital framework for positive dialogue between local councils and others agencies, and between the indigenous and Gypsy & Traveller communities.

258 Our inquiry report 'Common Ground'[37] 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 cohesion.

259 We recommend a general equality duty, as opposed to what the Government is proposing that is a limited duty to set and pursue only certain equality objectives. Any general equality duty, to be fit for purpose, will set clear, general, and the appropriate goals for public bodies to work towards and translate into their own actions and priorities. We recommend the following general equality duty:

'A public body shall, in carrying out its functions, (a) eliminate unlawful discrimination, harassment and unequal pay; and (b) pay due regard and take all proportionate and appropriate steps to progressively realise equality, defined as (i) equal respect for the dignity and diversity of each person, (ii) equality of opportunity amongst persons, (iii) equal participation

in society, and (iv) mutual respect and good relations between persons and communities in society.'

'Particular regard should be had to race, and religion or belief, in meeting sub-section (iv) of the general equality duty.'

260 *Issue 4: Strategic, Proportionate Equality Duty Needs Mainstreaming*

261 We have considered the Government's thoughts and proposals for a more 'strategic equality duty' and conclude that these are unnecessarily regressive as they constitute a clean break with the unique policy approach of equality mainstreaming.

262 We agree that there is a need to set strategic priorities and take the most pressing actions to tackle discrimination, achieve greater equality, and get better community relations. However this can never be achieved without equality mainstreaming; quite the contrary mainstreaming is a prerequisite to setting the right priorities and taking the right actions.

263 Mainstreaming, probably more than anything else, is what animates and gives real added value to the ambition of race equality. 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 race equality proportionately 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.

264 Often race involves the unpalatable side of discrimination with devastating consequences for life chances and community cohesion. Such discrimination is often in precisely those areas where many public bodies prefer not to look at or question.

265 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. It is these areas and the practices therein that need mainstreaming and equality duties more than anywhere else.

266 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.

267 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 practicing fairer law enforcement. In fact mainstreaming is one necessary condition for realising the good policy = better regulation rationale inherent to any properly-designed equality duty.

268 The Commission knows that if the current duties are replaced with a limited obligation 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, or indeed when race intersects with gender or disability issues. This consequence is clearly regressive and is unacceptable. We don't agree with the Government's proposal to restrict the legal obligation to only a limited set of priority equality objectives. We

urge the retention of this key policy approach in the new equality duty. Piecemeal equality doesn't work.

269 *Issue 5: Equality Duties and Equality Outcomes*

270 The Commission agrees with the Government's suggestion that the new equality duty should be underpinned a set of national equality outcomes. One of the weaknesses in the existing race, disability and gender models is the absence of any reference to equality outcomes. This can and should be rectified in the new equality obligations.

271 More specifically the Paper mentions a range of different institutions and framework that can generate national outcomes. For example on the one hand there is mention of the Government, the new CEHR, and the Scottish Government all having a role to play, whilst on other hand the Equalities Review's Equality Scorecard is mooted as a decent framework for taking forward this work. All of this is sensible.

272 *Why We Need National Equality Outcomes*

273 However before offering our thoughts on the proper way to set national and country-level outcomes, we return to the first principles' issue of why we need national outcomes at all. We need them for at least two reasons.

274 The first is that the give real substance and life to the necessarily aspirational equality goals set out in the equality duty. Secondly they can ensure that persistent national problems of inequality receive national attention: challenges here include the race and disability employment gaps; gender occupational segregation; or the life chances of those with learning difficulties in Britain.

275 The first point worth making here is that framework for giving national direction on equality, must also enable the setting of country-level outcomes also. The devolution settlement in both Scotland and Wales is now part of modern British politics and this must be respected by enabling the Scottish Government and the National Assembly for Wales to consult and set down their own particular equality outcomes.

276 At the national level we envisage a process involving Government, the new CEHR, the public service inspectorates, and of course public bodies and the public generally, in agreeing national equality outcomes. This would be replicated at the country level but this time with the leadership of the Scottish Government and National Assembly for Wales and the involvement of Scottish & Welsh civil society, respectively.

277 Specifically we recommend that the innovative duty in the disability regulations that requires certain Secretaries of State to report and take action every three years on disability equality within their sectors is re-modeled.[38] We think there should be a new 'leadership duty' on Secretaries of State to collectively agree and report on national equality outcomes for a set period.

278 These outcomes will require the involvement of key national institutions, such as the CEHR and the public service inspectorates, and ultimately will need to be reported on to Parliament. This process should be replicated in Scotland and Wales with the Scottish Parliament and the National Assembly for Wales playing a key role oversight role, through receiving progress reports. We think this approach will further cement equality into the mainstream of public life by first requiring political leaders to give national direction on equality; and second infusing the outcomes with democratic legitimacy.

279 *Issue 6: Supporting the Delivery of an Equality Duty*

280 The arrangements for supporting the delivery of an equality duty are clearly vital, and not surprisingly this debate engenders heated discussion and disagreement. The argument oscillates between those who advocate prescription through detailed regulation, those like the Commission who prefer a balance between prescription and discretion, to those who question the need for any legislation at all.

281 The answer probably lies somewhere in between that is that delivering the duties needs a group of essential steps specifying activities that are really just part & parcel of good policy and better regulation generally.

282 There are three reasons why the existing race, disability and gender equality duties enjoy the support of clear standards set out in legislation. These are, by way of initial outline, first to provide clarity on what public bodies need to do. Second to generally improve policy-making and delivery by embedding equality in as standard practice. Third in so doing to improve public confidence in public services and employment practice.

283 Starting with the need for clarity, it was foreseeable that to place a new equality obligation on public bodies, without any clarity on what this means in practice, would be unfair and counter-productive. Codes of practice can provide direction, whereas non-statutory guidance can provide more clarity although the latter can't require public bodies to take certain actions. Hence we think there is always a need for clear support at least at the level of secondary legislation, which blend clarity on what needs to be done, with of course some discretion for public authorities on how they should do this.

284 The second reason for having clear statutory minimum standards is to require public bodies to take certain steps to integrate equality approaches

and evidence into their normal daily work. This will involve activities such as ethnic monitoring, doing inclusive consultations, and training staff on race and other equality issues. The idea is of course that equality becomes a core part of developing policy, speaking to staff and service users, and monitoring and reporting on the effects of one's work.

285 Third the existing two-tier framework requires public bodies to do various things, including publishing their activities in meeting their various equality duties. The purpose of this is twofold: first to improve the transparency and accountability of an organisation generally, through ensuring that they are as open as possible in explaining their policies and decisions; but also in so doing to start addressing any confidence gaps that may exist amongst those serve or employ. The desire to increase public confidence is at the heart of the race, disability and gender duties.

286 The Commission notes the Government's proposals on the proper arrangements to support effective delivery of the new equality duty. Unfortunately we think these proposals are flawed and don't provide the clarity, consistency and rigour necessary for public bodies to know how they can build equality issues into their day-to-day work. We can't stress enough the need for clarity on what's required for delivering the duty, both for public bodies themselves and for an enforcing CEHR.

287 The Commission has a plethora of experiences, good and bad, on how public bodies have successfully implemented or not delivered on the race equality duty. From these we focus on two, one to highlight why taking the steps set out in various equality schemes matters objectively, and one looking at what happens when one doesn't pay heed to these processes, and why it is important in these circumstances to actually be able to enforce compliance.

288 For instance the Government's Sure Start supports very young children and their families through a range of universal social provision, ranging from early education, to healthcare, through to general family support.

289 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 its impact on race equality.[39] 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, again reflecting its good policy rationale. The converse was true for those that did take these actions.

290 One major conclusion was 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 services.

291 The message couldn't be clearer: equality duties, and specifically the requirements in equality schemes, help and don't hinder good policy and services. Those that implemented the race duty got things rights; whereas those that didn't tended not to reach diverse communities.

292 Another illustration of the need for clear minimum standards is reflected through the Commission being concerned from some time about the status and impact of the race equality duty within Whitehall. We respect that something new like the race equality duty takes times to bed down. Nonetheless given Whitehall's resources and responsibilities we expect to lead on delivery and not lag behind. Unfortunately our experience has been that a group of influential government departments responsible for major

national policy have failed to undertake race risk assessments on many or any of their proposals.[40]

293 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 an unacceptable failure 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.

294 We agree with the Government in that legislation must say something about how a public body should meet an equality duty. Of course we are clear this must be a general and not a limited equality duty. That said we are very concerned about what appear as a regressive proposal to substitute four 'statutory principles' for the existing race, disability & gender schemes and policies.

295 Unfortunately we think the 'statutory principles' proposal is flawed and will not provide the clarity, consistency and rigour necessary for public bodies to know how they can build equality issues into their day-to-day work. We cannot stress enough the need for clarity on what's required for delivering the duty, both for public bodies themselves and for an enforcing CEHR.

296 The Paper speaks of four 'statutory principles': (a) consultation and involvement; (b) using evidence; (c) transparency; and (d) capability ('training'). There is then a distinction made between prescriptive regulation; and these four principles, which the Government clearly envisage as underpinning but importantly not being the action needed to deliver on the duty.

297 We think this distinction is misconceived and actually creates problems; not least that it is no longer clear to anyone what needs to be done to deliver on the equality duty. It is our experience that above all else public bodies want clarity on what they need to do. The Commission is absolutely clear that these ‘statutory principles’ are at best a recipe for confusion, and at worst permission for inaction.

298 We recommend there are statutory steps that are the action needed to deliver on the new general equality duty. This will absolutely need clear minimum standards to support its effect delivery. Such standards will of course be applied proportionately, but they will need to be applied.

299 Our recommendation is that the new equality duty needs 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, aren’t at all onerous and reflect activities common to all public bodies.

300 We recommend six transparent steps. These are (a) a periodic review of a public body’s performance on equality – a kind of ‘state of the authority’ report; (b) gathering, monitoring and using evidence on equality throughout its activities, including in particular when developing new policies (necessary to retain impact assessment); (c) involving and consulting communities & staff in developing an annual equality action plan, including equality objectives; (d) implementing that action plan; (e) publicly reporting on this action plan and progress towards the objectives; and (f) a separate equality employment duty that focuses on recruitment, progression and retention issues.

301 *Issue 7: Public Service Inspectorates and the New Equality Duty*

302 There is consensus that the new 'super' inspectorates that will cover issues as opposed to specific sectors have an important role in monitoring performance in the public sector in delivering on the new equality duty. These new inspectorates will cover, respectively, local services, children and learners, health and adult social care, and justice and community safety.[41] These will be accompanied by the prisons inspectorate. It is hard to underestimate how important their role is in helping other public bodies deliver.

303 Presently inspectorates, as public authorities, are expected to build equality into their work, particularly their activities on assessing compliance in their sectors to various legal standards, such as the race equality duty. The common preferred means for this is twofold: first we have agreed memorandums of understanding with certain inspectorates, and second we have general provided regular support and advice to all of the main public service regulators.

304 The success, however, has been somewhat mixed with certain bodies, such as the Healthcare Commission and the Benefits Fraud Inspectorate being pro-active, with many other not doing as much as the Commission would have liked: for example five years after the specific duties took effect some inspectorates still do not have an approach for race equality impact assessment, and others still have non-compliant race equality schemes.

305 Whilst the memoranda approach is a start; for us and we suspect for the inspectorates also it is no substitute for clarity in the law on the latter's responsibilities for monitoring performance on the new equality duty. In fact, as the Government acknowledge there are strengths and weaknesses in the memoranda approach, not least that it hasn't moved all closer to the

common goal of making equality part of routine performance assessment. We think this conclusion alone means that something has to change.

306 The Equalities Review argued that such unevenness reflects insufficient clarity on the priority that inspectorates should give to equality, and that this should be addressed through the new equality duty. We agree with the Equalities Review. There is a problem of clarity of role, and a pressing need to ensure that equality is not lost through the shift towards risk-based and self-assessment. We do not think there is any need for equality to get lost here.

307 Specifically, the Equalities Review made two attractive recommendations.[42] First that public bodies are required to promote the new duty in their inspections by placing an unambiguous statutory requirement on them to give equality due priority; either in their parent statute or in the SEA. As stated above we agree with this recommendation and we suspect many inspectorates do also.

308 Second that chronic equality gaps are subject to special inspections in line, we think, with the Hampton Review stress on comprehensive risk-based assessment. We think that such gaps require a thematic approach in order to identify and understand their complex causes. However the Government rejects both of these recommendations.

309 The Paper states that accepting these two recommendations would not be consistent with the move towards greater risk-based assessment that is being set out in law following the Hampton Review that reported in March 2005. We are sceptical of this argument and think it unpersuasive for at least four reasons.

310 First the Hampton Review explicitly ruled most public service inspectorates as outside its remit. Second an express statutory duty to assess for equality doesn't contradict the targeted risk-based approach as equality outcomes would be included in whatever risk-based assessment are conducted. Third it really just gives equality its due status and inserts it into risk assessment criteria, which when applied will, anyway, focus inspection activity on the worst performers. Finally as good performance on duties means good performance generally it is more efficient to include equality in risk-based criteria: inspections will proceed through the prism of duties, complementing the risk-approach.

311 In conclusion here we make three recommendations. First public service inspectorates should enjoy the support of the six steps recommended above to enable them to be at the vanguard of good performance on the new duty. It is vital that those monitoring performance on the new duty practice what they preach; otherwise those inspected can have no confidence in the process. This has applied to the Commission, the DRC and the EOC, and will apply equally to the CEHR in the future.

312 Second the public service inspectorates should benefit by having an unambiguous requirement in their parent statute to give equality due weight in their inspection criteria and practice, including in risk- and self-assessment. This will ensure that the inspectorates lead in their domains of expertise, and involve the CEHR where and when appropriate; perhaps via the latter adopting strategic dip-sampling.

313 Finally it is line with the risk-approach and justified in itself that persistent equality gaps are subject to rigorous thematic inspections. There are a plethora of gaps and issues, some of which were outlined in the Equalities Review and many others well-known by the inspectorates themselves, that merit considered attention. We envisage the public service inspectorates

consulting on their annual work plans and the latter then including a range of targeted equality investigations.

314 *Issue 8: Equality Duties and Public Procurement*

315 The Commission agrees with the Government's recognition that public authority contracts are a hugely lucrative and expanding area. In many ways we have moved well beyond the traditional hermetically sealed model of public service provision, to a situation of huge diversity in the delivery of services. We have no problems with diversity per se, but are clear that it in general it mustn't permit any regression in equality standards, and specifically any diminution in the contracted-out delivery of equality duties.

316 The relationship between equality and public procurement is described as complex and contentious. We don't think it needs to complex or controversial. Rather the challenge is to build a coalition of guidance, good practice, but also a clear, proportionate and unique approach in legislation to enable 'pure' public bodies to understand and maximise equality in their procurement work. Put simply how to do we get the right fit between the new equality duty and public authority contracts.

317 We agree with the Government that procurement is a public function. This is undoubtedly the case. At a fundamental level the current race, disability and gender equality duties apply to procurement as they do to all other public functions. However it is also true that procurement is unique; it simply isn't comparable to other functions, such as the delivery of education, or policing, or local healthcare. In fact it often cuts across all of these. In this very real sense it is unique. This fact informs our recommendations set out below.

318 The Commission has always regarded procurement as a public function. As such the general race duty applies and we hoped and expected it to be reflected in the race equality schemes, policies and action plans of public bodies. To assist in this only one year after the introduction of the race specific duties we published two detailed and generally well-received guidance booklets on the dos, don'ts, and general good practice on building the race duty into both sides of the procurement divide, public and non-public.[43]

319 However despite this it is the case that most public bodies haven't built race equality into procurement. Our experience has been one of many public authorities failing to make the link between race and procurement, highlighted by its low status or sometimes complete absence in race equality schemes, policies, strategies and action plans. Unfortunately good practice isn't widespread or consistent; rather the good work has relied more on leadership and political willpower and not on the law. We need to move beyond this.

320 Other research confirms this rather depressing picture. Committed to Equality, a research and advisory membership body, recently found[44] that many local authorities in England & Scotland don't link race equality into their public authority contracts: (a) over one-third of councils don't ask standard non-discrimination / equal opportunity-type questions of those that wish to contract with them; (b) a slightly higher proportion fail to ask for evidence of equality-related policies or practices from potential contractors; (c) almost half of those that do get such information fail to assess it; and (d) almost all respondent councils failed to require even annual evidence of equality practices from those that they have contracted with.

321 Whilst this research doubtless won't give the full picture, its scope and response rate were comparatively high - 438 councils and 84.5%,

respectively – and it does convey a rather bleak message on the nature and extent of any links being made by councils between the race duty and public procurement. We reiterate that something is not working here and the new legislation presents a great opportunity to do things differently.

322 The Government generally repeats the formal position that the current general duties applies to all functions, and that this includes procurement. Moreover there is an inexplicable failure to recall the fact that what is being proposed isn't a general but a limited equality duty, which may include procurement or may not, depending upon whether it has been deemed by whatever public body as an equality priority.

323 If anything this restriction in scope would make it even more necessary to state in the law the starting-point of equality applying to contracts, so that public bodies couldn't inadvertently or deliberately contract themselves out of the new equality duty. This danger is reflected and compounded by the additional failure to recognise that procurement is a unique public function properly conceived as cross-cutting public policy and services.

324 Based upon these two fundamental misconceptions the idea that there is, in fact, a pressing need to clarify in the legislation the relationship between duties and public procurement, is outright rejected. Despite the fact that a selective, not a general, equality duty is being proposed the Government still use the current general approach as the basis for rejecting the need for any clarification between equality obligations and contracts, in the proposed new restrictive duty. This argument is unpersuasive.

325 We agree with the Government that guidance and good practice networks and the like are important ways to illuminate how to embed duties into public authority contracts; to the extent they are relevant. We depart, however, in their being sufficient. We regard them as necessary but

insufficient conditions for clarifying to public bodies how they are entitled and indeed obligated to build equality, proportionately, into their contracting-out.

326 The Paper acknowledges that there is already much guidance available on the relationship between equality duties and public procurement. This is true. However the facts are that guidance, whilst perhaps providing much-needed clarity on dos and don'ts around public contracts, will not require public bodies to actually learn by doing that is get used to building equality into contract tenders, conditions, or in their post-contract monitoring.

327 The Commission recommends a new approach with equality duties and public procurement. Public authority contracts cut across policy, and aren't confined to any particular function or activity. In other words procurement is unique and in so far as it is covered by the new equality duty it needs to be dealt with a little differently from other functions such as the provision of education, healthcare, policing or of leisure facilities.

328 We advocate a 'mainstream-plus' approach. This involves respecting that procurement is a public function, at the same time as noting how it different. We agree with the Government that it would be contrary within the common approach to supporting delivery of an equality duty, to give procurement special prominence. Rather we think it will be clearer, proportionate, and simpler to recognise procurement is different and to reflect this in the legislation.

329 Specifically this would mean three things. First there would be a similar but tighter general equality duty but this time confined to public procurement, reflecting its unique cross-policy impact. Second it would apply only to 'pure' public authorities reflecting the need to avoid undue burden on smaller bodies, as well as be clear on who is liable. So we would

recommend a list of ‘pure’ public authorities covered by the procurement equality duty. Third, it would enable a healthy coalition of statutory action; a code of practice, and non-statutory guidance, to meet the dual goals of clarity of understanding and widespread delivery of equality duties through public authority contracts.

330 We recommend a procurement equality duty, reflective of the unique nature of public authority contracts, and designed as a clear and proportionate way to deliver the duties through contracts. We envisage something along the lines of:

‘A designated public body shall (a) eliminate unlawful discrimination and harassment; and (b) pay due regard and take all proportionate and appropriate steps to progressively realise equality of opportunity, in (i) the procurement of goods, works or services; and (ii) the delivery of goods, works or services through existing contracts.’

331 We would expect this general procurement duty to be supported by tailored statutory actions around the different stages of a public authority contract, from defining the needs of a contract, onto tendering practices, through to post-award monitoring. More specific information on these actions could be provided through a code of practice led by the new CEHR, and be backed up by accessible non-statutory guidance. Throughout the focus would be on clarity, proportionality and promoting the consistent delivery of duties through contracts.

332 *Issue 9: Who is Subject to the Equality Duty?*

333 This is a complex issue that requires more thought. We do not have a final position on this. We would advise that care is taken when deciding on who is to be liable for the new duty. Based upon our own experience there

needs to be a balance struck between providing clarity on whether a body is covered or not, with the desire to apply the obligations to all those undertaking functions of a public nature.

334 Liability to the race equality duty flowed from a list that is public authorities were either named or captured under some general description. This list defined liability to the general race duty for some 43,000 public bodies, as well as placing additional obligations on a much smaller group of public authorities, by way of either race equality schemes, race equality policies or race employment duties.

335 This approach has the great benefit of legal certainty. However the disability and gender models adopt an arguably more modern and wider basis for liability, specifically that all bodies that undertake functions of a public nature. We consider that one can blend the two approaches in the following two ways.

336 First that all ‘pure’ and ‘hybrid’ public bodies are covered in their entirety that is to say that if a body has inherent public function to some degree then they should be bound by a general equality duty. We are sceptical that a meaningful line can be drawn in practice between public functions and non-public work within a ‘hybrid’ body.

337 However, in respect of the secondary duties that support delivery of the general duty, we prefer the list approach, with one general one relating to the general equality duty; and on smaller one for the procurement equality duty recommended above.

338 So certain public authorities will be on two lists: one requiring production, implementation etc of an equality action plan; and the other assisting them

to meet their procurement equality duty. We think this dual approach to listing is clear and proportionate, and greatly enhances legal certainty.

339 *Issue 10: Enforcing the Equality Duty*

340 The Commission is very concerned that the Government's proposals for a new equality duty render them unenforceable. We reiterate that whilst promotion is a necessary condition to tackling discrimination and harassment, it is by no means sufficient. Enforcement is necessary precisely because we know the voluntary equality model doesn't always or often work. The existence of the race, disability and gender duties reflects this recognition.

341 We have a wealth of experience enforcing the race equality duty. This has ranged from a plethora of preliminary legal notices in our compliance process against a wealth of public bodies that sometimes led to a compliance notice, as well as a series of strategic judicial review interventions on the ground of the race duty.

342 It is important to remember that these latter interventions, whilst including the race duty aren't confined to it: in practice they always involve wider policy and public law issues, be it planning decisions on Gypsy and Traveller communities, or human rights law issues.

343 We have integrated the race duty into other enforcement, including the investigation into the police service in England and Wales, onto the current investigation into regeneration activities, as well as the targeted investigation into the race equality impact assessment practice of the Department of Health. All of this enforcement has or is proving effective, and is indeed essential when the promotional approach has failed.

344 We have two very serious concerns with the Government's proposals for enforcing the new equality duty. The 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. The second is the proposal to confine all duty-enforcement with the CEHR and confine it to the lower courts.

345 It is unlikely that the proposed statutory principles are intended to or are capable of setting a minimum standard of compliance. With no knowledge of compliance, there can no idea of non-compliance, and without that there can be no enforcement.

346 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. This is partly why we recommend the six clear statutory steps above.

347 The distinction in the principles between underpinning action and action itself is, at best, unhelpful and confusing and, at worst, a recipe for an unenforceable equality duty. If it is not enforceable then it isn't a legal duty and if that were the case then we have regression.

348 Our second concern relates to the enforceability, or otherwise, of the duties through 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.

349 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 could sanction, or not as the case may be, enforcement of a new equality duty, thereby significantly narrowing its regulation in the future.

350 We are clear that the proposed 'single enforcement mechanism' removes the individual right to appeal to the duty in legal action. 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. Many of our stakeholders have expressed concern about this proposal.

351 To illustrate its potential impact, drawing on our casework, it would mean that Gypsy & Travellers' groups could not use the duty to challenge their eviction from Dale Farm in Cambridgeshire; or the mainly Bangladeshi Brick Lane community could not use it in relation to challenging certain work by Crossrail 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.

352 **POSITIVE ACTION OR 'BALANCING MEASURES'**

353 Despite forty years of race discrimination law, ethnic minority groups continue to suffer acute disadvantage in employment, education, health, housing and public services. Equality of opportunity, as the Equalities Review highlighted, and the Green Paper acknowledges, is a long way off and will remain elusive unless, among other things, we update and refine the legislative framework which will bring about change.

354 The Commission believes that the positive action provisions in the RRA are frequently relied upon by employers and voluntary and charitable organisations to improve equality of opportunity for disadvantaged groups. We set out some examples immediately below.

355 PATH National works with a number of public authorities and social housing landlords on providing positive action training programs to improve representation of under-represented racial groups in areas such as housing management, surveying and environmental services.

356 The Windsor Fellowship works with a number of major banking institutions to provide positive action opportunities such as shadowing and work placements for ethnic minority graduates and school pupils. Many large public and private sector employers such as Barclays Bank, British Telecom, the BBC, the Cabinet Office and the NHS offer a range of opportunities to encourage members from under-represented groups to take up particular work.

357 *Problems with the Current Provisions in the RRA*

358 The positive action provisions are now widely seen as overly restrictive and complex, stalling rather than progressing equality. Some of the problems include:

359 Terminology – ‘particular work’ and ‘particular racial group’ are too restrictive. Often employers want to address under-representation in a particular sector e.g. construction or finance and to refer to the generic term ethnic minority where anecdotal evidence suggests that the percentage of ethnic minority groups is low.

360 Training - the provisions rest on the premise that under-represented racial groups lack the right education, training and skills in particular work. This is now only partly true: over 40% of ethnic minority young people have degrees compared with the national average of 23%[45] - but they are still unlikely to find employment in their chosen careers or even generally.

361 Exclusive Training - is permitted only where there is under-representation throughout Great Britain. Under-representation in Scotland or Wales is treated as local under-representation. Where there is local under-representation an employer or training provider may only reserve training places for the under-represented group. This is futile if there is only one training place.

362 Statistics - there is also too strong an emphasis on statistical data - even though the RRA requires an employer only to be reasonably satisfied of under-representation.

363 Fundamental Problem of Only Under-Representation – due to this focus on under-representation positive action provisions cannot be justified by other possible legitimate aims that are not necessarily linked with under-representation.

364 Generally in our experience it is when employers want to tackle something more than mere under-representation in particular work or want to go wider than offering training or encouragement that the existing provisions under the RRA prove to be a hindrance rather than a help - the Equalities Review supports this view. Some examples illustrate these difficulties:

365 The Arts Council wanted to address disadvantage faced by aspiring BME authors in getting their work published. In conjunction with Penguin

Publishers they ran a writing competition which was restricted to BME writers – competitions are covered by s.20 of the RRA. Competitions do not fit within the definition of training or encouragement to take up particular work. In this particular case there was no evidence that the competition served a special need with regard to education, training or welfare. This competition therefore fell outside the scope of the positive action provisions. As a result the Arts Council was obliged to review the program.

366 Avon and Somerset, and Gloucestershire Constabularies sought to increase representation of women and BME's within their forces to comply with government equality targets. The recruitment process consisted of an initial sift, after which successful applicants would go on to the next stage. The forces decided that all women and BME's who met the eligibility criteria at the first stage would be selected to go through to the second stage. All White male applicants who met the basic eligibility criteria were ranked according to their scores. Only the highest scoring White male applicants were selected for stage 2 of the process. In effect, the lowest ranking White male applicant did not proceed to the second stage even though he might have scored higher than a woman or BME applicant. Because this was an arrangement for a job, such action is expressly precluded by the RRA.

367 A local authority wanted to offer apprenticeships to members from ethnic minority groups because the evidence showed under-representation of ethnic minorities taking up apprenticeships. The authority could not do this because apprenticeships are deemed employment for the purposes of the RRA.

368 A city council wanted to offer on the job-training in administration to Bangladeshis and Pakistanis; the Commission had to advise that it was outside the scope of the provisions.

369 The NHS offers a monetary award to ethnic minority nursing professionals to undertake research into health issues affecting ethnic minority communities. The award is known as the Mary Seacole award and the underlying purpose of granting the award is to tackle under-representation in senior positions in the NHS. The award does not fall within the ambit of the provisions because it is not training or encouragement in particular work; neither does it meet the special need provision because under – representation by itself is not a special need. The aim of the NHS in offering the award is to tackle the disadvantage suffered by ethnic minority nursing professionals who struggle to get into management.

370 A public authority wanted to offer solicitor training contracts to certain racial groups known to be under-represented in the profession. However, this could not be offered as positive action training because on completion successful trainees are automatically offered employment.

371 A private sector company enquired to the Commission whether it could use 'tie-breaks' to address under-representation of black workers in the company. The Commission had to advise this was not permissible under the legislation.

372 The Government set out two main proposals on balancing measures (a) to expand the range of measures which would fall within the range of measures permitted under European law; and (b) to shift the aim in the legislation from under-representation to preventing or compensating for disadvantage linked to a protected ground which would be subject to the measure being necessary, appropriate and time limited.

373 The Commission generally agrees and thinks this approach is consistent with our view that training and encouragement are no longer sufficient on their own to tackle disadvantage caused by discrimination for ethnic

minority groups and that the SEA should mirror the positive action provisions in the Equal Treatment Directives for race, sexual orientation, religion or belief and age. Article 5 of the Race Directive and Article 7 of the Equal Treatment Framework Directive state:

> *'With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the [protected grounds]' (out insertion)*

374 The strengths of such a provision are generally that it is broader and more flexible than the existing arrangements. This should make it easier for employers, service providers and others to adopt measures which would address the particular problem identified. For example, a well-established university could offer bursaries to ethnic minority students to encourage them to take up courses where there is evidence of financial hardship preventing them taking up such opportunities.

375 'Disadvantage' is wider than 'under-representation' and probably also 'special needs'. It therefore, ought to permit many of the initiatives which would fall outside the existing provisions e.g. awards and competitions and the types of activities mentioned under section 35 above, and finally this broader approach should be able to accommodate 'tie-breaks' scenarios.

376 The only possible disadvantage is that such a provision lacks clarity, and employers and others may not know: (a) what type of measures may be used; (b) what is meant by disadvantage; (c) how to determine whether a measure compensates for disadvantage; or (d) where the legal limits are.

377 The Government does not propose to put the details of measures which will be regarded as falling within the provisions, on the face of the legislation. The Commission agrees but in order to promote positive action and encourage its greater use we consider those wishing to rely on the provisions will want and need guidance on what they can and cannot lawfully do. We consider that the legislation must be supported by regulations which provide greater clarity and a code of practice.

378 *Extend 'Special Needs' Provision to all Protected Groups*

379 The Commission supports the proposal to extend the provision for 'special needs' under s.35 of the RRA, s.61 of the Equalities Act and s.13 The Equality Act (Sexual Orientation) Regulations 2003 to other protected groups but such measures should not be restricted to the fields of education training or welfare. However, it is arguable that if article 5 – or similar wording - is adopted then there should not be a need for a 'special needs' provision, as measures to meet particular need are measures which prevent or compensate for disadvantage.

380 *Guidance on Balancing Measures / Positive Action*

381 The CEHR already has the power to issue guidance and codes of practice - ss.14-15 Equality Act 2006 - as do the existing statutory commissions.

382 We agree that the CEHR should not have a power to approve positive action schemes. Our reasons for this are:

- A requirement for approval would add another layer of regulation making it more difficult for a person to adopt balancing measures.

- It will probably be cumbersome and become a potentially slow process.

- It may deter rather than encourage the adoption of balancing measures. The RRA required positive action measures to be registered with the Secretary of State. In practice this was prohibitive and the requirement was removed.

- Such a power may present a conflict of interest for the CEHR if it has to invoke its enforcement powers against a previously 'approved' organisation that then breaches equality legislation through a faulty balancing measure.

383 The CEHR should, however, undertake promotional work to encourage organisations to make more use of positive action - a recommendation of the Equalities Review.

384 *Women-Only Political Shortlists Should Continue After 2015*

385 Recent research by the EOC shows that despite the provisions allowing 'all women shortlists' that the rate of progress for women in Parliament is painstakingly slow. Women represent half of the population and it is only reasonable to expect to see their greater representation throughout the political process. The CRE therefore agrees that there should be a power to continue the operation of the current provision beyond 2015, if this is still necessary and appropriate.

386 *Ethnic Minority Shortlists*

387 The low representation of ethnic minority persons as councillors and MPs is a more complex issue than may be presumed.

388 First, the RRA does not expressly prohibit discrimination by political parties. We consider that political parties should be brought within non-discrimination legislation so that any discrimination which occurs in the selection process or in other areas may be challenged.

389 Second, we agree that political parties can do more by way of mentoring, shadowing, etc. These measures do not require new or additional measures – just commitment and leadership.

390 Thirdly, we consider that ethnic minority shortlists are more problematic than gender shortlists: in particular, who is an ethnic minority for the purposes of the shortlist?

391 At this stage we do not consider that legislation permitting ethnic minority shortlists should be introduced but a full programme of balancing measures should be adopted.

392 **THE PRIVATE SECTOR AND EQUALITY**

393 The Government considers there should be no other regulation on the private sector because it would be an unnecessary burden. The Commission disagrees.

394 First, it is important to remember that the private sector is already a regulated sector: employers and service providers are bound by the legal obligation not to discriminate irrespective of whether they are private enterprises, voluntary organisations or the public sector. We feel it important to state this as, occasionally; discussions about the private sector give the impression that private enterprises are somehow exempt from anti-discrimination legislation. Any other regulation would be to ensure better compliance with already existing legal obligations.

395 Second, the growing disparity between obligations on the public sector and those on the private sector is difficult to sustain and justify given that the private sector employs 80% of the UK workforce. It is also the largest supplier of goods, facilities and services. The private sector, therefore, has a crucial role to play in advancing full equality in practice, a role which is recognized by the Green Paper.

396 Third, the private sector is not monolithic: it includes the multinational corporations to the sole trader. For some of these enterprises, additional requirements will not be a burden and can be easily adopted. The total number of private enterprises is 4.4m of which 1.2m are employers. The total number of private sector employers who employ 20 people or more is 55,000, (it is to be noted that approximately 43,000 public authorities are subject to the race equality duty and these include primary schools – which may be comparable to the small employer).

397 *Equality Obligations in the Private Sector*

398 The Commission notes that there have been a number of recent studies which have raised the possibility of introducing equality duties into the private sector. For example, the Hepple Review recommended that all employers should be required to 'conduct a periodic review of its employment practices for the purpose of determining whether members of ethnic minorities, women and disabled persons are enjoying, and are likely to enjoy, fair participation' in the workplace. This was also a recommendation shared through the report by the IPPR Task Force on race equality and diversity in the private sector, 'The Benefits for Responsible Business'.

399 The precedent has been set for legally enforceable employment monitoring duties in relation to specific equality grounds in Northern Ireland through the Fair Employment and Treatment (Northern Ireland) Order 1998

(FETO). In Great Britain there is also the employment monitoring duties for scheduled public sector employers.

400 In its Third Periodic Review of the RRA, the Commission recommended that it be compulsory for all employers with a total workforce in excess of 250 employees to monitor by ethnicity the composition of their workforce and certain employment procedures. We also support the introduction of equal pay reviews. Without some form of monitoring an employer cannot know whether any of its procedures are discriminatory or produce disparate outcomes.

401 In addition, the Commission recommended that employers publish the results of monitoring in their annual reports and that there be periodic reviews every 3 years. It was also recommended that the legislation should require the employer to respond to a request from the Commission (now the CEHR) within a specified time either to produce ethnic monitoring data or review or to certify that the total workforce at the relevant time was less than the statutory number above which monitoring was compulsory.

402 The Commission continues to support this recommendation but considers that further discussion is required on the effective implementation and use of monitoring.

403 We firmly believe then that the Government should approach this subject by asking how it can be done rather than whether it should be done. There are three areas which need to be looked at:

- How to capture the information.
- What should happen with the monitoring information?
- How should the data be used?

404 There are a number of options for collecting and publishing data which we believe might be workable and worthy of further exploration by the Government in taking forward this recommendation. Moreover, given the structure of the sector in terms of size and numbers it should be possible to adopt different approaches or levels of monitoring.

405 Data collection itself should not prove difficult: most employers will already have systems in place for collecting workforce data albeit in relation to national insurance contributions and tax.

406 The Government proposes that 'good equality practice' could be encouraged and embedded in the private sector' through other forms of reporting. In relation to quoted companies, we consider that the Companies Act 2006 may offer such a possibility although we accept that it may be limited in scope as it only applies to 'quoted' companies.

407 The Government recognise the importance of encouraging responsible business practice; the underlying assumption in the Companies Act 2006 is that, given appropriate information about a company, investors and consumers alike will make decisions based on ethical and social considerations. Consequently, to encourage transparency and social responsibility, a requirement has been placed on directors of all companies, except those subject to the small business regime, to include a business review in their annual report.

408 In the case of quoted companies - of which there are about 1300 – the review must include among other things information about the company's employees and those policies which relate to employees and the effectiveness of those policies.[46]

409 It is not entirely clear what information is required on employees, but we can see no reason why this should not include information on equality issues such as race, gender, disability age, religion and belief and sexual

orientation and pay. We consider that, if this is not already the case, the information on employees should include equality issues.

410 The Companies Act 2006 is an introduction to the duty we propose on monitoring and publishing of information. We do however, recognise that there are shortcomings.

411 The corporate responsibility duty only applies to a small number of enterprises approximately 1300. Given that there are over 4,000,000 private sector enterprises in the UK of which only 2.1 million are registered companies; this does not come close to producing the desired outcome.

412 The requirements do not bite at large private equity firms such as Virgin Atlantic or foreign-owned private subsidiaries.

413 Because there is no mandatory reporting standard, it may not be easy to assess or challenge a company's performance.

414 We believe it is possible to overcome these shortcomings by amending the Companies Act 2006. This could help in various way, including some noted immediately below.

415 All companies registered through it are required to include in their information employees' equality criteria.

416 In the case of medium and large enterprises, which are not deemed 'quoted companies', this requirement should extend to include details in the director's report about what policies are in place to promote equality and what steps are being taken to ensure the effectiveness of the policies.

417 For unincorporated businesses one option is to consider the involvement of the regulatory or professional bodies. Most business activities i.e. law, construction, insurance etc. in the private sector are regulated by a statutory or self-regulatory body. These bodies and associations usually have no limit

on the size of an enterprise, which means they may capture a larger section of the private sector, than say that governed by the Companies Act 2006.

418 We would recommend that in addition to what we propose for companies that there be a requirement for these bodies to monitor their members and make that information available to the public. Data collection may be done at the point of application for membership or renewal.

419 Where the options above do not apply then it might be necessary to adopt a proportionate approach by, for example, requiring only enterprises of a certain size to carry out monitoring and equal pay reviews. For example, few benefits may be gained from imposing monitoring requirements on employers with 20 or fewer employees.

420 The Commission does not support data collection for its own sake: the information must be used to eliminate discrimination and advance equality. At the very least any information which is collected should be made available to the CEHR upon request to pursue its statutory and strategic objectives, as well as to trades unions and regulatory and professional associations.

421 In the case of information captured in accordance with the Companies Act 2006, this information should be available together with other accounting information.

422 In the case of information captured by regulatory bodies or membership associations, the information should be made available with details pertaining to application for membership.

423 The Commission recommends therefore that there should be a general statutory requirement on private sector employers to monitor their workforce, to carry out equal pay reviews and to publish the results of such monitoring. The details of who shall be subject to the requirement and how such monitoring shall be carried out should be set out in regulations.

424 *Promoting Good Practice in the Private Sector*

425 The Government is keen to promote good practice in the private sector and we very much support them in this. Subject to what has been said above the Commission supports the proposals in the Paper to promote good practice and we would support an accredited good practice compliance tool, although it might be possible to have a tool which starts off non-accredited to enable businesses to understand what is required of them; serving as an incentive perhaps for formal accreditation later.

426 The Equality Standard in Local Government (ESLG) is a useful model to look at here. By having different levels of achievement, enterprises could aim towards accreditation at their own pace and in line with their resources. The first two levels would be elementary similar to levels 1 to 3 of the ESLG.

427 At those levels businesses would only be required to produce an equality policy and to set equality objectives. If businesses wish to progress up the levels from level 4 onwards, they would be putting in place information systems and monitoring against targets and achieving and reviewing outcomes. At these points they would to formally apply for accreditation.

428 Such an equality standard would be particularly useful if for those private bodies competing for public authority contracts. If public authorities were given the distinct procurement equality duty it would be important to develop some form of read across between the private equality standard, and the public procurement equality duty. This is of course win-win, reflecting how good performance gives firms a competitive advantage on the one hand, as well as ensuring the non-public sector delivers on the equality duty, on the other.

429 **EFFECTIVE DISPUTE RESOLUTION, ENFORCEMENT AND REMEDIES**

430 As stated earlier, the principles on which single equality legislation should be based should include:

- Access to justice and fair hearings.
- Simple, effective and efficient procedures for enforcement.
- Effective, proportionate and dissuasive sanctions.

431 We reiterate also that there is a duty on the UK under art.7 of the Race Directive to ensure access to justice:

> *'Member states shall ensure that judicial and / or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.'*

432 It is appreciated that some of these issues have a reach beyond the remit of the Green Paper. Nevertheless, the Commission is disappointed to note that the Paper consults only on dispute resolution in the field of goods, facilities and services (GFS) and public functions; on the use of ombudsman in GFS cases and with regard to the venue for hearing GFS cases. This is too narrow a focus.

433 The resolution of employment disputes is left to the consultation by the Department for Trade and Industry (the DTI) on dispute resolution in the workplace, following the Dispute Resolution Review. However, that Review dealt principally with measures to simplify the management of groups of similar claims brought in the employment tribunals and mediation.

434 The DTI Review rejected without consideration the extension of tribunal powers to make wider-impact recommendations; issues of remedies; or calls for class and representative actions. Instead it was recommended that promoting compliance with the law should rely on advice and guidance. We are concerned that important issues have been to some extent sidelined.

435 *ADR and Goods, Facilities and Services*

436 The Commission considers that wherever possible disputes should be resolved without recourse to litigation. Individuals bringing proceedings face huge obstacles - lack of legal representation, complex law, lack of knowledge of judicial processes. Whilst the Commission welcomes proposals for ADR, it is not and should not be the only answer to these obstacles as that would hinder access to justice.

437 ADR works well where there is a dispute between individuals but outcomes are, not surprisingly, too individualistic; it is not appropriate for tackling structural discrimination. In addition we believe that there are unique characteristics to discrimination cases which contrary to the Government's view make them unsuitable for some forms of ADR. For instance:

438 Often, disputes arise because the discriminator does not have equality policies and / or practices in place.

439 Or in circumstances when the discriminator has failed to apply policies consistently to all racial groups.

440 The offending act may reflect structural racism and discrimination with an establishment – institutional racism. Although the dispute may be between individuals, a central although perhaps not critical feature will be the general attitude to equality and discrimination within the establishment.

441 ADR procedures, to be successful, require collective condemnation of racism and discrimination. This does not always exist in wider society. In fact in some establishments and organisations these are accepted as normal.

442 In **Baptiste v Westminster Press Ltd t/a Bradford and District Newspapers Case No. 35945/96 [1996] DCLD 30**: an unsuccessful black applicant for a post in the advertising department of a newspaper was told at the interview for the job that the phrase 'black bastard' was commonly used in that workplace.

443 Individuals may want to take cases on a point of principle and this should not be easily dismissed; they do not want others to suffer the same loss and humiliation that they have suffered. They may also want public condemnation of the offending behaviour.

444 Another fundamental problem with ADR is its insular nature: outcomes affect only the individual, removing any chance of rooting out systemic discrimination and inequality within an organisation.

445 *The Role of Ombudsmen in Discrimination Cases*

446 The Government sought in the Green Paper to explore how ombudsmen may be used to resolve discrimination disputes. However we think there are a number of drawbacks to this idea.

447 First their remit is usually restricted to dealing with complaints about particular matters, e.g. banking, insurance, pensions, local authority services and professional conduct.

448 Second the process is unduly lengthy, having to exhaust internal complaint procedures before complaining to the relevant ombudsman. This could have adverse consequences for victims of discrimination who must start legal proceedings within six months of the date of act of discrimination. If ombudsmen come into the picture, the time limits for discrimination cases would have to change. More importantly, it introduces an additional layer of bureaucracy and source of potential distress for applicants.

449 Third decisions are not binding on the parties so individuals may still have to go to court, and their decisions cannot establish precedent for other similar cases, as well as their being no power to enforce a decision by ombudsmen.

450 Fourth, Ombudsmen investigations can also take a long time to reach a decision on a matter because of their protocols, which may only add to the distress of victims. Also their compensation payments are usually nominal.

451 Finally it is very possible that different ombudsmen will take different approaches to discrimination, and some will lack discrimination expertise.

452 *Jurisdiction of Non-Employment Discrimination Cases*

453 The Government has rejected proposals for moving non-employment cases to the employment tribunals. The Green Paper proposes maintaining the status quo as to do otherwise would result in shifting the specialist resources of employment tribunals as well as creating jurisdictional problems: for example where a claim of discrimination in goods or services is combined with claims for other civil wrongs.

454 Under the RRA individuals were given direct access to the courts if they were discriminated against in the non-employment field. This covered not only the provision of goods, services and facilities (s.20); and housing and premises (s.21); but also education (s.17); clubs and associations (s.25); the functions of local education authorities (s.18); and consent to assignment (s.24).

455 Since then, of course County Courts have been given jurisdiction to deal with race cases concerning planning (s.19A)[47] and, from 1990[48] to July 2003, barristers and advocates (s.26A and s.26B); as well as those in relation to the functions of various education-related bodies, such as the Further and Higher Education Funding Councils and teachers' training bodies (s.18 A, B & C). Of much greater significance, of course, was the addition with effect from 2nd April 2001 of the non-discrimination principle to most of the functions of the vast majority of public authorities (s.19B).

456 The Commission has noted, however, the persistently low number of race discrimination cases lodged at county court. For a period of over a decade from June 1977 to 1989, the total number of such cases as recorded in the yearly Judicial Statistics for England & Wales was merely 313, with the highest yearly number being thirty-four cases in 1981.[49]

457 Claimants who issue proceedings under the Act in the county and Sheriff courts are expected to send a notice to the Commission[50], but during the period of eight years from 1997 to the end of 2004, the Commission recorded only seventy-seven notices, with the highest yearly number being seventeen in 1989. An unfinished study from the Commission in the early 1990s confirmed that County Courts only kept files for three to five years, which poses difficulties in quantifying the number of race cases in the county courts.[51]

458 It is only designated County Courts that hear race cases and judges sit with two assessors.[52] The Commission concluded in 1991 the general shortcomings of the county courts in discrimination cases as follows:

> *'The delays inherent in the county court system, the need for legal assistance, all for a very low potential award of damages, act as a considerable disincentive to pursuing cases there. Most of the issues county courts deal with (for example, refusal of service in public houses and clubs) tend to be simpler than those dealt with by the tribunals. Where they have dealt with more complex issues (for example, whether Gypsies are an ethnic group[53]) the county court has made heavy weather of the matter.'*[54]

459 All the indications are that the above comments still hold true. Although there was never any cap on the amount of damages County Courts can award, Commission records show that most awards and settlements are low.[55] The potential for obtaining high damages for discrimination in the situations that come under the extensive non-employment areas of the Act have not as yet been properly explored and / or realised.[56]

460 In its Second Review of RRA the Commission recommended that a discrimination division within the industrial - now employment - tribunal

system should be established to hear both employment and non-employment race cases. The reasons behind this recommendation were:

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

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

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

461 This recommendation was not repeated in the Third Periodic Review in 1998 partly because the government had announced its intention to prohibit discrimination in the exercise of public functions and the Commission decided to see how this new area of law would develop.

462 Although the Commission has issued few proceedings in the county courts we have enjoyed successes there, particularly in GFS cases establishing Gypsies and Irish Travellers as ethnic groups entitled to the protection of the Act.

463 In addition, in recent years we have seen an increase in multiple jurisdiction claims – non-employment discrimination claims with additional civil claims in statute, contract or tort e.g. housing, education and planning. It was always envisaged that such multiple jurisdiction claims would be heard in the civil courts.

464 However, the problems with the civil courts remain and the number of civil cases is still low. Court fees and the risks of costs' orders act as powerful deterrents together with the formality of the courts and its procedures, stricter rules of evidence and ineffective sanctions – the average compensation for discrimination cases in the county courts is £1000. This state of affairs could hardly be said to be compliant with article 7 of the Race Directive.

465 There are also now problems with employment tribunals: the introduction of costs' orders albeit in exceptional cases is having a chilling effect on potential applicants. It is the Commission's experience that respondents' solicitors will routinely threaten costs against applicants. For the litigant in person the law has become so complex that not even the employment tribunal can be described as easily accessible.

466 Moreover, we consider that in the longer term 'equality tribunals' would not be sustainable as the only forum for equalities expertise. While they would become repositories of equality expertise, the reality is that they would be experts only in discrimination law in employment and simple refusal of service cases but would be less effective in dealing with complex cases involving services or the exercise of public functions.

467 We also consider that the idea of equality tribunals is inconsistent with the policy on mainstreaming elsewhere in the public sector. All courts and tribunals need to become skilled and equipped to hear and determine discrimination claims for the following reasons.

468 First, judicial reviews of the race equality duty are forcing the administrative courts to become better informed in discrimination matters.

469 Second the civil courts would still retain jurisdiction for multiple jurisdiction claims for example, housing, education and public functions, and discrimination arguments may be raised in human rights matters.

470 Third, many of the statutory exceptions which may not be challengeable under single equality legislation may be challengeable under other jurisdictions or on judicial review, for example a decision not to prosecute.

471 Finally discrimination arguments may be made in criminal hearings for example see **HM Attorney General v D 2005 EWCA Crim 889** in which the Criminal Appeal Court had to determine whether referring to an individual as an immigrant while committing an offence under the Crime and Disorder Act was a racially aggravated offence attracting enhanced sentencing. There the court had to decide whether the term immigrant could fall within the definition of a 'racial group' for the purposes of the RRA.

472 If a court is accustomed to hearing cases of discrimination, inequality and disadvantage, then this will gradually influence its perceptions, prejudices and insight into human behaviour. In short, it adds to the experience and expertise of judges which is good for the wider public benefit.

473 It is the Commission's view therefore that wherever the venue, the starting-points must always be: (a) easy access to justice and to publicly funded independent legal advice and assistance where appropriate; (b) fair procedures for enforcement that are simple, effective, and efficient; and (c) that sanctions are effective, proportionate and dissuasive.

474 We are concerned that these principles are being eroded in both the civil courts and increasingly the employment tribunals, and through government proposals for the reform of civil and criminal legal aid.

475 Equality and non-discrimination are overarching principles and important social objectives and all courts and tribunals should be equipped with the necessary skills, training and expertise to hear discrimination cases and arguments.

476 The Commission supports the proposal to enhance discrimination expertise in the County and Sheriff Courts through designated courts of expertise, specialist training for judges sitting in such designated courts and increasing the use of expert assessors albeit with some reservations.

477 As noted above currently race discrimination cases are heard in designated county courts of which they are about eighteen throughout England and Wales. In Scotland equivalent matters are dealt with through the Sheriff courts.

478 The advantages of designated courts include: (a) they can develop expertise in discrimination, similar to employment (equality) tribunals; (b) they will be able to deal with multiple jurisdictional claims, e.g. housing or consumer issues; and (c) they have the skill to recognise when a case ought to be kept in the small claims courts - where there are no costs orders - and so less likely to treat all discrimination claims as complex.

479 In principle also it should be easier for the designated courts to serve the CEHR with notice of claims which have been issued and send judgments to the new body.

480 The disadvantages of this designation approach include, however: (a) they are few in number; (b) these low numbers and location means that they can be difficult to access; and (c) there can be a lack of awareness of their existence by individuals and sometimes court staff in non-designated areas.

481 If the designated courts are to be expanded there should be an evaluation of their current effectiveness and ways on improving on the system. We would also recommend that there should be an exemption from court fees in cases involving discrimination only. This exemption might also be extended to court costs in matters of pure discrimination, that is, cases which are not mixed jurisdiction.

482 We agree with the Government that more use should be made of assessors in discrimination cases but greater clarity is required on their role and on the weight of their views.

483 In the case of **Ahmed v Governing Body of the University of Oxford**[57] the judge took the view that he did not have to rely on the views of the assessors if they conflicted with his own; including even when the assessors were in agreement with each other. The Court of Appeal held that the judge had erred in law and that the views of assessors should be given appropriate weight.

484 As stated above we agree that it is imperative that judges receive specialist training in discrimination law. However, this should not be restricted to a small number of judges as proposed, but should be provided to all judges on a regular basis for example, every three years.

485 If a small number of judges are trained to hear discrimination cases, it will mean that unless those judges are available the case would not be heard. We think this could lead to unnecessary delays in hearing cases and consequently impact on access to justice. In any event as mentioned above, discrimination arguments will arise in many different types of cases.

486 The Commission further recommends that there be a duty on the court service to serve the CEHR with notices of discrimination claims and copies of judgments or orders. The current provisions require claimants and their representatives to notify the Commission when they issue proceedings in non-employment matters but very few do. The employment tribunals send decisions in race discrimination cases to the Commission and this has proven invaluable to the Commission's strategic work.

487 *Representative Actions in GFS Cases*

488 The Government appears to dismiss the possibility of representative actions in county court matters on the basis that: (a) it may lead to an 'undesirable litigation culture'; (b) it could benefit those with spurious claims; and (c) such matters may be difficult to measure and quantify.

489 However, article 7(2) of the Race Directive and article 9(2) of the Employment Equality Directive provide that:

> *'Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in*

any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.'

490 This provision permits Member States to provide for litigation by way of class or representative action. The CRE in its Third Review of the RRA has recommended that the Act be amended to enable a court or tribunal to consider a complaint where the discrimination affects a number of people who wish to bring a group complaint, without the need for each person to bring separate proceedings.

491 We firmly believe that representative actions, whereby a body such as a trade union or the CEHR could take action in its name on behalf of affected individuals, and class actions, would be very useful mechanisms for dealing with multiple claims of discrimination. We think this because:

- Such actions could lead to systemic change that is tackling discrimination at source, rather than relying upon the action of one individual to change the system.

- Bodies such as trade unions have the expertise and resources to bring representative actions on behalf of stakeholders and members. Many individuals lack the means of raising proceedings particularly where they may be complex.

- Such actions could take up less court and respondent time, and there is the potential to benefit a wider group compared to only an individual remedy.

- They may reduce the fear of retaliation or victimisation: it is easier to challenge a problem as a large group because they can lend support to

each other, and it is much more difficult for respondents to single out individuals.

492 We do not agree that representative or class actions would lead to an 'undesirable litigation culture' or to spurious claims; it is unlikely that any credible body or responsible group of individuals would invest time and resources in unmeritorious claims, and tribunals and courts would quickly throw out vexatious complaints. We also disagree that it would be difficult to quantify claims.

493 *Employment Tribunal Powers*

494 As already mentioned, the Commission was disappointed by the failure in the Paper to consider improvements to remedies and to tribunal powers in particular.

495 After hearing both sides in a complaint of discrimination an employment tribunal will often have a very clear view of the way the respondent manages its staff and should have the capacity to make recommendations on the employer's future conduct, based on the evidence in the case. Such a recommendation would have potential to dismantle any structural or institutional discrimination which may exist in an organisation. It is difficult to see why this has been rejected.

496 Currently s.56 of the RRA only permits 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.'*

497 Consequently, the power can only be exercised practically if there is a continuing employment relationship -often there is not - which means that other employees will not benefit. Moreover, even if the employment relationship subsists other employees in the same situation will not benefit from the employment tribunal's recommendation because it will apply to the individual only.

498 For example, in the case of Baptiste mentioned above a recommendation on the language to be used in the workplace generally and not just in relation to the applicant would have been useful and appropriate.

499 Furthermore, the recommendation may be desired by the respondent who may benefit from a wider-reaching recommendation, which could be used to persuade staff, managers or a board of the need to comply with equality legislation. In the CRE case of **Singh v The Chief Constable of Nottinghamshire Constabulary**[58], the Chief Constable invited the tribunal to make recommendations to assist them avoiding discrimination following a finding of discrimination . The tribunal was prevented from doing so.

500 We also recommend that similar powers should be expressly granted to the county courts.

501 *Commission Recommendations on Interim Relief*

502 The Commission repeats its long-standing recommendations on interim relief as set out below.

503 In employment cases interim relief should be available to preserve a claimant's position pending a hearing provided that the relief is sought promptly and the remedy appears appropriate to the tribunal of fact.

504 The tribunal of fact should have the power to order re-instatement or re-engagement where it appears appropriate to do so.

505 Tribunals and courts should have the power to grant injunctive relief to individuals pending a final hearing for example, an employer should be prevented from going ahead and appointing another individual to a relevant position where there still a live claim of discrimination.

506 A preventative remedy should be available where a person has stated a directly discriminatory intention to avoid that intention being put into practice.

507 *Compensation for Indirect Discrimination*

508 Under s.57(3) of the RRA, there is no remedy for compensation in cases of indirect discrimination where the discriminator can show lack of intention to discriminate. This only applies to indirect discrimination in the spheres covered by Part III of the RRA e.g. education, goods, facilities and services, but not to the employment field. This seems illogical and we recommend that this exception is scrapped.

509 **STATUTORY EXCEPTIONS**

510 *The Genuine Occupational Requirement (the GOR)*

511 We recommend that the GOR test be extended to all grounds. This recommendation is based on our general view that the GOR is sufficiently broad and rigorous to be used appropriate and proportionately. We provide examples of such use below.

512 It is our experience that the GOR is a useful exception for organisations which provide services for vulnerable members of protected groups and wish to cater for the distinct needs of that group.

513 For example, a rape counselling service providing services to predominately women may want to appoint women counsellors because it is considered that female rape victims may find it easier to talk to another woman about their experience.

514 Or, a mental health project offering services to African-Caribbean men may want to recruit workers from African-Caribbean backgrounds because they may be seen as having a better understanding of the cultural issues of the group and they may also appear less threatening than a person not of that group.

515 In summary the GOR test has a number of advantages, including:

- It is more flexible because there are no specified circumstances governing when it can be used - what is important is the ‘nature of the job or the context in which it is carried out’.

- It applies to all stages of employment: recruitment, promotion, transfer, training and dismissal.

- There is an in-built proportionality test to limit abuse: the characteristic must be a ‘genuine and determining requirement’ and be ‘proportionate’.

516 The main disadvantage of the GOR is that employers may find it difficult to understand where, when and how to apply the requirement.

517 More generally we think that any exception from the prohibition of direct discrimination in employment should be drawn as narrowly as possible and subject to a rigorous test; new legislation must make it clear that the exemption shall only be used where there is a legitimate objective and the requirement is proportionate.

518 *Genuine Occupational Qualifications (the GOQ)*

519 The Commission recommends that the GOQ be repealed and replaced by the GOR, which should now apply to all racial grounds including colour and nationality. The GOR test is capable of being applied to the prescribed jobs in the current limited s.5(2)(d) of the RRA.

520 *Genuine Service Requirement (the GSR)*

521 Currently, the RRA, like other equality legislation, follows the list approach to exceptions: The Commission considers that a list approach in single equality legislation spanning six or seven grounds would be cumbersome and unworkable in practice.

522 The alternative approach is to provide for a generic exception provided there is clarity on the principles and objectives in the legislation. The Commission can see the benefits of such a generic exception.

523 The characteristics of the generic approach are: (a) simplicity in the legislation; (b) the provisions could be drafted to include a proportionality test; (c) flexibility and adaptability to modern-day needs; and (d) it is developed by the courts who apply a purposive approach.

524 In contrast the characteristics of the list approach are: (a) Parliament decides on the exceptions rather than the courts; (b) it provides clarity for employers, public authorities and service providers; (c) it may be comprehensive but not exhaustive; but (d) it can be rigid and not adaptable to modern-day needs rendering the legislation inaccessible.

525 In relation to the race strand, the proposal for a GSR raises three distinct issues: (a) what is the objective pursued; (b) is it compatible with the Race Directive; and (c) should there be a distinction between the provision of goods, facilities and services, and public functions?

526 *Objective of the Genuine Service Requirement Exception*

527 In principle the Commission supports the GSR exception but considers that unless carefully drafted, it is open to abuse as it permits justification for direct discrimination in service provision; it is not unforeseeable that service providers may rely on it to exclude certain groups from the provision of services.

528 It could allow in through the back door those exceptions which the government has repealed and will repeal: for example, the exception to discrimination in the disposal of small premises - section 21 RRA as

amended. This is particularly so if the long list of exceptions are simultaneously retained as proposed by the Government.

529 It may be an extreme example but the Commission has received correspondence from a BNP councillor and at various time supporters who stated that ethnic minority people are not welcome in the countryside and should remain ‘in the slums they have created in the cities.’ It is not difficult to envisage a situation where such views could influence local housing policies with the effect that communities are segregated ‘for their own good’ or for reasons of public order using a GSR exception.

530 The objective of a GSR exception must be to secure equality in practice by permitting the service provider to deliver services appropriately to meet either the special needs of a protected group or to respect the protection of their private and family life - paragraph 4 of the Preamble to the Race Directive. This must be made clear in the legislation.

531 *Compatibility with the Race Directive*

532 As stated above, the GSR exception introduces a justification defence to direct discrimination outside employment, which as the GP acknowledges may be incompatible with the Race Directive. However, in practice, it is the special needs and charities exceptions which are most relied upon to justify differences in service provision; these are permitted under article 5 of the Race Directive. Also, as mentioned above, paragraph 5 of the Preamble to the Race Directive states that it is important to respect the protection of private and family life in the context of access to and provision of goods and services.

533 *Public Functions*

534 The Commission considers that a distinction should be made between the provision of goods, facilities and services and certain public functions, in particular law enforcement, regulatory and control functions. We do not consider that it is appropriate for example to allow public authorities to rely on the GSR in the exercise of these functions for example policing or prosecuting functions.

535 Any exceptions to the prohibition of discrimination in the exercise of these functions should be expressly provided for in the statute. The most notable example is the exception for national security which we do not consider can be is replaced by the GSR. It is our view that it is more appropriate for Parliament to approve such exceptions and the conditions in which they are to apply than for individuals to try and do so in a public authority.

536 *Specific Exceptions*

537 The Commission agrees that there should be a unified approach where exceptions apply to more than one protected ground. The unified approach would achieve consistency in the legislation.

538 The Commission welcomes the proposals to repeal those exceptions which have created inconsistencies in the RRA brought about by the Race Regulations of July 2003. However, we consider that there are some exceptions, which it is proposed to retain which we consider should also be repealed. The Commission recommends the following specific exceptions be repealed or amended:

539 *Merchant Seamen – s.9 RRA*

540 The exception permitting discrimination against merchant seamen has been substantially amended following the enactment of the Race Regulations. Previously, it was permissible to discriminate against merchant seamen in all terms and conditions of employment and in job performance i.e. not allowing them above deck. Now it is only permissible to discriminate on grounds of nationality in relation to pay.

541 The Commission and the RMT have long supported the repeal of this exception as it essentially allows the shipping industry to exploit non-EEA seamen and has a detrimental impact on the employment of British merchant seamen.

542 The Government had previously intimated that this exception would be repealed but since then it seems to have been persuaded by the Department of Shipping that this would make it more difficult to compete in the European market, where it is still permissible to discriminate against non-EEA national merchant seamen.

543 The exception does not serve a public policy purpose and is out of date. The Commission therefore supports its complete repeal. We recommend that the shipping industry works with the rest of Europe to remove discrimination rather than acquiesce in the practice.

544 *Immigration and Nationality – s.19D RRA*

545 The Commission has always opposed the power to authorise discrimination on grounds of ethnic or national origins or nationality and recommends the repeal of s19D (ministerial authorizations). We have three reasons behind this recommendation.

546 First, immigration control is based on nationality discrimination and international human rights law (e.g. CERD) permit distinction and restrictions between citizens and non-citizens. Section 19D however authorises discrimination on grounds of ethnic and national origin, which are not synonymous with nationality and cannot be easily separated from race, for example should White Zimbabweans be granted entry to the UK while Black Zimbabweans are refused purely on grounds of ethnic origin?

547 Second, Ministerial Authorisations are not being used for the purpose intended by Parliament that is to permit special measures to be taken on humanitarian grounds. The Race Monitor in her annual report for 2004/05 referred to nine Ministerial Authorisations, the two most wide-ranging of which allowed immigration officials to prioritise arriving passengers of specified nationalities for examination, and allow asylum claims to be prioritised by nationality.

548 Other authorisations that year related to language analysis of three nationals where nationality is disputed, asylum work streaming, directions for removal, and to narrower activities such as translation of documents, work schemes benefiting certain nationals, and additional checks of document of specified nationals.

549 Finally, the Race Monitor has repeatedly observed that there is a risk that caseworkers become case-hardened against particular groups: once it is decided that a particular national or ethnic group is suspect and there is an

authorisation to take extra measures, then a caseworker finds more reasons to be suspicious. This has an impact on good race relations where particular racial groups are perceived as illegal workers, overstayers or immigration offenders in general.

550 In relation to nationality discrimination, where there is justification for distinctions between nationalities then this should be dealt with in immigration legislation and not expressly authorized in a single equality act.

551 *Decisions Not to Prosecute – s.19F RRA*

552 The Commission agrees with the proposal to retain the exception but recommend it be restricted to prosecutions by the CPS; decisions to prosecute by other public bodies such as local authorities, planning authorities and inspectorates should be excluded from this exception.

553 *Acts Done under Statutory Authority – s.41 RRA*

554 The Government propose the retention of s.41 of the RRA As stated earlier s.41(1) provides that if an act of discrimination on grounds of colour or nationality is done to comply with other statutory law in the field of employment, education, goods facilities or services, education or social advantage then the act is <u>not</u> unlawful under the RRA. For example, charging higher tuition fees for foreign students is lawful provided it is authorised by statute.

555 Section 41(1) also provides that an act of discrimination on all racial grounds which is done to comply with other statutory law on enforcement and control functions e.g. stop and search, is not unlawful.

556 Section 41(2) permits discrimination on grounds of nationality or place of ordinary residence or length of residency in or out of the UK or an area of the UK, if done to comply with other statutory law or a Ministerial requirement or condition or Ministerial arrangements in any regulated area.

557 In the transposition of the Race Directive into UK law, the Government was obliged to amend significantly the scope of s.41 since article 14 of the Race Directive required that:

'Member States shall take the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.'

558 Although the Government amended this section to comply with the Directive it did not go beyond what was required, hence the distinction between acts of discrimination on grounds of colour and nationality and other grounds, as well as the anomaly between public functions and other regulated areas. Also we consider that s.41(2) allows through the back door discrimination on grounds of ethnicity and race disguised as residency criteria.

559 We consider that s.41 should be repealed but the important issues of how to protect parliamentary sovereignty and to a lesser extent the doctrine of precedent still remain for discussion and consideration.

560 As previously explained, the RRA is not a superior or constitutional rule of law: until the Human Rights Act, the principle of non-discrimination did not take precedent over earlier or subsequent legislation.

561 Under the Human Rights Act all legislation has to be read in conformity with the HRA which includes a right to protection from discrimination in the enjoyment of Convention rights. The doctrine of precedent, where human rights and freedoms are concerned, is pushed aside.

562 The doctrine of parliamentary sovereignty is also altered: s19 Human Rights Act 1999 requires a Minster to certify upon presenting a Bill to Parliament that it complies with the HRA. Also, where the House of Lords find that a statute breaches the HRA it is not struck down but must be amended by Parliament through a fast-track procedure.

563 As stated earlier, it is a CRE recommendation that the RRA should enjoy a similar status and we recommend that this be the same for a single equality act. In essence the principle of equality and non discrimination which is a human rights guarantee should apply to all legislation.

564 *Civil Service Rules – s.75(5) RRA*

565 This section provides that the operation of the civil service Nationality Rules are exempt from the RRA. The Green Paper is silent on whether this exception should stay or go. However we recommend it is repealed.

566 Currently there are two main types of nationality restrictions on recruitment to the civil service: non-reserved and reserved. Non-reserved posts, which constitute the majority of posts in the civil service, are only open to Commonwealth citizens; EU and certain European Free Trade Association nationals and certain family members; and exceptionally to other nationals under the provisions of the Alien's Employment Act 1955.

567 Reserved posts are only open to UK nationals, under the provisions of Article 48.4 of the EC Treaty of Rome, because they require special allegiance to the state – as distinct from security requirements. It is for departments, agencies and the devolved administrations in Scotland and Wales to allocate and defend posts as reserved, taking Cabinet Office guidance and EU case law into account. Grade is not an issue and departments are known to reserve all posts. The Cabinet Office estimates that 25% of the 470,000 civil service posts are reserved for UK nationals - based on a 1994 audit.

568 Currently, 850,000 residents of working age who are not UK, Commonwealth or EEA nationals are excluded entirely from applying to the civil service. In London, 350,000 people, 9% of the working age population, are entirely excluded even from applying for the most junior social security clerk's jobs.

569 It is also not entirely clear how departments determine the rules for example we received a complaint from an individual who applied for an administrative post with an unknown civil service department but was rejected because the post was deemed reserved for those born in the UK to UK citizens.

570 The individual was born in the UK and her parents were settled residents for a long period. It seems wrong that individuals who are born here and are British citizens whose parents may have lived here all their lives and are also British citizens should be excluded from joining the civil service, especially when the post is not in defence, national security or intelligence, and when it is a junior position.

571 However, we do acknowledge and welcome the European Communities (Employment in the Civil Service) Order 2007 that opens up a greater number of posts to non-UK EEA nationals.

572 *Armed Forces Procedures – s.75(8) RRA*

573 This section requires Armed Forces personnel to go through the internal service redress procedures before issuing proceedings in the employment tribunal. The Commission considers that this subsection should be repealed or amended. The internal service procedures can take anything between 12 to 18 months to resolve complaints of racial discrimination. This is in stark contrast to the length of time it takes to resolve complaints not involving discrimination – approximately 6 months. It appears that victims of discrimination are disadvantaged in the procedures because of the nature of their claims.

574 The Commission appreciates the government's wider aim to encourage local resolution of disputes and we therefore recommend putting a time limit on the internal redress procedures for example, 6 months which seems to be the length of time it takes to resolve other grievances.

575 *Office Holders: Appointment to Office – s.76ZA RRA*

576 The Commission cannot see any justification for retaining the exception for the appointment of office holders. We presume the exceptions exists because such appointments are the personal choices of the Prime Minister and / or Secretaries of State and there is no open competitive process. We consider that selection for posts based on personal choices limits diversity

as demonstrated by the case of **Coker and Osamor v Lord Chancellor and Lord Chancellor's Department [2002] IRLR 80**.

577 *Other Exceptions*

578 The Commission supports the removal of the exceptions listed in Table 2 in Annex A; this would remove the anomalies and discrepancies in the RRA brought about by the implementation of the Race Regulations in 2003.

579 The Commission however recommends the retention of the exception for training in skills to be used outside Great Britain, although there should be no discrimination in pay under this provision. This is not a controversial exception and is probably useful to foreign policies on international co-operation, mutual assistance and development.

Wales: The Commission had a recent case in Wales that raised the issue of the rights of employees working in Wales to speak Welsh in the workplace. We think there is a pressing need for further discussion on this matter specifically, between the key national and country-level institutions, including the Government, the National Assembly for Wales, the Welsh Language Board, and CEHR Wales.

This issue was highlighted to us through a matter involving employees of a national travel agent branch in Wales. Further information on this can and should be sourced from CRE Wales colleagues and post-0ctober 2007 from CEHR Wales staff. We urge the Government to take up this specific issue, as well as the general matter of the rights of minority language speakers in the workplace in Britain.

[1] s.43 RRA.

[2] These five challenges are based upon Commission policy work on integration, equality and participation; the Commission's experiences in casework and on wider legal policy issues – such as tackling far-right extremism; and on recent work by the Institute for Public Policy Research as set out in their publication, 'Politics for a New Generation', Margo, J., & Pearce, N., (eds) (2007), (Basingstoke: Palgrave Macmillan).

[3] Ibid: pp.216-218.

4 See (a) Census 2001 statistics – Ethnicity – Education; (b) pp.6-7, 'Ethnic Minorities & the Labour Market' (2003) (London: Cabinet Office Strategy Unit); and (c) Cassin, R., & Kingdon, G., (2007) 'Tackling Low Educational Attainment' (York: Joseph Rowntree Foundation).

[5] See (a) Census 2001 statistics – Ethnicity – Labour Market; and ibid: (b), especially pp.4, 19-20, and 25-26.

[6] See, respectively, (a) pp.9 & 19 of 'Section 95 Statistics 2004/5 on Race and the Criminal Justice System' (London: Home Office) and (b) 'Statistics on Race and the Criminal Justice System – 2005. A Home Office publication under section 95 of the Criminal Justice Act 1991' (London: Home Office).

[7] Report of the 'Independent Inquiry into the death of David Bennett', December 2003, Norfolk, Suffolk and Cambridgeshire Strategic Health Authority / Department of Health.

[8] See, for example, (a) Anderson, B., Clark, N., and Parutis, V., (2007) 'New EU Members? Migrant Workers' Challenges and Opportunities to UK Trades Unions: a Polish and Lithuanian Case Study' (Oxford: TUC and Compas, University of Oxford); and (b) Anderson, B., Rogaly, B., Ruhs, M., and Spencer, S., (2007) 'Migrants' Lives Beyond the Workplace. The Experiences of Central and East Europeans in the UK' (York: Joseph Rowntree Foundation).

[9] See, for example, 'Common Ground. Equality, Good Race Relations and Sites for Gypsies and Irish Travellers', (2006) (London: Commission for Racial Equality).

[10] Blanden, J., & Machin, S., (2007) 'Recent Evidence on Changes in Intergenerational Mobility', (London: Sutton Trust).

[11] Child Poverty Action Group (CPAG), (2004) 'Poverty: The Facts' (London: CPAG).

[12] Office for National Statistics (ONS) (2004) 'Labour Market: Muslim Unemployment Rate Highest' (London: ONS).

[13] For example see Kyambi, S., (2005) 'Beyond Black and White: Mapping New Immigrant Communities' (London: IPPR).

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

[15] Parkinson, M., et al, (2006) 'State of the English Cities' (Office for the Deputy Prime Minister: 2006).

[16] pp.21-22, Phillips, T., et al, (2007) 'Fairness and Freedom: the Final Report of the Equalities Review' (London: Cabinet Office).

[17] Ibid: pp.19-21.

[18] Ibid: p.52.

[19] p.6, Home Office White Paper (1976) 'Racial Discrimination' (London: Home Office).

[20] See A v Secretary of State for the Home Department [2004] UKHL 56.

[21] Paragraph 17 of judgment.

[22] Paragraph 43 of judgment.

[23] pp.5-6: endnote 19.

[24] p.5, chapter 7 of the Discrimination Law Association's response of September 2007 to the Discrimination Law Review Green Paper.

[25] [1997] ICR 1.

[26] [2004] IRLR 799 CA.

[27] See points 5.1.1 to 5.1.4 on pp.25-27 of the Equality Commission for Northern Ireland's response to the OFMDFM's consultation paper, 'A Single Equality Bill for Northern Ireland', November 2004.

[28] Paragraph 133 of judgment.

[29] [2007] All ER (D) 101.

[30] Feldman, A., Purdam, K., and Weller, P., (2001) 'Religious Discrimination in England and Wales' (London: Home Office).

[31] Seide v Gillette [1980] IRLR 427.

[32] Mandla (Sewa Singh) v Dowell Lee [1983] 2 AC 548.

[33] [2007] EWHC 483 (Admin).

[34] [2007] EAT 0587_06_0203.

[35] See s.75(1) & (2) and Schedule 9 of the Northern Ireland Act 1998.

[36] '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.

[37] See endnote 9.

[38] Article 5 and Schedule 2 of the new Disability Discrimination (Public Authorities) (Statutory Duties) Regulations (2005).

[39] See endnote 14.

[40] Drawn from the Commission's pro-active monitoring work of central government performance on the race equality duty, as well as from responses to Parliamentary questions tabled by Keith Vas MP over the past few years.

[41] For historical background here see, respectively, the consultation information on the proposed Local Services inspectorate at www.odpm.gov.uk; on the plans for a Justice, Community Safety and Custody

inspectorate at www.cjsonline.gov.uk; on the proposals around an inspectorate for Children and Learners at http://www.everychildmatters.gov.uk/strategy/inspection/?asset=News&id=35271; and in relation to the plans for a Health & Adult Social Care inspectorate at www.doh.gov.uk.

[42] pp.21-22: endnote 16.

[43] The Commission's has produced two guidance documents: (a) 'Race Equality and Public Procurement' (2003), and (b) 'Race Equality and Procurement in Local Government' (2003).

[44] For full details of this research see weblink: http://www.c2e.co.uk/press.htm.

[45] Members of disadvantaged groups are often in employment below their level of skills and qualifications see EOC (2006) *Moving on Up? Bangladeshi, Pakistani and Black Caribbean Women in Work* available at http://www.eoc.org.uk/default.aspx?page 19421

[46] Section 417(5) Companies Act 2006.

[47] Inserted by s.55 of the Housing & Planning Act 1986.

[48] Inserted by the s.64(2) of the Courts and Legal Services Act 1990 and now to be dealt with by Employment Tribunals unless the discrimination is on grounds of nationality or colour - see s.54(1)(a) of the Act as amended by regulation 40(b) the Race Relations Act 1976 (Amendment) Regulations 2003.

[49] 'Judicial Statistics' HMSO: London – for the years from 1977 to 1989. Incidentally the comparable figures for the recorded Sex Discrimination Act cases were only 68, with highest yearly number being 12 in 1986. In contrast the annual Employment Tribunals reports continue to record the numbers of race and other discrimination cases dealt with there.

[50] CCR 49 O 17(2) – this rule also covers now proceedings issued under the s.66 of the SDA76 and s.25 of the DDA1995.

[51] 'A study of the Race Relations Act 1976 with Special Reference to County Court Cases', Nwaboku: University of Warwick.

[52] The limited role of assessors in race cases was explored in the Court of Appeal case of Ahmed v Governing Body of the University of Oxford [2002] EWCA Civ 1907.

[53] As is turned out the Central London County Court did in fact issue a seminal judgment on Irish Travellers being an ethnic group in 2000 in the case of O'Leary & Others v Allied Domeco & Others - CL 950275-79. But the underlying criticism is still true and is supported by research into the DDA and county courts – for example: Meager, N., et al (1998) 'Monitoring the Disability Discrimination Act 1995', (London: DES). This study identified the formality and complexity of the court system, as well judges' inexperience in dealing with discrimination. In a similar vein see also 'The Price of Injustice', RNIB, 2000 that identified cost and complexity as a deterrent.

[54] Paragraph 45 of 'Second Review of the Race Relations Act 1976', CRE, 1991.

[55] The Sheriff Principal in the DDA services case of Purves v Joydisc Ltd [2003] SC694/01, reported in IRLR 240 commented about how difficult it was to find any appellate decision on quantification of damages for injury to feelings in discrimination cases dealt with by the courts and relied on the extensive cases relating to discrimination in employment.

[56] There is the odd rare case, now and again, such as the planning case of Davis v Bath & North East Somerset Council, reported in 'The Times' 19/11/2001, where a builder accepted an out of court settlement of £790,000 for refusal of planning permission.

[57] See endnote 52.

[58] See Review referred to in endnote 19.