

REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC

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This report has been drafted for the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), established and managed by:

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<i>Information which updates the position from that set out in the 2005 reports appears in boxes</i>
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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.

The United Kingdom (UK) comprises England, Wales, Scotland and Northern Ireland (NI). Great Britain (GB) includes England, Wales and Scotland.¹ The UK is a parliamentary democracy. It has neither a written constitution prescribing separation of legislative, executive and judicial powers, nor an entrenched constitutional bill of rights.

All UK-wide law-making powers are vested in the Westminster Parliament, which legislates both primary law [Acts of Parliament] and secondary law [Statutory Instruments]. These laws can subsequently be 'interpreted' by the courts to create the body of case-law that is based on the binding rules of legal precedent. When passing a law, the Westminster Parliament must at the time determine in which of the four parts of the United Kingdom it will apply. Both the Scottish Parliament and the Welsh Assembly have law-making powers, but these are limited both in scope and in the geographical area that they cover; anti-discrimination legislation is a matter reserved to the Westminster Parliament for all of Great Britain. After long negotiations, the 1998 Good Friday Agreement set out terms for a devolved government for NI, and the Northern Ireland Act 1998 that followed established a Northern Ireland Assembly with powers to legislate on most matters affecting NI, including discrimination matters. At the time of updating this report, the Northern Ireland Assembly has been suspended, and its powers have currently reverted to the Westminster Parliament.

By signing the Treaty of Rome in 1972 the UK impliedly accepted some limitation on the sovereignty of the UK and its parliament. For so long as the UK is a member of the EU, then it is bound by the directives and rules of the EU and the decisions of the European Court of Justice (ECJ). In the European Communities Act 1972, section 2(2) there is provision for EU legislation to be transposed relatively easily into UK legislation by regulations without the need for primary legislation. While this offers an efficient way to incorporate EU directives without excessive demand on the parliamentary timetable, there are some disadvantages. As transposition of the EU equality directives has demonstrated, as this procedure limits the scope of regulations to that of the relevant directive, where existing UK legislation on the same matter is wider in scope than the directive being implemented, then the resulting UK law post-incorporation is likely to have anomalies and inconsistencies.

The enactment of the Human Rights Act 1998 (HRA) has also had an impact on the content of UK legislation (see below 1.0 General Legal Framework).

The anti-discrimination legislation in the UK is enforced mainly through the civil courts, with the exception of some minor provisions that provide for criminal sanctions. The relevant judicial systems in the three jurisdictions are similar but not identical. In each there are first instance tribunals in which all employment-related cases are heard, and separate civil courts

¹ For purposes of transposition of EU legislation, the UK also has responsibility for Gibraltar. To comply with the Directives 2000/43/EC and 2000/78/EC the Gibraltar legislature enacted the Equal Opportunities Ordinance 2004, which came into force on 11 March 2004. The Gibraltar legislation is not discussed in this report.

(county courts in NI and England and Wales, sheriff courts in Scotland) for other civil claims. The final appeal court for all three jurisdictions is the Judicial Committee of the House of Lords.

Proceedings alleging breach by public authorities of HRA protection against discrimination (Article 14 ECHR) or failure by public authorities to comply with positive equality duties (Race Relations Act 1976 s.71) (Northern Ireland Act s.75 and Schedule 9) would normally be by application for judicial review in the High Court of Justice. Failure by public authorities to comply with specific duties set out in regulations made under the Race Relations Act can be enforced by the Commission for Racial Equality in the county/sheriff court.

The criminal courts in each jurisdiction have a similar tiered structure. Criminal courts in the UK would not hear complaints of discrimination; they may, however, hear cases where one of the protected grounds is relevant to the alleged offence, for example inciting racial hatred, or offences including harassment, assault, criminal damage that are aggravated by hostility on grounds of race, religion or belief, sexual orientation or disability.

NOTE: PLEASE SEE ANNEX 3 FOR SCHEDULE OF ABBREVIATIONS USED IN THIS REPORT

0.2 State of implementation

List below the points where national law is in breach of the Directives.

Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?

In the UK, legislation is now in place which had been enacted to meet the transposition requirements of Directive 2000/43 and Directive 2000/78, other than in respect of age for which the UK has notified its intention to defer implementation until 2 December 2006. However, the UK government has published draft regulations prohibiting age discrimination in employment and vocational training, and is currently considering responses to its general consultation (where any individual or organisation could submit their views) on the final form that these regulations should take. The UK government intends that these regulations will be introduced by December 2006 to meet the transposition deadline (see below 4.7 Exceptions related to discrimination on the ground of age).

The authors and other discrimination law practitioners consider that in a number of respects the UK legislation may perhaps fail to comply fully with the Directives, or at least judicial interpretation may be required to ensure that the UK legislation conforms with the requirements of the Directives. However, the introduction of the Disability Discrimination Act 2005 (with the Disability Discrimination (Northern Ireland) Order 2006) and the provisions of the recently enacted Equality Act 2006 (which establishes a new unified Commission for Equality and Human Rights and extends protection against discrimination on the grounds of religion and belief and sexual orientation: see below) reduce some of the potential areas of non-compliance. The areas of possible concern are as follows:

- the definition of indirect discrimination in much of the UK legislation is narrower than that used in the Framework Equality and Race Directives, and the test potentially less rigorous, although the UK courts could correct this flaw by applying the legislation in line with the requirements of the Directives;

- there is at present no general statutory right for *individuals* to seek legal redress for instructions to discriminate: only the equality commissions can bring such a case. Further, the UK law does not prohibit instructions to discriminate on grounds of sexual orientation or, in GB, on grounds of religion or belief. (Section 55 of the Equality Act 2006 prohibits instructions to discriminate on the grounds of religion or belief, but only in the provision of goods, facilities and services, education, and housing. This will probably come into effect in October 2006. See below 2.5 Instructions to discriminate);
- self-employment and occupation may not be fully covered;
- the test to justify genuine occupational requirement in UK legislation appears to be less rigorous than in the Directives, although again the UK courts could correct this flaw by applying the legislation in line with the requirements of the Directives;
- the law prohibiting discrimination on grounds of religion or belief in GB may be deficient as it is subject to ss. 58 – 60 School Standards and Framework Act 1998;
- the imposition of a “reasonableness test” in the definition of harassment may conflict with the non-regression principle in the Directives;
- there is no provision permitting organisations to engage in proceedings on behalf of a complainant; however, section 24 of the Equality Act permits the new Commission for Equality and Human Rights (to be formally established in October 2007) to seek injunctive relief to prevent a person from committing an unlawful act;
- the definition of victimisation requires a comparator and is retrospective; it does not provide for preventative measures;
- case law has demonstrated that the sanctions for unlawful acts of discrimination and harassment that are available for use by tribunals and courts may often not be effective, proportionate and dissuasive;
- compensation for ‘unintentional’ indirect discrimination is restricted;
- the Disability Discrimination Act (DDA) offers protection only to people who come within the statutory definition of “disabled” rather than prohibiting discrimination and harassment etc “on grounds of disability”, with the result that under UK legislation people who are perceived as disabled or associated with a disabled person are not protected against discrimination. The provisions of the Disability Discrimination Act 2005 Disability Discrimination (Northern Ireland) Order 2006 have widened the definition of disability to an extent (see below), and the victimisation provisions of the DDA do offer some protection for persons who are not disabled but suffer some disability-related discrimination;
- the Employment Equality (Sexual Orientation) Regulations 2003 in GB and NI (SO Regulations and NI SO Regulations) may permit wider scope for discrimination by organised religion than is provided for in Art. 4(1) Employment Framework Directive (but see *R (on application of Amicus & others) –v- Secretary of State for Trade and Industry* under 0.3 Case law below).

0.3 Case-law

Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

- a. *Name of the court*
- b. *Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.*
- c. *Name of the parties*
- d. *Brief summary of the key points of law (no more than several sentences)*

The legislation giving effect to the Directives came into force in July and December 2003 and October 2004. With the exception of the *Amicus* case discussed below that challenged certain provisions in the legislation, there have not yet been any major cases that have proceeded beyond the first instance to establish substantial legal precedents on the interpretation of this legislation. There is, however, a vast catalogue of cases which have established precedents for the interpretation of UK anti-discrimination legislation that has been in place since the 1960s, and there have been a number of recent decisions that have established new precedents as to how the race, sex and disability discrimination legislation should be interpreted. There also have been a number of very significant cases under the Human Rights Act 1998 and the legal instruments that relate to the transposition of the provisions of the Directives.

Cases on the interpretation of the transposing legislation

In *R(on the application of Amicus and others) –v- Secretary of State for Trade and Industry*,² Amicus and six other trade unions applied for the annulment of certain provisions of the Employment Equality (Sexual Orientation) Regulations 2003. The unions challenged certain regulations as incompatible with the Employment Framework Directive and incompatible with the ECHR. The case highlighted the potential conflict between the doctrines of particular religious faiths and protection against discrimination on grounds of sexual orientation. One of the provisions at issue before the High Court was reg.7(3) of the SO Regulations that, in the case of employment for the purposes of an organised religion permits discrimination on grounds of sexual orientation in order to comply with the doctrines of the religion or to avoid conflicting with strongly held religious convictions of a significant number of the religion's followers.. The High Court ruled that this regulation was a lawful implementation of Article 4(1) of the Directive and gave legislative clarity to the balance between competing rights.

The unions also asked the High Court to declare that reg.25 of the SO Regulations was incompatible with the Directive. Reg. 25 excluded from the scope of the regulations any rights to benefits which were dependent on marital status, thereby maintaining the disadvantages then faced by homosexual partners who, under UK law, cannot marry. The court, having regard to recital 22 of the Directive, held that there was not an issue of incompatibility. Reg. 25 has since been amended, following the introduction of the Civil Partnerships Act 2004, which allows homosexual partners to register their "civil partnership": discrimination in benefit rights between married couples and those in civil partnerships is now prohibited. See paragraph 4.5 below.

In *Whitfield v Cleanaway Ltd*,³ an employment tribunal decided that the claimant had suffered harassment on the grounds of his sexual orientation, and awarded £35,000 in damages. This is the first successful case on the sexual orientation ground under the 2003 legislation that transposes the Directive.

In *Khan v NIC Hygiene*, a Muslim man who was fired after going on pilgrimage to Mecca won his case for discrimination on the grounds of religious belief, receiving compensation of around £20,000.⁴

Cases on shift of burden of proof

Since amendment of the SDA to give effect to the Burden of Proof Directive 97/80/EC, there have been a number of cases in the EAT which provide guidance on how first instance

² [2004] EWHC 860 (Admin); www.bailii.org/ew/cases/EWHC/Admin/2004/860.html

³ Stratford Employment Tribunal, 28/01/2005.

⁴ (2005) 155 New Law Journal 160

tribunals and courts should apply the shift of the burden of proof, which, of course, now applies on all grounds of discrimination.

In *Barton –v- Investec Henderson Crosthwaite Securities Ltd*,⁵ the Employment Appeal Tribunal (EAT) laid down guidelines which have been applied in subsequent cases. However, the EAT has interpreted or modified these guidelines in different ways, especially in relation to the evidence the tribunal should look for from the respondent. Such cases included *University of Huddersfield –v- Wolff*⁶, *Chamberlin Solicitors –v- Emokpae*⁷, and *Igen Ltd. and Others –v- Wong*.⁸ Decisions of the EAT in some of these cases have recommended modifications to the guidelines set out in the Barton decision, especially in respect of the evidence the court or tribunal should look for from the respondent.

In 2005, the Court of Appeal in *Igen Ltd. and Others –v- Wong*⁹ (a decision that concerned appeals from some of the previous EAT decisions mentioned above) confirmed these modifications and set out new and strengthened guidelines for applying the shift in the burden of proof.¹⁰ The Court of Appeal also confirmed that it was possible for employment tribunals to find that unreasonable behaviour by an employer, that appeared to be linked to one of the grounds covered by the Directives, could by itself result in the burden shifting to the employer to show an adequate non-discriminatory explanation for the behaviour in question.

⁵ [2003] IRLR 332

⁶ 2004] IRLR 534

⁷ [2004] IRLR 592

⁸ UKEAT/0944/03/RN

⁹ *Igen Ltd. & others –v- Wong; Chamberlin & Anor. –v- Emokpae; Brunel University –v- Webster* [2005] IRLR 258, EWCA

¹⁰ The new guidelines issued by the Court of Appeal are as follows:

(1) Pursuant to section 63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

In *Sinclair Roche & Temperley –v- Hurd*¹¹ the EAT stressed the importance of the tribunal making plain what it considers to be the unfavourable treatment which is prima facie discriminatory, so the respondent can understand what it must explain, and the tribunal must address the respondent's response.

Other cases on the interpretation of the existing UK legislative framework

The case of *R (Elias) v Secretary of State for Defence*¹² concerned the exclusion of British civilians who had been interned by the Japanese Army during World War Two from a compensation scheme if they had not been born in the UK, or did not have a parent or grandparent born there. Elias J. in the High Court (who was no relation to the claimant!) decided that this policy constituted unjustifiable indirect discrimination on the grounds of national origin, contrary to the Race Relations Act. Alternative criteria could have been used, such as requiring a period of residence or domicile in the UK before eligibility could arise, which would have focused less upon the "racial" or "bloodline" element of citizenship, and more on whether a tangible link existed with the UK. Elias J. also decided that the failure of the Secretary of State to consider whether this policy raised issues relating to racial equality, or to assess whether any adverse impact was possible upon particular ethnic groups or groups with a particular national origin, was a violation of the positive duty imposed upon public authorities to promote race equality in the Race Relations (Amendment) Act 2000.

The important decision of the Northern Ireland High Court in *The Matter of an Application by Peter Neill for Judicial Review* [2005] NIQB 66 confirmed that the Equality Commission for Northern Ireland (ECNI) had the power to conduct an investigation into whether a public authority had complied with its equality scheme under its Northern Ireland Act 1998 equality duties and to produce a report with recommendations. It was then a matter for the Secretary of State to decide what effect, if any, should be given to the report and the recommendations.

In *Roads v Central Trains*¹³, the Court of Appeal has recently given guidance as to what will constitute "reasonable accommodation" in accessing a service, emphasizing that the duty to accommodate is anticipatory. (The UK Disability Discrimination Act applies to employment, the provisions of goods, facilities, premises and services, education and public transport.) In *Ryanair v Ross and Stansted Airport*,¹⁴ the Court of Appeal held that Ryanair and Stansted Airport had failed to reasonably accommodate the claimant by charging him for the provision of a wheelchair to access flights. In *Archibald v Fife County Council*,¹⁵ the House of Lords decided that the obligation to make reasonable accommodation for disabled employees could require employers not to apply the standard procedures for selecting individuals to fill posts in order to accommodate a disabled person.

Relevant cases on the interpretation of the UK Human Rights Act 1998 and other constitutional principles

In *R v Secretary of State for Work and Pensions, ex p. Reynolds*,¹⁶ the payment of lower amounts of social security to younger persons was challenged under the UK Human Rights Act 1998 (see below) as incompatible with Article 14 of the ECHR. The House of Lords decided that the use of certain 'suspect' grounds, such as race, ethnic origin, sexual orientation and gender, to justify differences of treatment between individuals would have to

¹¹ [2004] IRLR 763

¹² [2005] EWHC 1435 (Admin)

¹³ [2004] EWCA Civ 1541.

¹⁴ [2005] UKHL 37

¹⁵ [2004] UKHL 32

¹⁶ [2005] UKHL 37

satisfy a very high threshold of justification to survive a challenge under Article 14. However, the use of other grounds, such as age, would face a lower level of scrutiny, and the difference of treatment in making social security payments was held to be justified on the basis of the special characteristics of younger workers.

In *Copsey v WWB Devon Clays Ltd*,¹⁷ an employee who had been dismissed for a refusal to work on Sundays claimed that his employer had violated his rights to religious freedom under Article 9 of the ECHR. (the case arose before the legislation transposing the Directive came into effect.) However, the Court of Appeal decided that the dismissal of Mr Copsey was not based upon his religious beliefs, but rather upon his refusal to agree new employment terms and conditions, and that the dismissal was justified due to the economic needs of his employer and the desire to have similar working conditions for all employees, agreed after consultation with the relevant trade union. It appears to have also been relevant to the Court of Appeal's decision that the employer had offered Mr Copsey some form of alternative employment.

In *R (on the application of Begum) v Denbigh High School*,¹⁸ the Court of Appeal decided that a Muslim schoolgirl's right to freedom of religion under Article 9 ECHR had been violated, as her school had failed to give adequate weight in deciding its school uniform policy to her religiously-motivated desire to wear a particular form of Islamic dress. The House of Lords has subsequently reversed this decision, on the basis that the school had consulted with Muslim groups and alternative schooling options were available for the girl, which would allow her to wear her religious dress.

In *First Secretary of State v Chichester District Council*, the Court of Appeal decided that the right of members of the travelling community to respect for their home life under Article 8 of the ECHR had to be given due weight in planning decisions.¹⁹ This followed the decision of the European Court of Human Rights in *Connors v UK* that the legal framework governing when eviction from property was possible failed to take account the special needs and position of the Travelling community, and therefore constituted a violation of the positive obligations imposed under Article 8 of the ECHR.²⁰ The Court of Appeal in the later case of *Price v Leeds*²¹ has expressed concern that the decision in *Connors* cannot be reconciled with the decision by the House of Lords in the case of *Harrow London Borough v Qazi*²² that Article 8 of the ECHR does not create any right to a home that could be used to prevent a lawful property owner from asserting their right of ownership and possession, and have referred this apparent conflict of precedent to the House of Lords for resolution.

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?

¹⁷ [2005] EWCA CIV 932

¹⁸ [2005] EWCA Civ 199 (02 March 2005)

¹⁹ [2004] EWCA Civ 1248. See also *Clarke v Secretary of State for the Environment* [2001] EWHC Admin 800

²⁰ [2004] ECHR 223 (27 May 2004). For an analysis of the scope of positive obligations under the ECHR in general, see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

²¹ [2005] EWCA Civ 289

²² [2003] UKHL 43

b) Are constitutional anti-discrimination provisions directly applicable?

c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?

The characteristics of the constitution of the United Kingdom are as follows:

- There is no single constitutional document, although there are a number of constitutional 'conventions'.
- Parliament is sovereign, though it has constrained itself [for the time being] by joining the European Union and incorporating the European Convention on Human Rights.
- There is no strong principle of the separation of powers.
- The United Kingdom is a unitary state, although government of NI has been established (and temporarily suspended) under the Northern Ireland Act 1998, and limited legislative powers have recently been devolved to Scotland and to Wales.

Unlike the other Member States, the UK has no constitution that is codified, fully written, and entrenched (supreme over ordinary laws), that regulates the relationship between the citizens and the state. Over centuries, certain rights of natural and legal persons have been protected by decisions of the courts.

The UK is a signatory of all of the main international instruments and treaties relating to human rights and non-discrimination, but, other than the European Convention on Human Rights (ECHR), has declined to provide for rights of individual application or direct application in domestic courts. The 1998 Human Rights Act (HRA),²³ which came into force on 2 October 2000, gives the UK courts jurisdiction to enforce the rights guaranteed under the ECHR, including Article 14. Most other laws approved by Parliament, rather than declare rights, generally proscribe or regulate particular conduct of individuals or organisations.

There is no general principle of equality or non-discrimination that applies to Acts of the UK Parliament, although a common law principle of equality and non-discrimination can be applied in administrative law to prevent public authorities unreasonably discriminating against particular groups on 'suspect grounds' such as race or ethnic origin, without the authorisation of an Act of Parliament. For example, in the case of *Gurung v Ministry of Defence*, McCombe J. decided that the exclusion of Gurkha soldiers from a scheme of compensation payments awarded to former prisoners of war held in Japanese prison camps in the Second World War was based on *de facto* racial distinctions, which were contrary to this common law principle of non-discrimination.²⁴ The exclusion of these Gurkha soldiers from this compensation scheme was therefore held to be an irrational decision.²⁵ There is a requirement under the Human Rights Act 1998 for a minister to certify whether or not a bill is compatible with the ECHR, but, in the view of the authors, it is perhaps unlikely that such process would highlight a potential conflict with Article 14 of the ECHR. There is some degree of judicial discretion to avoid interpretations of Acts of Parliament which would result in discrimination, which however does not apply where the legislation is explicit.

All public authorities in Britain are subject to a positive duty to eliminate unlawful racial discrimination and promote equality of opportunity, imposed by the Race Relations (Amendment) Act 2000. A similar positive duty to promote equality for disabled persons has been imposed on public authorities in GB by the Disability Discrimination Act 2005, and is

²³ See <http://www.hms0.gov.uk/acts/acts1998.htm>.

²⁴ [2002] EWHC 2463 Admin.

²⁵ There is no specific definition of what exactly constitutes discrimination for the purposes of this common law principle.

effective from December 2006. (The Disability Discrimination (Northern Ireland) Order 2006 requires public authorities in NI to have due regard to the need to promote positive attitudes towards disabled persons and encourage participation by disabled persons in public life: the other elements of the positive duty imposed by the 2005 Act on public authorities in GB were not extended to public authorities in NI, as the NI s. 75 equality duty (see below) already covers much of this ground.) The Equality Act 2006 makes provision for a similar duty to be introduced for gender, to come into effect in April 2007.²⁶ The ‘devolved’ representative bodies that have been established in London, Wales and Northern Ireland (which is currently suspended: see above) are also subject to duties to promote equality. In Northern Ireland, sections 6(d) and (e) of NI Act provide that a provision is outside of the competence of the devolved Northern Ireland Assembly if it ‘is incompatible with Community law; and ‘discriminates against any person or class of person on the ground of religious belief or political opinion.’ Section 75 of the 1998 Act imposes a general duty upon certain designated public authorities to promote equality “in carrying out its functions relating to Northern Ireland” across all the anti-discrimination grounds covered by the EC Directives: this applies both to NI public authorities and some UK authorities that carry out functions in respect of NI. Public authorities are expected to report upon their compliance with these statutory requirements, and the equality commissions have a role in enforcing these very important duties.

Section 120 of the Government of Wales Act 1998 imposes a duty on the Welsh Assembly to ensure that its business and functions are conducted with due regard to the principle of equality of opportunity for all people. Section 33 of the Greater London Assembly Act imposes a similar set of duties upon the Greater London Assembly. This general duty is supplemented by a more specific equality duty to also promote equality of opportunity for all persons irrespective of their race, sex, disability, age, sexual orientation or religion, to eliminate unlawful discrimination and to promote good relations between persons of different racial groups, religious beliefs and sexual orientation. Under the Scotland Act the Scottish Parliament cannot legislate on designated ‘reserved matters’, including anti-discrimination legislation. However, there is an exception allowing the Scottish Parliament to legislate for ‘the encouragement (other than by prohibition or regulation) of equal opportunities’ and to impose duties on any office-holder in the Scottish Administration or any Scottish public authority subject to the control of the Scottish Parliament to make arrangements to ensure that their functions are carried out with due regard to the need to meet the equal opportunity requirements.²⁷

There appears to be no general principle of equality or non-discrimination that applies to the private sector; the general principle governing the private sector is that of ‘freedom of contract’, save where specific restrictions have been imposed by Parliament, as in the anti-discrimination legislation. However, the Human Rights Act has been interpreted as providing for a degree of ‘horizontal effect’: the UK courts will attempt to apply private law in a manner that ensures that the UK does not violate its obligations under the ECHR. In the *Copsey* case (see above 0.3 Case-law), the Court of Appeal would have interpreted UK employment law to find that the claimant had been unfairly dismissed, if the Court had decided that his rights to religious freedom under Article 9 ECHR had been violated.

²⁶ For an analysis of the duties, see C. O’Cinneide, “Positive Duties and Gender Equality” (2005) *International Journal of Discrimination and the Law* 91-119; by the same author, “A New Generation of Equality Legislation? Positive Duties and Disability Rights”, in A. Lawson and C. Gooding, *Disability Rights in Europe* (Oxford: Hart, 2005), 219-248.

²⁷ Scotland Act 1998, Schedule 5, Part II, L2.

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

Discrimination on the following grounds is explicitly prohibited under UK legislation in respect of certain activities: race, colour, nationality (including citizenship), ethnic origin, national origin, sex, gender reassignment, marital status, disability and sexual orientation. In GB discrimination is prohibited on grounds of religion or belief; in NI discrimination is prohibited on grounds of religious belief or political opinion and on grounds of belonging to the Irish Traveller community (which can also be classified as discrimination on the grounds of ethnic origin). In each jurisdiction there is separate legislation for each of the grounds (please see table in Annex 1), although many of the provisions are the same or nearly the same. Where existing legislation required amendment to comply with the Directives, this, again, has been achieved by separate, amending, regulations. Regulations will be introduced in 2006 to prohibit age discrimination.

The HRA enables ECHR rights to be enforced by UK courts. Under Art. 14 of the ECHR there must be no discrimination on an open-ended list of grounds in exercise of other ECHR rights. As the ECHR permits justification of direct discrimination, and there remains some uncertainty as to the standard of proof required, from a UK perspective this protection against discrimination is less certain than that provided under the anti-discrimination laws where such laws can be applied; in other areas, for example, discrimination in access to a fair trial the HRA (relying on Arts. 6 and 14 ECHR) would offer the only route to legal redress.

Pursuant to decisions of the European Court of Justice (ECJ), to the extent that any part of the present Directives or of those relating to equal pay or equal treatment between men and women have not been fully implemented by the UK after the designated date, those measures have direct vertical effect on the state or any emanation of the state. In practice this means that individuals can bring proceedings against the UK government or any public authority or any body subject to the authority and control of the state under any provision of a relevant Directive that has not been fully transposed into UK law.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?

Racial or ethnic origin:

The term “racial origin” is not used in UK legislation. In the Race Relations Act 1976(RRA) (s.3(1)) and the Race Relations (Northern Ireland) Order 1997(RRO) (art. 5(1))

“‘racial grounds’ means any of the following grounds, namely colour, race, nationality (including citizenship), ethnic and national origins”.

There is no definition in statute or case law of “race” or “racial origin”; since the first Race Relations Act in 1965 it has been clear that, as in Recital (6) of the Race Directive, the term has never been used to imply an acceptance of any theories regarding separate human races.

The meaning of “ethnic origins” or, “ethnic group” has been the subject of litigation. The judgment of Lord Fraser of Tullybelton in *Mandla –v- Lee*²⁸ remains the benchmark, which has been applied to establish that Jews, Gypsies and Irish Travellers are ethnic groups, but Muslims, Rastafarians are not:

“For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: – (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.

A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes, of the Act, a member. That appears to be consistent with the words at the end of subsection (1) of s.3: References to a person's racial group refer to any group into which he falls.’

Disability:

The status protected by the DDA is that of 'a disabled person', defined as 'a person who has a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities'.²⁹ The 'substantial adverse effect' must also be long-term, that is, to have lasted for at least 12 months, or the period for which it is likely to last is at least 12 months or it is likely to last the rest of the person's life.³⁰ Under the DDA an impairment is taken to affect a person's ability to carry out normal day-to-day activities only if it affects their mobility, manual dexterity, physical co-ordination, continence, ability to lift, carry or otherwise move everyday objects, speech, hearing or eyesight, memory or ability to concentrate, learn or understand, or their perception of the risk of physical danger.³¹

The focus is on what the applicant *cannot* do, rather than on what they *can* do.³² This focus on the negative aspects of the disability has been criticised as exposing applicants to demeaning cross-examination to establish the veracity of their claim, and to significant costs in obtaining medical verification of their incapacity. Increasingly it is the practice for

²⁸ [1983] IRLR 209

²⁹ DDA section 1 (1)

³⁰ DDA Schedule 1 Para. 2.

³¹ DDA Schedule 1 Para 4(1)

³² *Abedeh v British Telecommunications plc*, [2001, 156 ICR].

tribunals to hear medical evidence as to whether an impairment objectively exists, although whether the impairment is substantial remains a question of fact for the tribunal alone to determine.³³

Although 'mental impairment' is not defined by the DDA, the Act did originally state that if the mental impairment emanates from mental illness, disability will only be established if it is 'from, or consisting of, a mental illness that is clinically well recognised', as set out in the *WHO International Statistical Classification of Diseases and Related Health Problems (ICD)*.³⁴ This requirement was widely criticised, and section 18 of the Disability Discrimination Act 2005 (and the Disability Discrimination (Northern Ireland) Order 2006) has now removed it. However, anyone who has an impairment including one resulting from a mental illness, will still need to meet the requirements of the definition of disability. In addition to the above situations, the Act covers a number of special conditions, including progressive or asymptomatic conditions³⁵, controlled or corrected conditions, and severe disfigurement. Section 18 of the 2005 Act also provides that a person who has cancer, HIV infection or multiple sclerosis is to be deemed to meet the definition of disability, effectively from the point of diagnosis.

In order to have protection under the DDA, the definition of 'disabled' in the DDA must be satisfied regardless of whether a person is 'registered' as 'disabled' for the purposes of other legislation, or satisfies the eligibility conditions for certain disability-related benefits or concessions.

Sexual orientation

The English version of the Employment Framework Directive uses the words 'sexual orientation'. The GB and NI SO Regulations do the same. Regulation 2(1) defines 'sexual orientation' as 'a sexual orientation towards - (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of the same sex and of the opposite sex' (see also Regulation 2(2) of the NI Regulations). The Explanatory Memorandum published alongside the GB SO Regulations clarifies the definition by using the (apparently non-legal) words 'lesbian', 'gay', 'bisexual' and 'straight', and makes it clear why a definition was considered necessary: sexual orientation "does not extend to sexual practices and preferences".³⁶

Religion or belief

NI

The Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO), which outlaws discrimination on grounds of religious belief or political opinion, in Article 2(3) states, "*references to a person's religious belief or political opinion include references to –*

- a) his supposed religious belief or political opinion; and*
- b) the absence or supposed absence of any, or any particular, religious belief or political opinion."*

The FETO did not originally define further either "religious" or "belief"; the Fair Employment and Treatment Order(Amendment) Regulations (Northern Ireland) 2003 (FETO Regulations), however, add a further definition under article 2(2):

³³ *Abedeh v British Telecommunications plc*, [2001, 156 ICR].

³⁴ *Morgan v Staffordshire University*, [2002, IRLR 190].

³⁵ The Disability Discrimination Act 2005 provides that certain progressive conditions should be treated as a disability from the point of diagnosis.

³⁶ Employment Equality (Sexual Orientation) Regulations 2003 Explanatory Memorandum, Annex B, para. 5.

“ ‘religious belief’ in relation to discrimination or harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(2B) includes any religion or similar philosophical belief;” (see below re Article 3(2B))

GB

The Employment Equality (Religion or Belief) Regulations 2003 (RB Regulations) define “religion or belief” as “any religion, religious belief or similar philosophical belief”. Some commentators have queried whether this definition includes people with no religion or religious or philosophical belief within the protection of these Regulations. Sections 44 and 77 of the new Equality Act 2006 aim to clarify this point, providing that for both the purposes of the RB Regulations and the new provisions of the Act itself,

- ‘(a) “religion” means any religion,
- (b) “belief” means any religious or philosophical belief,
- (c) a reference to religion includes a reference to lack of religion, and
- (d) a reference to belief includes a reference to lack of belief.’

“Religion” itself is not defined. The Government made clear in Parliament that it expected religion or belief to be defined in accordance with case law. Guidance prepared by the statutory Advisory Conciliation and Arbitration Service (ACAS) states that when deciding what is a religion or similar belief the courts are likely to “consider things such as collective worship, a clear belief system, a profound belief affecting the way of life or view of the world”. The appendix to the ACAS guidance gives information on “commonly practised religions”.

Age

No legislation prohibiting age discrimination has yet been introduced by 1st February 2006. However, the draft age regulations published by the UK government contain no formal definition of ‘age’.

b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a ‘religion’)?

An amendment to the Crime and Disorder Act 1998, contained in the Anti-Terrorism, Crime and Security Act 2001, created ‘religiously-aggravated’ offences, and defines “religious group” as “a group of persons defined by reference to religious belief or lack of religious belief” but does not define “belief”. There is no statutory definition of religion under any other laws.

One useful reference for a common law definition of “religion” (but not “belief”) is the decision of the Charity Commissioners for England and Wales³⁷ rejecting the application by the Church of Scientology (England and Wales) to be a registered charity. In reaching their decision they considered English case law, the European Convention on Human Rights and decisions by the European Court of Human Rights as well as the law in other jurisdictions.

The Commissioners’ conclusions include the following:-

³⁷ 17 November 1999; www.charity-commission.gov.uk/registration/pdfs/cosfulldoc.pdf

The definition of a religion in English charity law was characterised by a belief in a supreme being and an expression of that belief through worship.

‘Belief in a supreme being’ is a necessary characteristic of religion for the purposes of English charity law, although it would not be proper to specify the nature of that supreme being or to require it to be analogous to the deity or supreme being of a particular religion. (The Commissioners did not accept that the requirement of a supreme being is no longer necessary to the concept of religion in English charity law and, contrary to Indian case law, they did not find themselves compelled to reject “theism” altogether.)

The criterion of ‘worship’ would be met where belief in a supreme being found its expression in conduct indicative of reverence for or veneration of a supreme being.

‘Age’ has not as yet been given a fixed meaning elsewhere in national law.

c) Are there any restrictions related to the scope of ‘age’ as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)

There is not yet legislation in GB or NI in relation to discrimination on grounds of ‘age’ and hence no definition or statutory restrictions. However, the draft GB age regulations published in July 2005 and the draft NI age regulations published in September 2005 contain no restrictions related to the scope of ‘age’ or any minimum or maximum age limits to the scope of the regulations.

2.1.2 Assumed and associated discrimination

a) Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.

b) Does national law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?

Disability

UK law on disability discrimination does not prohibit discrimination based on assumed or perceived characteristics as a disabled person or on association with a disabled person; the DDA protects only persons who can establish that they are ‘disabled’ or have previously been ‘disabled’ within the statutory definition set out in the legislation (other than in relation to protection against victimisation).

Other grounds

The UK law prohibiting discrimination on grounds of race and ethnic or national origins, religion or belief and sexual orientation includes prohibition against discrimination based on assumed characteristics and association. Such prohibition is not usually specifically stated in the legislation but is now well established based on case law under the RRA, which refers to discrimination “on racial grounds”.

In *Mandla –v- Lee*³⁸ Lord Fraser commented: “A person may treat another relatively unfavourably ‘on racial grounds’ because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous.” In *Showboat Entertainment Centre –v- Owens*³⁹ and in *Weathersfield(t/a Van & Truck Rentals) –v- Sargent*⁴⁰ the courts approved a broad interpretation of the expression “racial grounds”, upholding complaints of race discrimination by white employees dismissed for refusing to comply with instructions to discriminate against black customers.

Thus, in the Explanatory Notes accompanying the SO and RB Regulations, the government advised:

24. The use in regulation 3(1)(a) of the phrase “on grounds of sexual orientation / religion or belief” (rather than “on grounds of his/her sexual orientation / religion or belief”) follows the formula used in the RRA (“on racial grounds”), which has been interpreted broadly by the courts and tribunals. The wider formula means that discrimination based on perception, association or instructions is covered as described below.

Direct discrimination: perception

25. Direct discrimination “on grounds of sexual orientation / religion or belief” can also include discrimination based on A’s perception of B’s sexual orientation / religion or belief, whether the perception is right or wrong. This has been recognised by the House of Lords in relation to the RRA definition: see speech of Lord Fraser in *Mandla v Dowell Lee*... This means that people will be able to bring a claim even if the discrimination was based on (incorrect) assumptions about their sexual orientation / religion or belief. Nor will they be required to disclose their sexual orientation / religion or belief in bringing a claim of direct discrimination – it will be sufficient that they have suffered a disadvantage because of the assumptions made about their sexual orientation / religion or belief

Direct discrimination: association

26. In addition, direct discrimination “on grounds of sexual orientation / religion or belief” covers discrimination against a person by reason of the sexual orientation / religion or belief of someone with whom the person associates. For example, an employee may be treated less favourably because of the religion of his or her partner, or because his or her son is gay. This has been recognised by the House of Lords in relation to the RRA definition: see paragraph 80 of Lord Hope’s speech in *MacDonald v Advocate General for Scotland* [2003] UKHL 34.⁴¹

The Equality Act 2006 prohibits discrimination on the grounds of religion and belief in the provision of goods, facilities and services, as well as in education, housing and public functions. Section 45 prohibits discrimination of this type on the basis of association or assumed belief. These provisions are expected to come into effect in October 2006. Draft reg. 3 of the draft age regulations explicitly prohibit discrimination on the grounds of a person’s ‘apparent age’: this may mean that, as with the case of disability, discrimination on

³⁸ [1983] IRLR 209

³⁹ [1984] IRLR 7

⁴⁰ [1999] IRLR 94

⁴¹ The House of Lords drew from case law under the RRA and the FETO the fact that the words “on grounds of” enable, in relevant circumstances, the characteristics of third parties to be taken into consideration. (per Lord Hope paragraphs 80 – 82)

age grounds against persons associated with a person of a particular age may not be unlawful, as it appears to only prohibit discrimination against a person directly on account of their own particular or apparent age.

2.2 Direct discrimination (Article 2(2)(a))

a) How is direct discrimination defined in national law?

Disability

There are now **three** definitions of discrimination in the DDA, a new definition of “direct discrimination” has been added to meet the requirements of Directive 2000/78 (and therefore applying only to employment-related discrimination).

1) Discrimination against a disabled person for a reason relating to their disability, which allows defence of justification (DDA s. 3A (1)):

A person discriminates against a disabled person if

- a) for a reason which relates to the disabled person's disability, he treats that person less favourably than he treats others to whom that reason does not, or would not, apply, and*
- b) he cannot show that the treatment in question is justified.*

2) Direct discrimination, that excludes a defence of justification (DDA s.3A (5)):

A person directly discriminates against a disabled person if, on the ground of the disabled person's disability he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.

The following examples illustrate the way the two definitions might apply:

Direct discrimination (under 2 above) occurs when the relevant circumstances of the disabled person and the (real or hypothetical) comparator are the same or nearly the same but for the disabled person's disability. This may involve an employer acting on the basis of a stereotype rather than enquiring whether the disabled person can do the job; for example an employer who rejects an application by a person using a wheel chair for a receptionist job for which she is well qualified, because he thinks a wheel chair in the front office will give a wrong image to customers; this would constitute direct discrimination, as he would not treat a person who does not use a wheel chair in the same way.

If, however, the job applicant in the above example had severe arthritis and was not able to do some of the tasks which the job involved and for that reason was not offered the job, this would be less favourable treatment for a reason related to the disabled person's disability (under (1) above); unlike the first example, this is not a case of comparing people equally able to do the job, since, in a relevant regard, namely carrying out the required tasks, the disabled woman's circumstances are different from those of a person who is able to carry out all of the tasks. Whether it would constitute unlawful discrimination would depend on whether the employer could justify his decision not to offer her the job.

3) It is also discrimination to fail to comply with the duty to make a reasonable adjustment in relation to a disabled person (DDA s. 3A(2)) (see 2.6 below).

Race, sexual orientation, religion or belief

There is a consistent definition of direct discrimination (although not specifically labelled as such):

A person discriminates against another person on racial grounds/on grounds of sexual orientation/ on grounds of religion or belief if he treats that other less favourably than he treats or would treat other persons. (See RRA s.1(1)(a); SO Regulations, reg. 3(1)(a); RB Regulations reg. 3(1)(a); RRO art. 3(1)(a); FETO art. 3(2)(a); NI SO Regulations reg 3(1)(a), section 45 of the Equality Act.

Draft reg. 3 of the draft age regulations adopt a similar approach, except that as direct age discrimination can be objectively justified, it also requires that if the existence of less favourable treatment has been shown, the alleged discriminator must also be unable to show that the treatment is a proportionate means of achieving a legitimate aim.

Each of the UK laws includes a further provision making clear the need to have a relevant (real or hypothetical) comparator, using either identical or similar wording as the following:

A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other. (RRA s.3(4) ; SO Regulations reg. 3(2); RB Regulations reg. 3(2); RRO 3(1c); FETO art. 3(3); NI SO Regulations reg. 3(2); section 45 of the Equality Act 2006)

Cases of direct discrimination under both the RRA and SDA have established the following principles:

- The intention or motive of the discriminator is not relevant to liability; the test is whether *but for* the person's race or sex he or she would have been subjected to the treatment complained of⁴². This was recently reinforced in the recent Prague Airport case⁴³ where the House of Lords, acknowledging that, on the facts, immigration officers may have had good reason to treat Roma more sceptically than non-Roma, stated that to do so would involve acting on racial grounds and, for purposes of direct racial discrimination the reason is irrelevant. Stereotyping on racial grounds is wrong, not only if it is untrue, otherwise this would imply that direct discrimination can be justified.
- As the definition says "treats or would treat" a hypothetical comparator is acceptable.⁴⁴ In the absence of an actual comparator, the court must construct a hypothetical comparator to show how a person of the other racial group or sex would have been treated.⁴⁵

The RRA(s.1(2)) and the RRO(art. 3(2)) make segregation on racial grounds a form of direct discrimination:

"... for the purposes of this Act/Order, segregating a person from other persons on racial grounds is treating him less favourably than they are treated."

⁴² *James –v- Eastleigh Borough Council* [1990] 2 AC 751

⁴³ *R -v- Immigration Officer at Prague Airport & Anor.ex parte ERRC and others* [2004]UKHL 55

⁴⁴ *Chief Constable of West Yorkshire –v- Vento* [2001] IRLR 124

⁴⁵ *Balamoody –v- UK Central Council for Nursing, Midwifery and Health Visiting* [2002] IRLR 288

b) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).

- Other than in respect of the first definition of disability discrimination (DDA s.3A(1)) cited above, the UK anti-discrimination legislation does not permit justification of direct discrimination on the grounds of discrimination to which the legislation applies.⁴⁶ S. 3A(1) of the DDA relates to less favourable treatment on the grounds of disability, which sections 3A(4) and (5) provide cannot be justified if it amounts to direct discrimination on the grounds of a disability.

[Note: Regulation 3 of the Employment Equality (Age) Regulations, permits direct discrimination on grounds of age if it can be objectively justified, as provided for by Article 6 of Directive 2000/78/EC.]

- Outside the scope of the anti-discrimination legislation, as noted above, direct discrimination under Article 14 ECHR can be justified. The approach, as for other breaches of human rights principles, is one of proportionality, with the test being whether the discriminator can show that a legitimate aim exists and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Justification for less favourable treatment of a disabled person for a reason related to their disability

Once a discriminatory act on the grounds of disability has been shown on the balance of probabilities to exist, the employer can only avoid a finding of unlawful discrimination if it can show that the less favourable treatment was *justified*. Treatment is *justified*

“if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.” (DDA s.3A(3))

The DRC Code of Practice⁴⁷ stresses that ‘material’ means that there must be a reasonably strong connection between the reason given for the treatment and the circumstances of the particular case; ‘substantial’ means that the reason must carry real weight and be of substance. The Code of Practice provides a series of examples to explain the scope of the defence.

c) In relation to age discrimination, if the definition is based on ‘less favourable treatment’ does the law specify how a comparison is to be made?

There is not yet UK legislation in relation to age discrimination. However, the draft age regulations do not specify how the comparison is to be made. It is expected that the ‘but for’ approach applied above will also be applied in the age context. Draft reg. 3(2) of the GB age regulations does give examples of treatment which could be deemed to be objectively justified. (Note that the the regulations finally laid before and approved by Parliament in 2006 do not include examples of such treatment. However, guidance includes such examples).

⁴⁶ *Ratcliffe –v- North Yorkshire CC* [1995] IRLR 439

⁴⁷ Code of Practice – Employment and Occupation 2004, pp. 83 – 85. For disability, but also for grounds of race, religious belief or political opinion and sex there are Codes of Practice issued by the Equality Commission for Northern Ireland that apply in Northern Ireland.

2.2.1 Situation Testing

a) *Does national law permit the use of ‘situational testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court.*

UK law provides that if a person has been subject to direct discrimination, then a claim can be brought under anti-discrimination legislation. There is no legal bar to ‘situational testing’ being used as evidence to establish that direct discrimination is occurring, as long as a person has been subject to less favourable treatment. There is no legal definition of this term, nor are there any particular procedural conditions for its admissibility, or barriers to its use once its relevance has been established.

b) *Outline important case-law within the national legal system on this issue.*

There is little case-law on the use of ‘situational testing’, and none that establishes any significant precedent. However, the House of Lords in *R (European Roma Rights Centre) v Chief Immigration Officer, Prague Airport*⁴⁸ were willing to accept evidence obtained through situational testing as relevant and admissible testimony, along with other forms of evidence.

c) *Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

‘Situation testing’ is rarely used at present in the UK. The types of direct forms of discrimination that it is effective at identifying are less common now, and it can often be difficult to establish a clear case of direct discrimination using this method. Community groups do periodically use this method to put pressure on bars and night clubs that they feel are restricting entry to ethnic minority groups: often, its use may generate changes in practice that do not require litigation. The Commission for Racial Equality has produced some internal guidance for its staff on the use of situational testing, including examples of where and when it could be used.

2.3 Indirect discrimination (Article 2(2)(b))

a) *How is indirect discrimination defined in national law?*

The 2003 Regulations introduced a definition of indirect discrimination that applies to all activities within the scope of the RB Regulations, SO Regulations and NI SO Regulations. It applies to certain activities within the scope of the FETO, as specified in art. 3(2B), and to certain activities within the scope of the RRA, as specified in s.1(1B)⁴⁹, and in the RRA and

⁴⁸ [2004] UKHL 55

⁴⁹ subsection 1(1B) sets out an exhaustive list of activities within the scope of the 1976 Act that are presumed to be within the material scope of the Race Directive (art.3.1) to which most of the amendments to the RRA apply (the description in italics are the author’s and not part of the RR Regulations) :

(a) Part II (*all employment related activities*)

(b) sections 17 to 18D (*education*)

(c) section 19B (*functions of public authorities*), so far as relating to

(i) any form of social security;

(ii) health care;

(iii) other forms of social protection; and

(iv) any form of social advantage,

(d) sections 20 to 24 (*housing and disposal of premises*)

(e) sections 26A and 26B (*discrimination by and against barristers and advocates*), and

(f) Part IV (*instructions to discriminate, discriminatory advertisements etc.*), in its application to the provisions referred in paragraphs (a) to (e).

RRO to grounds of race and ethnic and national origins but not grounds of colour or nationality.

The draft age regulations use a similar definition as that used in the 2003 Regulations, while the Equality Act 2006 uses a slightly different and potentially weaker definition in prohibiting indirect discrimination on the grounds of religion or belief in the provision of goods and services.

Racial and Ethnic Origin - GB

The RRA contains two definitions of indirect discrimination:

Since July 2003 the following definition of indirect discrimination applies on grounds of race or ethnic or national origins and in relation to activities within s.1(1B)

1(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 -

- (a) which puts or would put persons of the same race or national or ethnic origins as that other at a particular disadvantage when compared with other persons,*
- (b) which puts that other at that disadvantage, and*
- (c) which he cannot show to be a proportionate means of achieving a legitimate aim.”*

The original definition of indirect discrimination (RRA s.1(1)(b)) continues to apply where the grounds are those of colour or nationality or where the activity in question, while within the scope of the RRA, is not specified in new section 1(1B), for example search by the police or planning control by local authorities (RRA ss. 19A and 19B). These areas are considered by the UK government to be outside the scope of the Race Directive.

1(1)(b) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but –

- (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and*
- (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and*
- (iii) which is to the detriment of that other because he cannot comply with it.*

Racial and ethnic origin and Religion or Belief - NI

Since amendment by the NI RR Regulations and the FETO Regulations, the RRO and the FETO also now contains the above two definitions of indirect discrimination. In the RRO, the original definition applies where the grounds are those of colour or nationality, and the new definition applies where the grounds are race or ethnic or national origins. In the FETO the new definition applies only to activities specified in art. 3(2B)⁵⁰

⁵⁰ 3(2B) The provisions mentioned in paragraph (2A) are - (Italics are the author's)
 (a) Part III; (*employment and employment related activities*)

Sexual orientation/Age – GB and NI - and Religion or Belief - GB

Reg. 3(1)(b) of the SO and RB Regulations 2003 provides that:

a person ('A') discriminates against another person ('B') if ... A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same sexual orientation/religion or belief as B, but

(i) which puts or would put persons of the same sexual orientation/religion or belief as B at a particular disadvantage when compared with other persons,

(ii) which puts B at that disadvantage, and

(iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

However, section 45(3) of the Equality Act 2006 adopts the following definition in prohibiting indirect discrimination on the grounds of religion or belief in the provision of goods, facilities and services and public functions.

(a) A person ("A") discriminates against another ("B") for the purposes of this Part if A applies to B a provision, criterion or practice- which he applies or would apply equally to persons not of B's religion or belief,

(b) which puts persons of B's religion or belief at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances),

(c) which puts B at a disadvantage compared to some or all persons who are not of his religion or belief (where there is no material difference in the relevant circumstances), and

(d) which A cannot reasonably justify by reference to matters other than B's religion or belief.

This definition could be considered to be slightly weaker than that used in the SO and RB Regulations, as it refers to 'reasonably justify' rather than 'show to be a proportionate means of achieving a legitimate aim'. It is not clear why this alternative definition was used.

Draft age reg. 3 uses a similar definition as that used in the SO and RB Regulations, except that it refers to 'age groups': it prohibits discrimination where

- ◆ an apparently neutral provision, criterion or practice puts or would put persons of a certain age group at a particular disadvantage compared with other persons;
- ◆ a person of that certain age group suffers that disadvantage; and
- ◆ there is no objective justification for the provision, criterion or practice.⁵¹

Disability – GB and NI

There is no definition of indirect discrimination in the DDA. Some instances of 'less favourable treatment for a reason which relates to the disabled person's disability' and failures to make reasonable adjustment where required to do so by the legislation may be comparable in effect to indirect discrimination, but the scope of indirect discrimination, which under the Directive can be anticipatory, is wider than the provisions of the DDA.

b) What test must be satisfied to justify indirect discrimination?

(b) Article 27 (*further and higher education*), so far as it applies to vocational training or vocational guidance;

(c) Article 32 (*barristers*); and

(d) Part V (*other unlawful acts, e.g. discriminatory advertisements*), in its application to the provisions referred to in sub-paragraphs (a) to (c).".

⁵¹ See *Coming of Age*, (London: DTI, 2005), p. 23.

Under the earlier definition that applies under the RRA and RRO on grounds of colour or nationality and under the RRA for activities not specified in subsection 1(1B) and under FETO for activities outside art. 3(2B) the alleged discriminator must show that the requirement or condition in question is justifiable irrespective of the racial group/religious belief or political opinion of the person to whom it is applied.

The ECJ interpretation of ‘justifiable’ indirect discrimination in *Bilka-Kaufhaus GmbH –v- Weber von Hartz*⁵² was adopted by the UK courts in respect of the earlier RRA/RRO/FETO definition. Thus a requirement or condition would be justifiable only where it corresponds to a real need of the organisation, and, with a view to achieving the objective pursued, is appropriate and necessary. In *Hampson –v- DES*⁵³ the Court of Appeal, applying the *Bilka* test, stated that “justifiable” requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.

To justify indirect discrimination under the 2003 Regulations, the alleged discriminator must show that the provision, criterion or practice in question is a proportionate means of achieving a legitimate aim. There are not yet any reported decisions offering an interpretation of this new definition.

There are no cases as yet either on the requirement in s. 45(3) of the Equality Act 2006 to ‘reasonably justify’ the provision, criterion or practice in question where indirect discrimination on the grounds of religion or belief is alleged to have occurred in the provision of goods and services. These provisions are not yet in force.

c) Is this compatible with the Directives?

The new, wider, definition was introduced into UK legislation for purposes of compliance with the Directives. Nevertheless, this definition of indirect discrimination could be potentially seen as narrower than that in the Directives in its application, since, unlike the Directives, it would not apply to disadvantage which could be anticipated before the provision, criterion or practice was actually applied. Some commentators suggest that the UK definition is also more restrictive by requiring evidence that there is a group defined by the particular characteristic (of which the affected person is a member) which is disadvantaged, while under the Directive indirect discrimination could occur when only one person defined by the particular characteristic was put at a disadvantage.

Until there is a body of case law it is difficult to assess whether the justification test in the Directive is adequately transposed in the 2003 Regulations; the Regulations refer to “a proportionate means” of achieving a legitimate aim, which may be interpreted as imposing a less rigorous test than to show that the provision, criterion or practice, as a means of achieving a legitimate aim, is both “appropriate and necessary”, as required in the Directives.

However, the UK courts would probably be able to give effect to the Directive’s requirements by interpreting the test provided for by the Regulations in line with that specified in the Directive.

The earlier and more restrictive definition that is still part of the RRA, RRO and FETO, and which still applies to those areas which are outside the scope of the Directives, appears not to be in line with the Directives. The definition used in s. 45 of the Equality Act also appears to be not in line with the Directives.

d) In relation to age discrimination, does the law specify how a comparison is to be made?

⁵² Case 170/[1986] ECR 160

⁵³ [1990] IRLR 302

- There is not yet UK legislation on age discrimination. However, as noted above, draft age reg. 3 uses a similar definition as that used for the other grounds, except that it refers to ‘age groups’: it prohibits discrimination where an apparently neutral provision, criterion or practice puts or would put persons of a certain age group at a particular disadvantage compared with other persons;
- a person of that certain age group suffers that disadvantage; and
- there is no objective justification for the provision, criterion or practice.⁵⁴

3(4) defines ‘age group’ as a “group of persons defined by reference to age, whether by reference to a particular age or a range of ages”. Aside from this, the draft regulations do not specify how a comparison is to be made.

2.3.1 Statistical Evidence

a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?

Statistical evidence may be used as evidence from which the existence of indirect discrimination can be inferred, as long as it is relevant and of real evidential value in the circumstances. There exist no restrictions in UK law on the use of such statistics.

b) Is the use of such evidence commonly used?

Yes, especially in race and gender cases.

c) Please illustrate the most important case law in this area.

In *West Midlands Passenger Transport Executive v Singh*,⁵⁵ the Court of Appeal laid down extensive guidance as to the use of statistics in race discrimination cases. Statistical evidence is not conclusive and definite proof by itself, but in the absence of a satisfactory explanation of clear-cut statistical disadvantage, an inference of discrimination can be established, depending upon the circumstances.

In the sex discrimination case of *London Underground v Edwards (No 2)*, the EAT decided that it could take into account national statistical patterns that indicated that women had greater primary care responsibility for children than men in general.⁵⁶ The Court of Appeal confirmed this approach as correct, and it is expected to be applied across all the grounds covered by the Directives. See also *CRE v Dutton*,⁵⁷ and *Perera v Civil Service Commissioners*.⁵⁸

d) Are there national rules which permit data collection? Please answer in respect of all 5 grounds.

There are no national rules that restrict data collection in respect of all 5 of the grounds, although organisations are subject to data protection requirements that prevent the collection and retention of data in a form that would identify specific individuals. Individuals also can

⁵⁴ See *Coming of Age*, (London: DTI, 2005), p. 23.

⁵⁵ [1988] IRLR 186

⁵⁶ [1999] IRLR 364

⁵⁷ [1989] IRLR 8

⁵⁸ [1977] IRLR 291

refuse to reveal personal data.⁵⁹ Many employers collect data on the ethnic composition of their workforce, and this practice is becoming more common for disability and age. It is still rare for data on sexual orientation and religious belief to be collected, although certain organisations have introduced some data collection in these areas, with considerable caution and sensitivity. The position in Northern Ireland is different: see below.

UK anti-discrimination law can require that statistical data be produced in certain circumstances. Before proceedings have commenced, a complainant can under the UK's anti-discrimination legislation ask an alleged discriminator for answers to specific questions set out in a questionnaire format. Replies to the questionnaire are admissible in evidence. A failure to reply, or inadequate replies, may give rise to an inference of discrimination. A tribunal can also order that written answers be given to specific questions before proceedings commence, and can make this order either at the request of one of the parties to the action, or on its own authority.⁶⁰ The production of evidence can also be ordered to be disclosed by a court or tribunal during the proceedings of a case.

Through all these different means, statistical data can be ordered to be disclosed for the benefit of a complainant. However, a tribunal or court may refuse a request for disclosure of statistical evidence if it requires the employer to provide material that is not readily available, or it means that an employer is required to begin a process of data collection that would add unnecessarily to the length and cost of a hearing. An employer can also refuse to provide statistical evidence if it is confidential in nature, protected from the disclosure by the Data Protection Act 1998, irrelevant or covered by legal professional privilege. Inferences of discrimination would not normally arise from a failure to disclose such material.

The collection and publication of statistics by public authorities is sometimes required by law. In Northern Ireland, the Fair Employment Act 1989 imposed a positive duty on employers with a workforce of ten employees or more to take measures to ensure a fair proportion of Catholics and Protestants in their workforce. This 'employment equity' duty has been extended and modified by the Fair Employment and Treatment (Northern Ireland) Order 1998 ("FETO"). Employers with ten or more employees are required to monitor annually the 'community composition' of their workforce, and every three years to review their recruitment, promotion and training practices.

In GB, there is a general statutory duty upon British public authorities to eliminate unlawful race and disability discrimination and to promote equality of opportunity between persons of different ethnic groups and for all persons with disabilities. As part of giving effect to this duty, public authorities are often required to monitor the ethnic composition of their workforce and the relevant pools of service users, as well as the numbers of disabled persons they employ and who use their services. The CRE publishes guidance as to how public authorities should conduct monitoring of the ethnic composition of their workforce and service users, and what ethnic categories should be used.⁶¹ Standard practice is to use the categories of a) White, with options for White British, White Irish, White Other; b) Mixed, with options to tick White and Black Caribbean, White and Black African, White and Asian or any other mixed background; c) Asian or Asian British, with options for Pakistani, Bangladeshi, Indian, Other Asian background; d) Black or Black British, with options for Black African, Black Caribbean, or Other Black background; e) Chinese or Other Ethnic, and f) mixed categories. It is beginning to be more common for membership of the travelling

⁵⁹ There is little data on why individuals choose to do this, or what ethnic groups are more likely to refrain from revealing data. The extent to which individuals in a particular workplace refuse to reveal personal data varies considerably.

⁶⁰ See Employment Tribunal Rules rule 4(3)

⁶¹ See <http://www.cre.gov.uk/duty/ethnicmonitoring.html> (last accessed 31st January 2006) for the detailed guidelines.

community or Roma ethnicity to be included in these categories. The DRC has issued similar guidance for monitoring in accordance with the disability equality duty, which comes into force in December 2006.⁶²

The Equality Act 2006 imposes a new duty to promote equality of opportunity on the basis of gender on GB public authorities, so similar monitoring requirements will be imposed under this duty. This will come into effect in April 2007.

In NI, section 75 of the Northern Ireland Act 1998 imposes a duty on specified public authorities to have “due regard to the need to promote equality of opportunity” across all the equality grounds, and again this can require the collection of data, including data on religious belief, age, disability and the other equality grounds. Again, collection of such data is usually subject to the data protection laws discussed above, and the Equality Commission for Northern Ireland has issued guidance on monitoring.

2.4 Harassment (Article 2(3))

a) How is harassment defined in national law?

A definition of harassment has been incorporated into the RRA, the RRO, the DDA and the FETO⁶³ and is included in the SO Regulations in GB and NI and the RB Regulations in GB, as well as in the draft age regulations:

(1) A person ('A') subjects another person ('B') to harassment where, on racial grounds/on grounds of sexual orientation/religion or belief, A engages in unwanted conduct which has the purpose or effect of –

(a) violating B's dignity; or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B'.

(2) conduct shall be regarded as having the effect specified in paragraph (a) or effect (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.

In the DDA harassment, as defined in s.3B, was added by the DD Regulations and the NI DD Regulations; it applies only in relation to employment, including members of locally electable authorities and employment services, and the definition is slightly different from the above because the UK legislation on disability discrimination is intended to protect only disabled people:

(1) A person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of –

(a) violating the disabled person's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

⁶² See DRC, *Code of Practice on the Disability Equality Duty*, available at <http://www.drc-gh.org/thelaw/publicsectordutycodes.asp>

⁶³ For grounds of colour and nationality under the RRA and RRO, for activities under the RRA not specified in subsection 1(1B) and for activities under FETO outside art. 3(2B) the new statutory definition of harassment does not apply; instead the definition of harassment that has been developed through case law, requiring a real or hypothetical comparator will continue to apply.

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

Until the 2003 Regulations came into force, there was no definition of harassment in the RRA or other anti-discrimination statutes. From the 1980's the courts gradually recognised the consequences of racial (or sexual) harassment and accepted that racial harassment (and sexual harassment) were forms of conduct that Parliament, in passing the anti-discrimination laws had intended to prohibit. In 1986⁶⁴ the Scottish Court of Sessions, as a court of appeal, established that sexual harassment could constitute direct discrimination, and in the context of employment⁶⁵, sexual harassment could constitute a *detriment*⁶⁶ under the SDA (s.6(2)(c)). In a number of cases that followed, the nature of the harassment was regarded as sufficiently race-specific, or sex-specific, so that the complainant did not need to point to a comparator of a different racial group, or different sex, to demonstrate that the treatment amounted to racial or sexual discrimination. However, in 2003 the House of Lords⁶⁷ overruled many of these earlier decisions. They held that to bring sexual harassment within the direct discrimination provisions of the SDA there must always be a comparator. This requirement applies not only to sexual harassment but to any harassment on racial grounds or grounds of religion or belief in NI that is not within the new statutory definitions.

Case law has defined other aspects of racial/sexual harassment. For example, it has been established that a court can look at a number of incidents that form a course of conduct based on race/sex; on the other hand a one-off event of sufficient seriousness can amount to racial/sexual harassment and to a detriment. The courts have established that it is a subjective matter for the victim whether certain acts undermined their dignity or created a threatening, hostile, intimidating or degrading environment.

In, a decision under the SDA⁶⁸, the EAT offered guidance to employment tribunals:

"A characteristic of sexual harassment is that it undermines the victim's dignity at work. It creates an 'offensive' or 'hostile' environment for the victim and an arbitrary barrier to sexual equality in the workplace."

"The essential characteristic of sexual harassment is that it is words or conduct which are unwelcome to the recipient and it is for the recipient to decide for themselves what is acceptable to them and what they regard as offensive."

"Because it is for each individual to determine what they find unwelcome or offensive, there may be a gap between what a tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that the complaint must be dismissed because the tribunal would not have regarded the acts complained of as unacceptable."

In transposing the Directives and introducing a statutory definition of harassment it was necessary to ensure that the level of protection was not less than that which already existed under case law – to comply with the principle of 'non-regression' in the Directives. Thus,

⁶⁴ *Strathclyde Regional Council –v- Porcelli* [1986] IRLR 134

⁶⁵ The Sex Discrimination 1975 (s.6(2)(b) and the RRA s.4(2)(c)) include as a form of discrimination by an employer "by dismissing [the employee] or subjecting [the employee] to any other detriment".

⁶⁶ Both the SDA and RRA refer to "any other detriment" as one aspect of treatment by an employer in which discrimination is prohibited; "detriment" has been interpreted to mean 'put to a disadvantage'.

⁶⁷ *Macdonald –v- Advocate General for Scotland and Pearce –v- Governing Body of Mayfield Secondary School* [2003] IRLR 512

⁶⁸ *Reed and Bull Information Systems Ltd. –v- Stedman* [1999] IRLR 299

the above definition of 'harassment' in the RR Regulations and the other 2003 Regulations differs from that in the Directives as it uses "or" instead of "and" between paragraphs (a) and (b) of subsection (1), making it closer to that established by case law. However, in subsection (2), the new statutory definition includes a further test, namely that the unwanted conduct shall be regarded (by any court or tribunal) as *having the effect in 1(a) or 1(b) only if* "it should *reasonably be considered as having that effect*. While the court or tribunal must have regard to all the circumstances including the perception of the victim, it is the view of some commentators that this test reduces the protection against racial harassment from that established by case law (see *Reed and Bull Information Systems Ltd –v- Stedman* referred to above) and therefore is likely to conflict with Article 6.2 of the Race Directive.

No separate prohibition of harassment on the grounds of religion or belief in the provision of goods and services is contained in the Equality Act 2006: see below.

Harassment on grounds of sexual orientation

There are not yet any appellate level cases concerning harassment on grounds of sexual orientation. While some hypothetical scenarios would clearly come within the SO Regulations, there are others that may not.

Harassment in the form of words or physical acts that demonstrates hostility against LGB persons will be caught by reg. 5(1), as unwanted conduct 'on grounds of sexual orientation', whether or not it involves unwelcome sexual advances. A single unwanted revelation of an LGB employee's sexual orientation might not be sufficient to constitute harassment, whereas repeated revelations might be (e.g., posting notices in multiple locations around a workplace, sending a series of e-mail messages)

Unwelcome sexual advances will be caught by reg. 5(1) as 'unwanted conduct which has the purpose or effect of ... violating [the victim's] dignity; or ... creating an intimidating ... environment for [the victim]'. However, it will not necessarily be clear that the unwanted conduct was 'related to sexual orientation'? This might sometimes be the case: a gay man sexually harasses another gay man because he thinks that the victim might be receptive, and would not have treated a heterosexual man in this way; or a heterosexual man sexually harasses gay or bisexual men because he does not want to see them in the workplace, and would not have treated heterosexual men in this way.

But this will not always be the case: a gay man sexually harasses men he finds attractive, whether or not they are gay, bisexual or heterosexual, or a bisexual man sexually harasses persons he finds attractive, regardless of their sex or sexual orientation. Arguably cases of this sort may be more suitably considered under legislation prohibiting harassment of a sexual nature as in Directive 2002/73/EC.⁶⁹

Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.

Harassment can, of course, take various forms, from physical assault to offensive banter. Many of the different forms of conduct that could constitute harassment are prohibited under criminal law in the UK.

⁶⁹ Art. 1(2) inserts into Council Directive 76/207/EEC a new art. 2(2)-(3), which expressly prohibits 'sexual harassment' as sex discrimination and defines it as: 'where any form of unwanted verbal, non-verbal or physical *conduct of a sexual nature* occurs, with the purpose or effect of violating the dignity of a person ...' (emphasis added).

The 1986 Public Order Act includes for GB offences of inciting racial hatred (Part III) and offences concerned with causing harassment, alarm or distress or creating fear or provoking violence (Part I). The Public Order (Northern Ireland) Order 1987 includes offences of inciting hatred or arousing fear on grounds of race or religious belief, and on grounds of sexual orientation and disability.⁷⁰

The Protection from Harassment Act 1997 and the Protection from Harassment (Northern Ireland) Order 1997 prohibit harassment both as a tort and a criminal offence. Harassment is not specifically defined; it requires conduct (including speech) on at least two occasions, and can include alarming the victim or causing them distress. The criminal offence is punishable by 6 months imprisonment or a fine or both.

The Crime and Disorder Act 1998, as amended by the Anti-Terrorism, Crime and Security Act 2001, creates racially and religiously aggravated offences (including offences of assault, harassment and criminal damage), which carry higher sentences than the same offence without aggravation. It also provides that in sentencing for any other offences which are racially or religiously aggravated the court shall treat that as an aggravating factor that could lead to a more severe sentence. The Criminal Justice Act 2003 provides that in sentencing for offences aggravated on grounds of disability or sexual orientation the court must treat that as an aggravating factor increasing the sentence.

The Criminal Justice (No.2)(Northern Ireland) Order 2004 requires a court in considering the sentence for an offence to treat as serious any offences which are aggravated by hostility based on the victim's membership (or presumed membership) of a particular racial, religious or sexual orientation group or based on a disability or presumed disability of the victim. This would apply to the Protection Against Harassment (Northern Ireland) Order 1997 when the offence of harassment was aggravated on one of the specified grounds.

In section 10(1) of the Damages (Scotland) Act 1976 (interpretation), in the definition of "personal injuries", after "to reputation" there is inserted ", or injury resulting from harassment actionable under section 8 of the Protection from Harassment Act 1997"

b) Is harassment prohibited as a form of discrimination?

An important feature of the Directives and the 2003 Regulations is that harassment is prohibited not as a form of direct discrimination but as a separate form of unlawful conduct. Draft reg. 6 of the draft age regulations adopts the same approach. In practical terms this means that, unlike the earlier case law, the new explicit statutory definition of harassment does not require a comparator. This fact is likely to reduce significantly the impact, in practice, of the decision in Pearce so far as it required a comparator to prove racial or sexual harassment.

In the passage of the Equality Act 2006 through Parliament, the UK government encountered many difficulties in attempting to draft a similar form of explicit prohibition of harassment on the grounds of religion or belief in the provision of public functions, education and housing. In the debates on the text of the Bill in Parliament, concerns were expressed as to the impact of this prohibition on free speech, and the Act now contains no explicit prohibition of harassment as a separate form of unlawful conduct.

⁷⁰ Amended by the Criminal Justice No.2 (NI) Order 2004

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

There is brief reference and five examples of harassment in the Disability Rights Commission Code of Practice for Employment and Occupation⁷¹ and other examples are also available in the Disability Code of Practice produced by the Equality Commission for Northern Ireland.⁷² The revised CRE Code of Practice for Employment has been recently issued and offers extensive guidance on harassment in the context of race and ethnic origin.⁷³ The guidance published by ACAS⁷⁴ on religion or belief and sexual orientation discrimination includes some information and examples on harassment. The Code of Practice on Fair Employment produced by the Equality Commission for Northern Ireland contains similar guidance on discrimination on the grounds of religion or belief, and political opinion.⁷⁵

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

Both instructions to discriminate and pressure or inducement to discriminate are explicitly prohibited under national law for grounds of race, disability and, in NI religious belief or political opinion, but, other than in NI under FETO, without a right for individuals to seek legal redress. Of course, where instructions to discriminate result in acts of unlawful discrimination, any person subjected to less favourable treatment could seek legal redress in respect of such acts.

The RRA (s.30) and RRO (art. 30) and the DDA (s.16C) make it unlawful to instruct a person to do an act which is made unlawful by the Act/Order including discrimination, victimisation etc. in all of the activities within the scope of the Act/Order. The Act and the Order limit instructions to discriminate to instructions by a person:-

- a) who has authority over another, or
- b) in accordance with whose wishes that other person is accustomed to act.

The main distinction between UK legislation and the Directive is in the means of enforcement. The Directive includes instructions to discriminate within the concept of discrimination for which a right of individual redress should, under Article 7.1, be available. Under the UK legislation, enforcement of the prohibition of discriminatory instructions lies solely with the CRE, DRC and the ECNI (RRA s.63), (RRO art.60), (DDA s. 17B), and the Equality Act 2006 now provides for enforcement of these provisions to be undertaken by the soon to be established Commission for Equality and Human Rights. The approach in the UK legislation may reflect the view that discriminatory instructions could lead to discrimination against an open and undefined group of persons, and therefore enforcement by the statutory agency is more appropriate.

Instructions to discriminate on grounds of sexual orientation and religion or belief in GB are not explicitly prohibited. The position is different for religion and belief in Northern Ireland, under FETO (art.35), which brings together aiding, inciting, directing, procuring and inducing another to do unlawful acts, and states that the person who directs another to discriminate “*shall be treated ... as if he, as well as that other, had done that act.*”

⁷¹ Available at <http://www.drc-gb.org/thelaw/practice.asp>

⁷² Available at <http://www.equalityni.org/uploads/pdf/DisEmploymentCOP05F.pdf>

⁷³ The code is available at <http://www.cre.gov.uk/gdpract/employmentcode2005.html>

⁷⁴ www.acas.org.uk/publications

⁷⁵ *Code of Practice – Fair Employment* (Belfast: ECNI, 2003); extracts are available at <http://www.equalityni.org/uploads/word/finalChpt5excerpts260203.doc>

However, instructions to discriminate on these grounds of religion or belief and sexual orientation could be implicitly covered in certain circumstances in both GB and NI, as the sexual orientation and religious discrimination legislation, as noted above, use the wider definition of discrimination derived from the RRA, which prohibits discrimination ‘on the grounds of’ the prohibited ground. This has been recognised by the Court of Appeal to cover instructions to discriminate where the plaintiff is subject to a detriment: see Weathersfield Ltd. v. Sargent [1999] IRLR 94. DTI guidance states that “this wider formulation means that discrimination based on perception, association or instructions is covered”: see Section 2.1.4 above. Therefore, instructions to discriminate on the grounds of sexual orientation and religion or belief could be classed as discrimination ‘on the grounds’ of these characteristics, and therefore be unlawful if there is a detriment to the plaintiff, who may therefore be able to bring an individual action. However, where no individual suffers a direct detriment to themselves, instructions to discriminate on these grounds in the field of employment and occupation are not explicitly prohibited.

There may also be some circumstances where an action may be brought by a private individual against an employer for instructing an employee to discriminate, via the provisions of UK law that make employers liable for the misdeeds of their employees, and under the provisions that prohibit aiding unlawful acts. However, some concerns still exist that instructions to discriminate where no individual suffers a detriment may still fall outside the scope of the legislation in some circumstances.

This distinction in GB law between sexual orientation and religion and belief on the one hand, and race and disability on the other, is likely to be due to the fact that where instructions to discriminate are prohibited, it is reserved to the specialised body, the CRE, DRC or EOC to challenge in the courts or tribunals, and no comparable body exists in GB for sexual orientation or religion or belief. However, it is interesting that while in the NI SO Regulations, the ECNI is given powers in relation to sexual orientation, there is still no explicit prohibition of instructions to discriminate on grounds of sexual orientation.

However, Section 55 of the Equality Act 2006 does prohibit instructions to discriminate on the grounds of religion or belief, in the provision of goods, facilities and services, education, housing and public functions, and only the proposed Commission for Equality and Human Rights will be able to bring legal action to enforce this provision.

Draft reg. 5 of the draft age discrimination regulations does prohibit instructions to discriminate and at present also permits individuals to enforce this provision

Although there are very few reported cases, the ability of the CRE to bring proceedings for instructions to discriminate has operated as a useful deterrent. For some years there has been a good working relationship between the CRE and JobCentrePlus (part of the Department for Work and Pensions); if an employer instructs a job centre to discriminate on racial grounds in selecting potential employees, the job centre would not only refuse to comply but would refer any recalcitrant employer to the CRE who would consider enforcement action. In some instances the threat of proceedings by the CRE has been sufficient to secure withdrawal of discriminatory instructions.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) *How does national law implement the duty to provide reasonable accommodation for disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*

The non-anticipatory duty to provide reasonable accommodation is covered in the DDA (s.4A) by a parallel set of [perhaps subtly different] duties on public and private sector employers⁷⁶ to make reasonable adjustments in relation to their disabled employees or job applicants. Similar, but anticipatory, duties exist in the context of the provision of goods and services, as well as education, and these duties are unique within UK anti-discrimination laws. The duty to make reasonable adjustments arises whenever any physical feature of premises, or any provision, criterion or practice applied by or on behalf of an employer, places a disabled person at a substantial disadvantage in comparison with people who are not disabled. In these circumstances, the employer (or potential employer in respect of a job applicant) must take such steps as can be considered reasonable in all the circumstances of the case in order to prevent that disadvantage. When an employee is placed at substantial disadvantage by arrangements or physical aspect of premises, the onus is on the employer to consider whether a reasonable adjustment can be made to overcome this disadvantage.

Employers do not have a duty to make reasonable adjustments if they do not know a person is disabled and could not reasonably be expected to know.

The DDA (s. 18B(2)) includes some examples of steps an employer may need to take in order to comply with a duty to make reasonable adjustments; these include making physical adjustments to premises; allocating some duties to another employee; transferring the person to fill an existing vacancy, being flexible with regard to working hours or place of work; allowing absence from work for rehabilitation, treatment and assessment; giving or arranging special training; acquiring or modifying equipment; modifying instructions or reference manuals; modifying procedures for testing or assessment; providing a reader or interpreter; and providing supervision or other support. The DRC code of practice on employment mentions other steps an employer might have to take, including modifying disciplinary or grievance procedures and modifying performance related pay arrangements.⁷⁷

As discussed above at 0.3, in the recent case of *Archibald v Fife County Council*,⁷⁸ the House of Lords decided that the obligation to make reasonable accommodation could require employers not to apply the standard procedures for selecting individuals to fill posts in order to accommodate a disabled person.

The DDA also sets out a list of factors which should be considered in determining whether in the particular circumstances it is reasonable for the employer⁷⁹ to have to make a particular adjustment.⁸⁰ The factors it lists include the following:

- effectiveness in preventing the particular disadvantage
- practicability

⁷⁶ The DDA duty to make reasonable adjustments also applies to contract workers, office holders, partnerships, barristers and advocates, trade unions and professional bodies, qualifications bodies, practical work experience and occupational pension schemes.

⁷⁷ Available at <http://www.drc-gb.org/thelaw/practice.asp>

⁷⁸ [2004] UKHL 32

⁷⁹ or the person responsible in the employment related situations mentioned in the above footnote

⁸⁰ DDA s. 18B(1)

- financial and other costs which would be incurred and extent of any disruption caused
- employer's financial or other resources
- availability to the employer of financial or other assistance (for example government grants under *Access to Work* scheme)
- nature of the employer's activities and size of its undertaking

Increased risk to the health and safety of any person is also a relevant factor.⁸¹

The question of 'reasonableness' is the sole determinant of whether the adjustment has to be made and what would constitute a 'disproportionate burden' for an employer. In *Morse v Wiltshire CC*,⁸² the EAT held that a tribunal must apply an objective test in deciding whether a particular accommodation was 'reasonable' in the circumstances. Deciding what constituted a 'disproportionate' burden was a task for the tribunal, which should pay considerable attention to what factors the employer has considered or failed to consider, scrutinise any explanation for not accommodating the disabled person in question, and reach its own decision on what, if any, steps were reasonable.

A different (if similar) duty to make reasonable adjustment applies in relation to access, by disabled people, to goods, facilities and services, when accommodation is required where, otherwise, access to the service is "impossible or unreasonably difficult", (Part 3 DDA Section 21). A similar duty is imposed by Part 4 of the DDA upon education providers.

b) Does failure to meet the duty count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?

The DDA (s.3A(2)) states,

"For the purposes of this Part a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person."

Failure to meet the duty therefore is discrimination. Since coming into force of the DD Regulations in October 2004, there is no justification defence in the context of employment and occupation for discrimination in the form of a failure to comply with this duty. A justification defence remains for the goods and service accommodation duty.

The DDA (s. 3A) now includes three different concepts of discrimination:

- a) Discrimination for a reason relating to a disabled person's disability, with justification defence;
- b) Direct discrimination, without justification defence; and
- c) Discrimination by virtue of a failure to comply with the duty to make reasonable adjustments, without a justification defence in the employment and occupation context.

The DDA does not include any provision labelled, or identifiable, as 'indirect discrimination'. (However, see the comment on this point at 2.3(a) above.)

⁸¹ Management of Health and Safety at Work Regulations 1999

⁸² [1998] IRLR 352, EAT

c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?

No. However, a failure to make reasonable accommodation for religious beliefs could violate the ECHR as incorporated into UK law by the Human Rights Act: see the cases of *Copsey* and *Begum*, discussed above at 0.3. Similarly, a failure to make reasonable accommodation for Roma and traveller families could give rise to a breach of Article 8. As discussed above at 0.3, in the case of *First Secretary of State v Chichester District Council*, the Court of Appeal decided that the right of members of the travelling community to respect for their home life under Article 8 of the ECHR had to be given due weight in planning decisions.⁸³ This followed the decision of the European Court of Human Rights in *Connors v UK* that the legal framework governing when eviction from property was possible failed to take account the special needs and position of the travelling community, and therefore constituted a violation of the positive obligations imposed under Article 8 of the ECHR.⁸⁴ However, the Court of Appeal in the later case of *Price v Leeds*⁸⁵ has expressed concern that the decision in *Connors* cannot be reconciled with the decision by the House of Lords in the case of *Harrow London Borough v Qazi*⁸⁶ that Article 8 of the ECHR does not create any right to a home that could be used to prevent a lawful property owner from asserting their right of ownership and possession, and have referred this apparent conflict of precedent to the House of Lords for resolution.

d) Does national law require buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/43?

Under the duties in the DDA, employers and those involved in supplying goods and services or delivering public functions may be required to make reasonable adjustments to the physical features of a building. The sale, rental and management of buildings are covered by separate and more restricted provisions of the DDA. Sections 22-24 DDA prohibit less favourable treatment in housing on the grounds of disability, unless this treatment can be shown to be justified. Section 13 of the Disability Discrimination 2005 Act imposed a duty on landlords, and others who manage rented premises, to provide reasonable adjustments in relation to practices and terms etc and the provision of auxiliary aids or services. Section 16 permits tenants to seek consent to modify buildings to facilitate the enjoyment of the premises by a disabled person, which landlords cannot unreasonably withhold. Under Part M of the Building Regulations 2000, as amended, all new buildings also have to be constructed in accordance with legislative standards to facilitate access to, and within, buildings by people regardless of disability, age or gender.

The provision of transport services is only partially covered by the legislation. Any services which involve “the use of a means of transport” are excluded.⁸⁷ However, transport infrastructure (such as roads, train stations and airports) is not covered by this exemption, and

⁸³ [2004] EWCA Civ 1248. See also *Clarke v Secretary of State for the Environment* [2001] EWHC Admin 800

⁸⁴ [2004] ECHR 223 (27 May 2004). For an analysis of the scope of positive obligations under the ECHR in general, see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

⁸⁵ [2005] EWCA Civ 289

⁸⁶ [2003] UKHL 43

⁸⁷ s.19 (5), Employment by transport providers is subject to the provisions of Part II of the DDA.

therefore is subject to the requirements of the access provisions in Part 3 of the DDA.⁸⁸ Part V of the DDA permits regulations to be introduced to set minimum access standards and disability-friendly operational requirements for land based public transport such as taxis, private hire vehicles, buses, trams and trains.⁸⁹ This permits the relevant Minister to ensure that as transport systems are modernised, suitable provision is made for disabled persons. With effect from December 2006, under provisions in the DDA 2005, the Government, is bringing land based public transport within the scope of the access provisions of Part 3 of the DDA 1995. In addition, application of the regulatory powers provides for all rail vehicles to be fully accessible to disabled people by 1 January 2020.

2.7 Sheltered or semi-sheltered accommodation/employment

a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for disabled workers?

UK government policy at present is designed to encourage disabled persons to move from 'sheltered' accommodation and employment to 'conventional' accommodation and employment. However, as it does not constitute discrimination under the DDA to give preferential treatment to disabled persons or to make special provision for their needs, there is no legal obstacle in UK law to public authorities or charities maintaining 'sheltered' environments.

b) Would such activities be considered to constitute employment under national law?

Forms of 'sheltered' activities could constitute employment under the DDA, depending upon the nature of the employment relationship in question.

3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

There are neither residence nor citizenship/nationality requirements for protection under any of the anti-discrimination measures in GB or NI.

3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

⁸⁸ See the *Code of Practice on Rights of Access*, para. 2.36

⁸⁹ Regulations governing access standards have applied to certain types of buses and coaches since the end of 2000: see SI 1998/1970, amended by SI 2000/3318. Access standards for rail vehicles entering into use from 1 January 1999 have been introduced: see SI 1998/2456. Since April 2001, s. 37 of the DDA makes it illegal for licensed taxis to refuse to carry or impose an extra charge on a disabled person accompanied by a guide dog or human guide: see also SL 2000/2989.

Dealing first with liability for discrimination, in respect of all grounds, UK legislation refers to acts of discrimination, harassment and victimisation by “a person”, and there has never been any doubt that the discriminator, as employer, provider of goods and services, provider of education or training, etc. may be a natural person or a legal person. As is discussed, below, the legislation specifically provides that the employer (as a natural or, often, legal person) is liable for the acts of discrimination of his employees, while the individual employee may be liable for aiding the discrimination by the employer.

Generally protection against discrimination is regarded as a right given to natural persons. In the case of disability discrimination, protection under the DDA is provided to “a disabled person”, which, on the basis of the statutory definition, will always be a natural person.

Protection against discrimination in the field of employment applies only to persons who come within the definition of employee, or partners, officeholders, barristers, members of trade unions, professional associations etc., which, again, is limited to natural persons.

In principle, there could be discrimination against a legal person in relation to the provision of goods facilities and services under the RRA, RRO or FETO. There could also be instructions to discriminate against legal persons. The authors are not aware of reported cases where this has occurred.

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

Under all of the UK anti-discrimination laws, an employer may be vicariously liable for the discriminatory acts of an employee, if these acts are committed during the course of their employment.⁹⁰ This applies regardless of whether the act of discrimination is in the context of employment or provision of goods and services, education, housing etc. The legislation offers a limited defence if the employer can prove that s/he took reasonably practicable steps to prevent that employee from committing the unlawful discriminatory acts.⁹¹

As police constables are not formally employees, the anti-discrimination measures include provisions creating, for the purpose of such legislation, a notional relationship of employer-employee between the chief officer of police and constables, and thereby making chief officers of police vicariously liable for the unlawful acts of discrimination or harassment committed by police constables under their direction and control. For example see RRA s.76A, DDA s.64A. RRO art. 17.

In *Jones –v- Tower Boot*⁹² the Court of Appeal ruled that s.32 RRA should be given a purposive interpretation, extending vicarious liability for discrimination beyond employers' common law liability in tort.

⁹⁰ DDA s 58, RRA s.32, RRO art. 32, FETO art.36, RB Regulations reg. 22, SO Regulations reg 22, NI SO Regulations reg. 24

⁹¹ DDA s 58 (5)

⁹² *Jones –v- Tower Boot Co Ltd* [1997] IRLR 168

Liability may be shared with another person who knowingly aids in the commission of an unlawful act of discrimination; for example the employee who commits the act of discrimination or harassment. The legislation provides a separate defence if the ‘aider’ acts in reliance on a statement made to them by the discriminator that the discrimination would not be unlawful, for example a personnel officer acting on a statement by her manager regarding discriminatory policies of the employer.⁹³ These vicarious liability principles also apply, at least in part to the relationship of principal and agent. Anything done by a person as agent for a principal, and with the principal's express or implied authority, is treated for the purposes of the Act as also done by the principal.⁹⁴

The more difficult question is whether an employer is liable for the acts of discrimination by third parties. For some time in the UK there appeared to be an answer, based on the decision of the EAT in *Burton –v- de Vere Hotels* [1997] ICR 1. In *Burton*, employees of de Vere Hotels were racially harassed by customers of the hotel. The EAT found the employer liable, as they could have prevented the harassment of their employees. The EAT stated that the employer’s liability for acts of discrimination by third parties should be decided by the degree of control the employer has in the circumstances. However, in 2003, the House of Lords⁹⁵ overturned the decision in *Burton* on the basis that the employees would need to prove that the employer’s failure to protect them from harassment was on racial grounds and that a hypothetical white employee would not have been subjected to racial harassment.

The House of Lords decision was before the RR Regulations introduced a statutory definition of harassment for which no comparator is required, as did the SO and RB Regulations. To date there are no reported cases regarding third party harassment under the new definition (which will not in any case apply to harassment cases that fall outside the scope of the Regulations, where the rejection by the House of Lords of *Burton* still means that employers would not be liable for harassment by third parties). Discrimination lawyers are considering other ways in which an employer’s failure to protect its employees from harassment might otherwise be challenged, including constructive dismissal, health and safety detriment, injunction under Protection from Harassment Act 1997.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

The UK anti-discrimination legislation applies to all sectors of employment. The legislation defines employment as “employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour”. The legislation covers some but not all forms of self employment, for example it would protect a self-employed carpenter who is discriminated against or subjected to harassment when she is carrying out work herself, but would not protect a carpenter from discrimination or harassment if she is self-employed but does not necessarily do all of the work herself as she employs others to do work on her behalf. Therefore the UK legislation falls short of the Directives in relation to self-employment. UK

⁹³ DDA s 57 (3)

⁹⁴ DDA s 58.

⁹⁵ *Macdonald –v- Advocate General for Scotland and Pearce –v- Governing Body of Mayfield Secondary School* [2003] IRLR 512

legislation also applies to partnerships, to contract work, to barristers and to appointed, but not elected, officeholders; the Disability Discrimination Act 2005 and the Disability Discrimination (Northern Ireland) Order 2006 prohibit discrimination by a local authority against a disabled elected member of the authority. With the exception of the DDA, employment includes employment in the armed forces.

Part 2 of the DDA also extends to the following occupations, which do not fall within the definition of employment: contract workers; office holders; police officers; partners in firms; barristers and advocates; and people undertaking practical work experience for a limited period for the purposes of vocational training. However, certain forms of occupation, such as occupation in a voluntary capacity, may fall outside the DDA and therefore then the material scope of the UK legislation may not fully reflect that of the Directives in every respect

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)).

Is the public sector dealt with differently to the private sector?

Except to the extent that the UK legislation fails fully to cover self-employment and occupation (see above 3.2.1), the UK anti-discrimination legislation covers this area in several ways.

- a) The prohibition of discrimination or harassment in employment (defined as above) includes the arrangements made for the purpose of determining who should be offered employment, the terms on which employment is offered and refusing or deliberately omitting to offer employment or access to opportunities for promotion or transfer.
- b) Discrimination is prohibited in offering pupillage or tenancy to a barrister.
- c) It is also unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate in the terms on which it is prepared to confer the authorisation or qualification or by refusing or deliberately omitting to grant the application

The public sector is generally treated in the same way as the private sector, subject to the elected representatives exception (see 3.2.1 above). However, public authorities in Britain are also subject to duties to promote equality of opportunity on the grounds of disability and race, imposed (from December 2006) by the Disability Discrimination Act 2005 and the Race Relations (Amendment) Act 2000, respectively. These duties require public authorities to take active steps to assess whether their employment policies comply with anti-discrimination law, and whether these policies should be altered to ensure a greater degree of equality of opportunity. The Equality Act 2006 introduces a similar gender duty, coming into effect from April 2007, and the duty imposed by s. 75 of the Northern Ireland Act on public authorities in NI has a similar effect across all of the equality grounds.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

UK anti-discrimination legislation fully covers this area. It applies to terms of employment (which include pay and other contractual matters), to the way the employer affords access to

any benefits, facilities or services and to dismissal and subjecting the employee to any other detriment. The Equal Pay Act 1970 (and Equal Pay Act (Northern Ireland) 1970) specifically deals with matters relating to pay inequality between women and men. The DDA includes within Part II specific prohibition of discrimination and harassment and requirement for reasonable adjustments in occupational pension schemes (ss 4G – 4K).

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

UK anti-discrimination law covers access provided by employers to training. It also prohibits discrimination or harassment by a person who provides, or makes arrangements for the provision of, facilities for training to fit a person for any employment, including terms for access to any training courses or facilities, refusing or omitting to afford such access. Where practical work experience is a form of employment then it is covered by the provisions that apply to non-discrimination by employers. The DDA specifically prohibits discrimination and harassment and requires reasonable adjustments in practical work experience (ss. 14C – 14D).

The RRA and RRO have always applied to all stages of education, including further and higher education, and FETO also applies to further and higher education. Recognising that vocational training is often the main, or one of the, objects of further or higher education, in transposing the Employment Framework Directive (Article 3(1)(b)), the UK government has included further and higher education generally in the GB SO and RB Regulations and the NI SO Regulations.

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

The UK anti-discrimination legislation applies to all aspects of membership of a “trade organisation” that is an organisation of workers, an organisation of employers, or any other organisation whose members carry on a particular profession (including any vocation or occupation) or trade for the purposes of which the organisation exists. Discrimination is prohibited in relation to admission or refusal to admit to membership, or to discriminate against any member in relation to access to benefits, depriving or varying terms of membership or subjecting to any detriment.

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

Social protection is not defined in UK law. The RRA and the RRO cover discrimination in the provision by public or private sector organisations of goods, facilities and services to the public or a section of the public. The RRA also covers all functions of public authorities, which would include any publicly provided social protection as well as social security and publicly provided healthcare. The NI RR Regulations amend the RRO⁹⁶ to extend protection

⁹⁶ Article 20A RRO

to functions of public authorities that consist of the provision of any form of social security, healthcare and any other form of social protection.

The DDA prohibits discrimination in access to goods, facilities and services provided to the public or a section of the public, which would be expected to include health care. The Disability Discrimination Act 2005 and the Disability Discrimination (Northern Ireland) Order 2006 has extended this protection, prohibiting discrimination on the grounds of disability in the exercise of public functions by public authorities, which encompasses the administration of publicly provided forms of social protection, including healthcare, as well as social security. This duty comes into force in December 2006.

The FETO prohibits discrimination on grounds of religious belief or political opinion in provision by public or private sector organisations of goods, facilities and services to the public or a section of the public. Healthcare would be included, but it is unlikely that all forms of social protection and social security including inequality in levels of state benefits would be wholly within the FETO.

Section 52 of the Equality Act 2006 prohibits discrimination on the basis of religious belief in the performance of public functions by public authorities in GB: this would appear to prohibit discrimination in the provision of forms of social protection, including healthcare provision and social security. This will probably come into effect in October 2006.

Sections 81 and 82 of the Equality Act also permits the UK government to introduce regulations prohibiting discrimination in both GB and NI on the grounds of sexual orientation: this would allow the UK government to use this power to prohibit discrimination on the grounds of sexual orientation in the performance of public functions, which, if these measures are introduced, will again extend the scope of coverage to social protection, including healthcare and social security.

The UK government has indicated that it may take similar steps to extend protection against age discrimination beyond employment and occupation, as part of its Discrimination Law Review (see below).

The various positive duties imposed upon British and Northern Irish public authorities discussed above at 1.0 require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the performance of public functions, which would presumably include the provision of social protection.

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

Since, under UK law, payments made as part of the state social security scheme which do not arise from an employment relationship are not defined as 'pay', such payments did not come within the scope of the 2003 regulations on religion or belief or sexual orientation, which cover only employment and employment related activities and vocational training. Therefore, there was no need for a specific exception to reflect Art. 3(3) in those regulations.

However, as indicated above, the extension of the DDA in the 2005 Act to prohibit discrimination in the performance of all functions of public authorities means that discrimination on the grounds of disability in the administration of types of payments by state schemes is prohibited.

The prohibition in the Equality Act of discrimination on the grounds of religion or belief in the performance of public functions in GB will have a similar impact, as will any extension of protection against discrimination on the basis of sexual orientation, when the UK government uses its power to make regulations to this effect for both GB and NI that the Act confers. The UK government has indicated that it may take similar steps to extend protection against age discrimination beyond employment and occupation, as part of its Discrimination Law Review (see below).

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.

The RRA (section 20) and the RRO (article 21) cover the provision by public or private sector organisations of goods, facilities and services to the public or a section of the public. The RRA (section 19B) prohibits discrimination by public authorities in carrying out any of their functions, and the RRO, since amendment by the 2003 NI RR Regulations prohibits discrimination by public authorities in providing any form of social advantage (article 20A).

The extension of the DDA in the 2005 Act to all functions of public authorities should mean that the administration of most forms of social advantages is subject to the DDA requirements. The prohibition in the Equality Act of discrimination on the grounds of religion or belief to the performance of public functions in GB will have a similar impact.

The Act also permits the UK government to extend protection against discrimination on the basis of sexual orientation to the performance of public functions in GB and NI: if the UK government chooses to introduce regulations to this effect, protection will again be extended across most forms of social advantages.

The UK government has indicated that it may consider whether to take similar steps to extend protection against age discrimination beyond employment and occupation, as part of its Discrimination Law Review (see below).

However, there is not in UK law a clear definition of social advantage, and the total context to which it applies and whether the existing legislation is adequate, will not be known until a body of case law has been developed, both within the UK and in the European Court of Justice.

The various positive duties imposed upon British and Northern Irish public authorities discussed above at 1.0 require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the performance of public functions, which would presumably include the provision of social advantages.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases of segregation in schools, affecting notably the Roma community. If these cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

The RRA and RRO have always included within their scope all forms and all levels of education, including all educational institutions, publicly and privately maintained. (NOTE: in GB a significant number of publicly maintained schools are denominational schools, but all are subject to the provisions of the RRA without exception). Both the RRA and the RRO also prohibit segregation across their scope of application, so segregation in schools between persons of different racial or ethnic groups would be unlawful, including segregation of traveller or Roma children. However, concerns persist as to the concentration of ethnic minority students in particular schools, which reflects wider issues of divided communities and social segregation.⁹⁷ Concerns also exist as to the lack of facilities for traveller children.⁹⁸

The scope of the SO and RB Regulations and the FETO includes further and higher education. All employees working in the education sector, including teachers and other educational staff are covered.

Sections 49-51 of the Equality Act 2006 prohibit discrimination on the grounds of religion or belief in access to and provision of education in GB, subject to an extensive series of exceptions to protect the status of public state-funded denominational schools and private schools with a particular religious ethos. This will probably come into effect in October 2006.

Sections 81 and 82 of the Act also permits the UK government to make regulations prohibiting discrimination in access to and provision of education on the grounds of sexual orientation in GB and NI.

The provision of education services was originally excluded from the scope of the DDA, even if employment by schools and colleges was covered: Part IV of the Act only required schools and institutes of further and higher education to publish their policies on educating disabled persons.⁹⁹ These provisions have now been replaced by the extensive obligations and provisions protecting individual educational rights introduced by the Special Educational Needs and Disability Act (SENDA) 2001 (and in Northern Ireland by the Special Educational Needs and Disability (NI) Order 2005), which prohibits disability discrimination in GB (NI) schools.

The various positive duties imposed upon public authorities in Great Britain and Northern Ireland discussed above at 1.0 require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of education.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.

⁹⁷ See S. Burgess and D. Wilson, *Ethnic Segregation in England's Schools*, CASE paper 79, Centre for Analysis of Social Exclusion, London School of Economics, 2004, available at <http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper79.pdf>

⁹⁸ See the Commission for Racial Equality, *Gypsies and Travellers: A Strategy for the CRE 2004-7*, available at http://www.cre.gov.uk/policy/gypsies_and_travellers.html

⁹⁹ See original Part IV DDA 1995, ss. 29 and 30.

The RRA (s.20) and RRO (art. 21) have always prohibited discrimination by public or private sector bodies in the provision of goods, facilities or services to the public or a section of the public.

The DDA (Part III) and the FETO (art.28) also prohibit discrimination in access to goods, facilities and services provided to the public or a section of the public.

The Equality Act 2006 prohibits discrimination in GB on the grounds of religion and belief in access to and provision of goods and services. No distinction is made between services available to the public and those available privately, except that where a skill or particular services are generally provided only for persons of a particular religion or belief, when it will not be unlawful to restrict the exercise of that skill or the provision of those services to these persons in certain circumstances. It is expected that these provisions of the Act will come into force in October 2006.

The Act also gives the power to the UK government to introduce regulations which could also prohibit discrimination in both NI and GB on the grounds of sexual orientation in access to and provision of goods and services. The UK government has indicated that it may take similar steps to extend protection against age discrimination beyond employment and occupation, as part of its Discrimination Law Review (see below).

There are separate provisions covering associations with 25 or more members (RRA s.25) (RRO art. 25) which prohibits discrimination on racial grounds against any member or associate in access to any benefits, facilities or services. In the author's opinion, it was never seen as a purpose of the RRA to regulate the private relationship between two natural persons, for example disagreement between neighbours regarding shared use of a driveway or arrangements for feeding their pets. However, where the RRA had originally distinguished between wholly private disposal of premises and disposal involving either an advertisement or the services of an estate agent (s.21(3)) that distinction has been removed by the RR Regulations. Thus it may be that under s.20 any form of contractual arrangements between two natural persons, or the steps preceding such arrangements, will be within the scope of the RRA. The author is not aware of any cases on this point.

With effect from December 2005, Section 12 of the Disability Discrimination Act 2005 also prohibits less favourable treatment by clubs and associations with 25 or more members for reasons related to disability, as does the equivalent provision of the Disability Discrimination (Northern Ireland) Order 2006. From December 2006, such clubs and associations will also be required to make reasonable accommodation for disabled members and disabled guests of members.

The various positive duties imposed upon British and Northern Irish public authorities discussed above at 1.0 require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of state services.

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions?

The scope of the RRA (ss. 21 – 24) and RRO (arts. 22 – 24) cover all aspects of housing: sale or letting of privately owned properties, allocation of tenancies in public or private sector, management of rented accommodation in public or private sector, residential care institutions et. The RRA and RRO specifically prohibit discrimination or harassment in the sale or

letting of premises, including residential premises; this includes terms and conditions, giving priority etc. It is unlawful to discriminate or commit acts of harassment in the management of premises, including residential premises, in access to benefits or facilities, in eviction or any other detriment. It is also unlawful for a landlord to discriminate in the granting of licence or consent for the disposal of a tenancy.

For grounds of colour and nationality there continue to be exceptions to the prohibition of discrimination for residential accommodation that is shared with the owner or their near relatives or with other residential occupiers or in small premises or for the private disposal of premises.

Part 3 of the DDA includes provisions to prohibit disability discrimination in relation to certain aspects of the sale, letting and management of premises. The Disability Discrimination Act 2005 and the Disability Discrimination (Northern Ireland) Order 2006 extended protection by requiring certain reasonable adjustments and the provision of auxiliary aids by landlords or others involved in letting or seeking to let premises.

FETO prohibits discrimination in NI in housing on the grounds of religious belief or political opinion. The Equality Act 2006 prohibits discrimination in GB on the grounds of religion or belief in housing, with exceptions being made for small dwellings where landlords or their close relatives reside in the building, and where property is not publicly offered for sale or rental.

The Act permits the UK government to introduce similar regulations in GB and NI prohibiting discrimination on the grounds of sexual orientation in housing.

The various positive duties imposed upon British and Northern Irish public authorities discussed above at 1.0 require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of housing.

4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

GB and NI - Disability

The DDA does not provide an exception for genuine and determining occupational requirements. It is assumed that this is for two reasons: firstly in the DDA there is no prohibition against discriminating in favour of a disabled person; secondly, as the DDA permits a defence of justification for discrimination in the form of less favourable treatment related to a disabled person's disability, where a disabled person could not meet genuine and determining occupational requirements, the employer should be able to justify not employing that disabled person for that job.

GB and NI - Race

The RRA (s.5(2)) and RRO (art. 8(2)) had listed four types of jobs¹⁰⁰ where being of a particular racial group could be a genuine occupational qualification, and discrimination in recruitment, selection, opportunities for promotion, transfer and training would be permitted. For grounds of colour and nationality those exceptions remain unchanged. For grounds of race and ethnic and national origins, the exceptions have been replaced by a new generic rule for genuine and determining occupational requirement. In addition to discrimination in recruitment, promotion, transfer, etc., the new provision also permits discrimination in dismissal. The same generic exception forms part of the RB Regulations, the SO Regulations, and NI SO Regulations: it usually takes the form of a declaration that the ban on discrimination does not apply where, having regard to the nature of the employment or the context in which it is carried out –

(a) being of a particular race or of particular ethnic or national origins is a genuine and determining occupational requirement;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either

(i) the person to whom that requirement is applied does not meet it, or
(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."

This provision may be inconsistent with the Directives in that it does not require the employer to demonstrate that to impose the requirement has a legitimate objective. Judicial interpretation of the Regulations to ensure that direct effect is given to the Directive may be required.

There are other exceptions in the RRA and RRO, for example employment for purposes of a private household, that will continue to apply for grounds of colour and nationality.

GB – Religion or Belief

The RB Regulations appear to reflect Articles 4(1) and 4(2) of the Directive in that they permit discrimination in two types of circumstances: (i) as in the RRA (see above) where having regard to the nature or context of a job, being of a particular religion or belief is a genuine and determining occupational requirement; and (ii) where an employer has an ethos based on religion or belief and, having regard to that ethos and the nature and context of the job, being of a particular religion or belief is a genuine (but not necessarily determining) occupational requirement. In either case applying the requirement must be proportionate, but in the RB Regulations there is no obligation to show that to do so meets a legitimate objective, as in the Directive. (See below re decision in *R(on application of Amicus and others) –v- Secretary of State for Trade and Industry* regarding compatibility of particular exceptions in SO Regulations with Article 4(1) of the Directive)

GB and NI – Sexual Orientation

Art. 4(1) Directive is transposed by SO and NI SO Regulations (reg. 7(2), NI reg 8(2)), (as in the RRA/RRO - see above). It is anticipated that Reg. 7(2) could be invoked both by predominantly LGB organisations claiming that certain jobs require an LGB individual (e.g., counselling about safer sexual activity), or by predominantly heterosexual organisations claiming that certain jobs require a heterosexual individual.

¹⁰⁰ a) participation in a dramatic performance, b) participation as an artist's or photographer's model, c) working where food or drink is provided to the public in a particular setting where a person of a particular racial group is required for reasons of authenticity, and d) providing persons of a particular racial group with personal services promoting their welfare which can most effectively be provided by a person of that racial group.

Aware of objections that this provision does not require the genuine occupational requirement to meet a legitimate objective, the GB Explanatory Memorandum, published alongside the Regulations (Annex B, para. 23) argues that “a requirement which pursues an illegitimate objective would not constitute a *genuine* occupational requirement’ under reg. 7(2)(a)”.

The provision in reg. 7(2)(c) (NI reg 8(2)), that enables an employer to rely on the genuine occupational requirement exception if the employer reasonably believes that the employee or prospective employee does not meet it, could apply where there is a dispute as to the sexual orientation of the employee or prospective employee and acknowledges the difficulty of ‘proving’ an individual’s sexual orientation. As long as the ‘reasonableness test’ is applied by UK courts with sufficient strictness, reg. 7(2)(c) should comply with art. 4(1) Directive.

NI – Religion or Belief

The fair employment legislation has always had exceptions for employment as a clergyman or minister of a religious denomination; that exception is maintained. The FETO also permits discrimination ‘*where the essential nature of the job requires it to be done by a person holding or not holding a particular religious belief*’ (which, under the FETO Regulations, would include any religion or similar philosophical belief). The FETO Regulations do not amend this provision, leaving an exception considerably wider than Article 4(1) or 4(2) of the Directive; most significantly there is no obligation to justify the requirement on the basis of a legitimate aim or that it is a proportionate means of meeting that aim. Judicial interpretation of the Regulations to ensure that direct effect is given to the Directive may be required.

The FETO Regulations removed the blanket exception for the employment of teachers that had been in the FETO, and, in line with the special provision in Article 15(2) of the Directive, the FETO now permits discrimination on grounds of religious belief only in the recruitment of teachers.

The targeted recruitment on grounds of religious belief under the Police (Northern Ireland) Act 2000 is discussed below (see 5. Positive Action)

GB and NI – Age

The draft age regulations state at present that an employer will be entitled to use an age requirement where (having regard to the nature of the employment or the context in which it is carried out) this is a genuine and determining occupational requirement, it is proportionate for the employer to apply the requirement, and it is reasonable for the employer to consider that the person to whom this age requirement is applied does not meet this requirement.

4.2 Employers with an ethos based on religion or belief

a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?

See above re national laws concerning discrimination on grounds of religion or belief.

The RB Regulations are subject to ss 58 – 60 of the School Standards and Framework Act 1998 (reg. 39), which permits a voluntary aided school (a publicly maintained school with a degree of independent management) with a religious character to discriminate in the recruitment of teachers and their dismissal. Specifically s. 60(5) of the School Standards and Framework Act 1998 permits a voluntary aided school with a religious character to have regard ‘*in connection with the termination of the employment of any teacher at the school, to*

any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the [school's specified] religion or religious denomination'. This exception applies only to teachers, according to s. 60(6). The wide scope for discrimination in selection and dismissal, without the need to demonstrate that for the job in question (for example teaching mathematics) the person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, suggests that by taking this Act into account, the RB Regulations may fail to comply with Article 4(2). Judicial interpretation of the Regulations to ensure that direct effect is given to Article 4(2) may be required.

There is some concern that, despite the final statement in Art. 4(2) of the Employment Framework Directive, the discrimination permitted under the School Standards and Framework Act 1998 may be used to exclude or dismiss LGB teachers in publicly maintained schools of a religious character.

The SO Regulations do not contain an 'ethos' exception based on art. 4(2) (second para.) Directive.

b) Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination?

Reg. 7(3) of the SO Regulations (and reg 8(3) of the NI SO Regulations) purports to be based on art. 4(1) Directive. It permits a religious employer to refuse to hire or promote or to dismiss an LGB individual, on grounds of sexual orientation, if:

- '(a) the employment is for purposes of an organised religion; [and]*
- (b) the employer applies a requirement related to sexual orientation –*
 - (i) so as to comply with the doctrines of the religion, or*
 - (ii) ... to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers ...'*

Reg. 16(3) (and reg 18(30) of the NI SO Regulations) creates a similar exception for 'a professional or trade qualification for purposes of an organised religion', e.g. qualification as a priest or other minister of religion.

Regs. 7(3) and 16(3) appear to potentially go beyond the exceptions permitted under the Employment Framework Directive. They may not comply with art. 4(1) Directive because, unlike reg. 7(2), they do not provide that the '*requirement related to sexual orientation*' (e.g. not engaging in any sexual activity at all, or not doing so outside of a different-sex marriage, and accepting the religious organisation's doctrines on same-sex sexual activity) must be 'proportionate' to any legitimate aim, especially considering the nature of the job to which the requirement is applied (priest vs. cleaner in a convent). Nor do they comply with art. 4(2) (second para.) Directive, which requires an assessment of each LGB individual's conduct. Instead, they create (as drafted) a blanket exception, without regard to the conduct of the individual employee or prospective employee, for any employment 'for the purposes of organised religion'.). Judicial interpretation of the Regulations to ensure that direct effect is given to Article 4 of the Directive may be required.

The compatibility of reg.7(3) with the Directive and with the ECHR was challenged by 7 trade unions who applied, unsuccessfully, to the High Court to have the regulation annulled. (see above under Case Law)¹⁰¹ The Court accepted the government's argument that reg. 7(3)

¹⁰¹ *R (on application of Amicus and others) –v- Secretary of State for Trade and Industry* [2004] EWHC 860 Admin www.bailii.org/ew/cases/EWHC/Admin/2004/860.html

was intended to have a narrow scope and was therefore not outside Art. 4(1) of the Directive. It should be noted that this case was a challenge to reg. 7(3) as drafted; the authors are not aware of any cases that raise reg. 7(3) within a complaint of discrimination on grounds of sexual orientation.

There is genuine concern that the exceptions in regs. 7(3) and 16(3) will have a deterrent effect on prospective LGB employees thinking of applying for jobs with religious organisations (including schools and hospitals run by religious organisations), and on LGB employees of such organisations in relation to how open they could be regarding their sexual orientation. Despite the ‘narrow scope’ these exceptions have on paper, there must be a real risk that, in practice, they may be relied upon (unlawfully) by some religious organisations, and not merely organised religions, to operate employment policies that discriminate against LGB people. It remains to be seen if such practices, which undermine the wider purpose of the Directive, will be challenged. There remain strong arguments that regs. 7(3) and 16(3) of the SO Regulations should be repealed. If necessary, reg. 16(3) could be replaced by an exception along the lines of reg. 7(2).

4.3 Armed forces and other specific occupations

a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?

b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?

There is not yet UK legislation on age discrimination. However, the draft age regulations do not extend as currently drafted to the armed forces.

The DDA includes an exception for the armed forces. The Joint Committee of Parliament that was established to scrutinise the Draft Disability Discrimination Bill recommended that the Bill should include a power, by regulation to delete the exemption of the armed forces from the DDA, but the government rejected that recommendation and the Disability Discrimination Act 2005 and the Disability Discrimination (Northern Ireland) Order 2006 contained no provision on this matter.

There are no exceptions intended to reflect Recital 18, Employment Framework Directive. Neither the DDA nor any of the other anti-discrimination laws is likely to be interpreted as requiring these bodies or any other to employ a person who is not capable of carrying out whatever tasks are included in their job. Under the DDA, the duty to make reasonable adjustments does require employers within the police, prison and emergency services to make appropriate reasonable adjustments to enable a disabled person to be employed. However, in doing so, they are not required to compromise the operational capacity of the service.

4.4 Nationality discrimination

Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).

a) How does national law treat nationality discrimination?

b) Are there exceptions in anti-discrimination law that seek to rely on Art 3(2)?

The RRA (s.3) and RRO (art.5) defines ‘racial grounds’ as on grounds of race, colour, nationality and ethnic or national origins. S.78/art. 2 defines “nationality” as including citizenship. Thus, under UK legislation, discrimination on grounds of nationality -- across

the full scope of the RRA or RRO -- is prohibited. Other than the amendments to s.41/art.40 mentioned below, the amendments to the RRA and RRO by the 2003 Regulations generally leave untouched the protection against discrimination on grounds of nationality that were in place before the Race Directive came into force.

The Race Relations (Amendment) Act (RR(A)A) brought within the scope of the RRA all functions of public authorities (s.19B RRA) including immigration control. There is one major exception that is particularly relevant to nationality discrimination. This is the exception in s.19D, under which a minister can authorise discrimination on grounds of nationality and ethnic or national origins in the carrying out of specified immigration control functions. Under the Race Relations (Immigration and Asylum) Authorisation 2004, effective from 12 February 2004, there is a list (not in the public domain) of nationalities, and a person of a nationality on the list seeking to enter the UK can be subjected to more rigorous examination than other persons, detention pending examination, refusal of leave to enter and imposition of conditions on temporary admission and a person of a nationality on the list wishing to travel to the UK can be refused leave to enter or can be required to provide information and documents.

The RRA contains specific exceptions to the protection against discrimination on grounds of nationality:

In order to comply with Art. 14 of the Race Directive, the UK has removed, for grounds of race or ethnic or national origins, the exception (RRA s.41(1), RRO, art. 40(1)) that permitted discrimination where this was done under statutory authority (to comply with primary or secondary legislation (or requirement imposed by a Minister by virtue of an enactment), but this exception continues to apply on grounds of nationality. At the same time, the UK has strengthened the exceptions in RRA s. 41(2)/RRO art. 40(2) that permit discrimination not only on grounds of nationality but also on place of ordinary residence or length of time a person has been present in the UK, if this is done under statutory authority or in pursuance of any arrangements made or approved by a Minister of the Crown or in order to comply with any condition imposed by a Minister of the Crown. This exception applies in relation to legislation passed at any time.

The RRA(s.75) and RRO(art.71) permit rules which restrict employment in the civil service or by prescribed public bodies to persons of particular birth, nationality, descent or residence. While the government had indicated its intention to review this restriction, there remains a long list of 'reserved posts' in the civil service that are open to UK citizens only.

The RRA (s.39)/RRO(art.38) permits discrimination on grounds of nationality in selecting persons to represent a country in any sport or game.

4.5 Work-related family benefits

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a. Does national law permit an employer to provide benefits that are limited to those employees who are married?

b. Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?

Relying on Recital 22 in the Employment Framework Directive, the UK included in the SO Regulations (reg. 25) and the NI SO Regulations (reg. 28), a specific exception for benefits related to 'marital status': *Nothing in Part II or III shall render unlawful anything which prevents or restricts access to a benefit by reference to marital status.*

This provision, that continued the exclusion of same sex partners from certain types of benefits, was widely criticised as incompatible with the Directive and the ECHR. A group of 7 major trade unions were unsuccessful in their High Court challenge to the SO Regulations on this point (see the Amicus case, above at 0.3 Case Law).¹⁰²

The position has now radically changed. After the hearing, but before judgment was given in the Amicus case, the government published the Civil Partnership Bill, which established a civil partnership scheme whereby same-sex couples could register their partnership which would be legally recognised as equivalent to marriage. Before that Act received Royal Assent, the government announced that same sex couples who make a formal commitment to each other by registering under this statutory civil partnership registration scheme will be able to benefit from private occupational pension schemes and public sector schemes in the same way that married people do. Pension schemes would also be required to provide survivor's pensions for registered civil partners accrued from 1988 as they do for surviving widowers. Employment benefits, including occupational pension schemes, would be expected to comply with the non-discrimination requirements of the SO Regulations. Therefore, the Civil Partnership Act 2004 (Amendments to Subordinate Legislation) Order 2005 which came into force on December 5, 2005 amends the Employment Equality (Sexual Orientation) Regulations. A corresponding NI Order amends the NI SO Regulations. Employers now have to extend any benefits offered to the spouses of employees who are married to partners of employees who are in a civil partnership.¹⁰³

There are no legal requirements to offer such benefits to couples of either the same or opposite sex who have not entered into a marriage or civil partnership.¹⁰⁴ However, where benefits are made available to unmarried couples of opposite sex they must be extended equally to same sex couples who have not registered a civil partnership, by virtue of the SO Regulations.¹⁰⁵ This has been the case since 1 December 2003, when the Regulations came into force.

4.6 Health and safety

Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

Employers have a duty¹⁰⁶ to carry out an assessment of the risks to health and safety to which their employees are exposed while at work to identify what they must do to comply with health and safety legislation. Employers are expected to put in place measures that reduce risks to as low a level as is reasonably practicable, but there is no duty to remove all conceivable risks.

¹⁰² *R (on application of Amicus & others) –v- Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin)

¹⁰³ Schedule 17, s.7. This does not affect benefits limited to married couples where the right to the benefit accrued or the benefit is payable in respect of periods of service prior to December 5, 2005.

¹⁰⁴ Schedule 17, s.7(3)

¹⁰⁵ ACAS Website, available at, www.acas.org.uk; ACAS, 'Sexual Orientation in the Workplace: A Guide for Employers and Employees', *supra* note 7, p.30.

¹⁰⁶ Management of Health and Safety at Work Regulations 1999

The DDA does not include any specific exceptions in relation to health and safety matters.

It could constitute direct discrimination to treat a disabled person less favourably than others if this were based on a generalised assumption about risks to health and safety. A health and safety risk assessment for a disabled person should consider the degree of risk in carrying out relevant work-related activities and the impact of any reasonable adjustment. If after such assessment, the employer decides that the degree of risk to the health and safety of the disabled person or other people arising from employing the disabled person to do the job in question is too great, then he will rely on this as a justification for less favourable treatment of the disabled person; whether on the particular facts this justification meets the statutory test of 'material and substantial'.

Disability-related discrimination in the provision of goods and services can be justified on the grounds of health and safety, where the treatment is necessary in order not to endanger the health and safety of any person (including the disabled person) : s. 20(4) of the DDA makes explicit provision for this.

Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?

Legislation outlawing discrimination on other grounds does not include specific exceptions relating to health and safety law. The requirement to carry out an assessment of health and safety risks applies in respect of all employees. A number of cases alleging indirect discrimination on racial grounds have been brought where the employer or the educational institution imposed a dress code on health and safety grounds that disadvantaged members of particular racial groups who were not able to comply with the dress requirements. For example, a "no beards" requirement where food is prepared or packaged for reasons of hygiene,¹⁰⁷ or for airplane cabin staff because the standard smoke hood could not safely fasten on men with beards (unreported) or a requirement for all railway repair workers to wear protective headgear,¹⁰⁸. The outcome of such cases would, as in any other complaint of indirect discrimination, depend on whether the employer could show that their need for the rule outweighed its discriminatory impact: often such cases have resulted in the employer recognising that there were other, non-discriminatory, ways in which they could have dealt with the health and safety risk.

4.7 Exceptions related to discrimination on the ground of age

4.7.1 Direct discrimination

a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?

The UK has deferred to October 2006 the duty to implement the Employment Framework Directive in relation to discrimination on grounds of age. Currently there is no UK legislation prohibiting age discrimination. The draft GB age regulations published by the UK government in July 2005 and the draft NI regulations published in September 2005 (which are

¹⁰⁷ *Panesar –v- Nestle’ Co. Ltd.* [1980] IRLR 64; *Blakerd –v- Elizabeth Shaw Ltd.* [1980] IRLR 64

¹⁰⁸ *Singh –v- British Rail Engineering Ltd.* [1986] ICR 22

similar in content) will, if they become law, prohibit direct or indirect age discrimination in employment and occupation. (They are expected to become law in their current form in October 2006.) However, an employer will be permitted to show that the discriminatory treatment is a proportionate means of achieving a legitimate aim. Examples are given of what may constitute justified differences of treatment on the grounds of age. These include the setting of requirements as to age in order to ensure the protection of people of a particular age group or to promote their vocational integration; the fixing of a minimum age to qualify for certain employment-linked advantages in order to recruit or retain older people in the workforce; and the fixing of a maximum age for recruitment or promotion which is based upon the training requirements for a post, or the need to have a reasonable period of employment in a post before retirement. The wide scope of some of these examples has attracted some criticism, as possibly not reflecting the strict test of objective justification apparently adopted by the ECJ in *Mangold*. [Note that these examples are not in the final regulations laid before and approved by Parliament. However, similar examples have been provided in the accompanying guidance.]

A specific exception is also made for positive action: see below. Specific exceptions are also made for the use of age distinctions in the payment of national minimum wages to encourage employers to employ younger workers, and special benefits paid by employers that are more generous than the statutory benefits. Special and complex exceptions are also made for the use of some age-based criteria in invalidity and occupational pension schemes, as permitted by Article 6(2) of the Directive. [Note: invalidity benefit schemes exception was not included in the final regulations laid before and approved by Parliament in March 2006. Also, lower and upper age limits for receiving statutory maternity paternity and sick pay are being removed from 1 October 2006.]

Benefits that are linked to the length of an employee's length of service with a particular employer are also excepted from the legislation, if an employer can show a reasonable expectation that economic advantages, such as the encouragement of employee loyalty, will be obtained from these benefits. All benefits that are based upon five years' length of service or less are automatically exempted, to allow employers to encourage recently-joined employees to remain with their new employers for at least some time.

Finally, the draft regulations make an exception for the dismissal of employees when they reach 65 years of age. This allows employers to use mandatory retirement ages if they wish. This is controversial, as many groups have called for an end to the use of mandatory retirement ages. The UK government has promised to review this provision in 2011. It also intends to place a duty upon all employers to inform employees of their dismissal six months before it happens, and to consider requests from employees to remain in employment. To protect employees who are allowed to work later than 65, the regulations will remove the current age limit of 65 on bringing unfair dismissal claims and the age cap of 65 for receiving redundancy payments.

The UK government believes that this exception, and all the other exceptions contained in the draft regulations, can be objectively justified under the Directive. The consultation will focus upon these exceptions and their scope, and they will remain the main focus of attention and debate. In general, the draft regulations appear to transpose the age provisions of the Directive to a reasonably accurate degree, but questions remain as to the scope of some of these exceptions, in particular those relating to mandatory retirement.

b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

Currently, in the absence of age discrimination legislation, there is a wide variety of age-based barriers which employers, providers of qualifications or training, can lawfully maintain. Many of these barriers will have to be reviewed when the age regulations come into force.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

The national minimum wage is paid at three different rates based on the age of the worker: the rates from October 2004 were - ages 16-17 £3.00 per hour; 18-21 £4.10 per hour and workers 22 and over £4.85 per hour. The draft age regulations contain an exemption allowing employers to pay employees aged 22 and over more than those under 22, even where they are doing the same job; and employees aged between 18 and 21 can be paid more than those under 18 even where they are doing the same job, where all are being paid at the relevant minimum wage rate. The exemption will not allow employers to pay different rates to those in the same age category.

Employers of children and young people have additional health and safety obligations.

The Employment Rights Act 1996 enables people with caring responsibilities for children under age 6 (or under 18 if disabled) to request a change in their terms and conditions of employment regarding hours, time of work or working partly or wholly from home. The employer must consider every such request and if they refuse must give reasons for refusal; the employee has a right of appeal but no automatic right to flexible working. From April 2007, following entry into force of the Work and Families Bill currently before Parliament, there will be a parallel entitlement where the care responsibilities relate to an older person who also requires a high level of care. Comparable provisions exist in NI under the Employment Rights (NI) Order 1996.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

There is no legislation outlawing age discrimination in access to employment and training as yet. However, as discussed above, the draft age regulations provide for exceptions to the general prohibition on age discrimination where persons of a particular age are given special access to training facilities to help them take on particular work, or where they are allowed to take advantage of opportunities for doing particular work, where it seems reasonably necessary to introduce these measures to prevent or compensate for disadvantages linked to age. Any minimum or maximum age requirements that do not come within the scope of this specific provision will have to be objectively justified.

There are national laws and local by-laws regulating the employment of children (up to minimum school leaving age (age 16)) consistent with EC Directive 94/33/EC. Currently, a wide variety of trades and professions set minimum ages for entry as trainees: the use of such entry ages will have to be objectively justified when the age regulations enter into force. Health and safety considerations may influence minimum ages for certain types of jobs; in

some cases there are also maximum ages for entry; in fixing age limits employers are expected to avoid unlawful discrimination on other grounds. A maximum age for entry to the Civil Service was held to be unlawful indirect discrimination on grounds of sex.¹⁰⁹

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

a) Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

State pensions are payable at 60 for women and 65 for men, although these ages will be equalised at 65). Individuals are now able to defer collecting their pensions in return for higher payments if they wish to work longer: they can also continue to work, if they wish and their employer agrees.

b) Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

While arrangements vary, individuals are often now able to defer collecting their occupational pensions in return for higher payments if they wish to work longer. Tax rules preventing people from collecting their occupational pension while continuing to work will be abolished in April 2006. Occupational pensions will be paid when the scheme rules determine, though from 1 October 2006 those rules must be compliant with the Employment Equality (Age) Regulations 2006).

c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?

For most workers, there is no legal requirement to retire at a certain age. However, for certain public sector employment that is regulated by statute, there are national laws specifying a retirement age, including judges, the police and some civil servants. For other public sector employment, "retirement age" is regarded as the age when a worker can receive a full pension, at which point their contracts of employment are often terminated. In the private sector, employers will often set a fixed retirement age: see below.

d) Does national law permit employers to set retirement ages by contract, collective bargaining or unilaterally? In the absence of age discrimination legislation, public and private sector employers may fix their own contractual mandatory retirement age, or agree a

¹⁰⁹ Price –v- Civil Service Commission [1977] IRLR 291

retirement age through a collective bargaining process, and this varies from employer to employer.

e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)? At present, employees cannot claim unfair dismissal if they have reached the standard retirement age at their workplace, and if there is no standard retirement age, they lose their rights to bring unfair dismissal claims at 65. However, the UK government has decided that this may be incompatible with the Directive. The draft age regulations as discussed above provide for a national default retirement age of 65. Employees will have a right to request working beyond 65, but there will be no obligation on employers to agree. While not making retirement compulsory at age 65, a person above 65 would not be able to complain of unfair dismissal where their dismissal was on grounds of age, since “retirement” at age 65+ will be a fair reason for dismissal. However, if they are dismissed for other grounds, then they will be able to sue for unfair dismissal. In addition, if an employer has a retirement age that is less than 65, then this will have to be objectively justified. The UK government has promised to review these provisions in 2011.

For these above questions, please indicate whether the ages are different for women and men.

As noted, at present State pension ages are different for men and women.

4.7.5 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?

National law does not regulate criteria for selection for redundancy; normally this is a matter negotiated and agreed between trade unions and employer. There is no prohibition on taking age or seniority into account, provided that it is not discriminatory on any of the grounds currently covered by anti-discrimination legislation. However, when the age regulations come into force, any such use of age will have to be objectively justified.

b) If national law provides compensation for redundancy, is this affected by the age of the worker?

The current statutory scheme for compensation for unfair dismissal and redundancy in the Employment Rights Act 1996 (and the Employment Rights (NI) Order 1996) is based on the age of the worker as well as his/her period of employment. No compensation is available if the worker is age 65 or older. In a recent case these provisions were challenged, unsuccessfully, as being indirectly discriminatory on grounds of sex.¹¹⁰ However, in the draft age regulations, this upper age limit is to be removed. At present, redundancy payments will vary with age: the UK government intends to remove this rule, and is currently consulting on how redundancy payments should be set after the age regulations come into force.

¹¹⁰ Rutherford & Another –v- Secretary of State for Industry [2004] EWCA Civ 1186 3 September 2004 (www.bailii.org.uk/ew/cases/EWCA/Civ/2004/1186.html) the Court of Appeal upheld the decision of the Employment Appeal Tribunal that the imposition of the statutory upper age limit for compensation for unfair dismissal and redundancy was not indirect sex discrimination, since there was no real difference between the proportions of men and women who are able to comply with the requirement of being under 65.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?

The RRO (art. 41) , FETO (art 79) and the NISO Regulations (reg. 26) provide an exception for an act done for the purpose of protecting public safety or public order : “ *Nothing in Parts II to IV shall render unlawful an act done for the purpose of safeguarding national security or of protecting public safety or public order.*” However, in the FETO and NISO, the exception applies only where the doing of the act is justified by that purpose.

Most of the parallel legislation in GB (RRA, DDA, SO Regulations, RB Regulations and the new Equality Act and draft age regulations) includes a similar exception for national security, but does not refer to protecting public safety or public order,

It is relevant to mention that since the coming into force of the Human Rights Act 1998 which incorporates the ECHR into UK law, the courts are expected at all times to consider ECHR implications of matters before them, which may involve balancing the rights and freedoms of different parties where prohibiting discrimination may limit exercise of one of the qualified ECHR rights.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

DDA (s. 59) contains an exception for acts done in pursuance of primary legislation, including any passed after the date of the DDA or to comply with secondary legislation made after the date of the DDA or any condition or requirement imposed by a Minister of the Crown. Such an exception may be in breach of the Employment Framework Directive (art. 16).

In order to comply with the Directives (art. 14/16) the RRA and RRO were amended by the 2003 Regulations modifying similar exception in order to comply with the Directives (articles 14/16). However, outside of the scope of the Directives, the RRA, RRO, and the new Equality Act retain exceptions for all acts done under the authority of primary legislation.

5. POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic.

b) Do measures of positive action exist in your country? Which are the most important?

Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma.

The need for positive action to overcome historic patterns of disadvantage and exclusion was recognised by the UK government from at least the mid-1970s and is reflected in the anti-discrimination laws passed at that time, namely the SDA, RRA and the Fair Employment (Northern Ireland) Act 1976. Evidence of slow progress and resistance to change in the 1990s indicated the need for more stringent measures; one such was the decision to impose positive equality obligations on the public sector in GB and NI (see below).

Within UK anti-discrimination legislation positive action is permitted as follows:

Age

In the draft age regulations, a specific exception is made for positive action that gives persons of a particular age access to training facilities to help them take on particular work, or that allows them to take advantage of opportunities for doing particular work, where it seems reasonably necessary to introduce these measures to prevent or compensate for disadvantages linked to age.

Disability

The DDA permits discrimination in favour of a disabled person on grounds of their disability in employment, in further and higher education and in access to goods, facilities and services. Therefore there was no need to include in the DDA specific positive action provisions like those in other anti-discrimination legislation that operate as exceptions to the prohibition of discrimination.

The positive duty to promote equality of opportunity imposed upon public authorities by the Disability Discrimination Act 2005 may require public authorities to take certain forms of positive action where necessary to alter policies and practices that may have negative consequences for disabled persons.

Religion or Belief – NI

The most comprehensive provisions for positive action in employment are found in the FETO. In NI, where the primary aim of the fair employment legislation, from the mid-1970's, was to overcome and/or to compensate for historic discrimination and disadvantage of Roman Catholics, or Protestants, it is not surprising that the FETO and its predecessors have been applied, in part, for a this purpose.

Article 4 of the FETO defines 'affirmative action':

"...action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including –

- a) the adoption of practices encouraging such participation; and*
- b) the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.*

Article 5 defines equality of opportunity and provides in 5(5) that promotion of equality of opportunity includes promotion of affirmative action.

The FETO requires registration of all employers with 10 or more employees, and requires all registered employers to monitor the composition of their workforce by persons belonging to either the Roman Catholic or Protestant communities and by sex. The ECNI has powers of enquiry, investigation, etc. accompanied by powers to recommend or require employers to take certain 'affirmative action' in a specified period.

Article 73 states that to pursue ‘affirmative action’ in selection for redundancy will not be unlawful discrimination.

Article 74 states that acts done by employers, employment agencies or vocational organisations in pursuance of affirmative action will not be unlawful discrimination.

Article 76 states that, provided ECNI has given its approval, it will not be unlawful discrimination for an employer or a training agency on the employer’s behalf to provide training to persons of a particular religious belief (not specifically Roman Catholic or Protestant) in relation to employment at a particular establishment in NI (but not current employees of that employer) where there are no persons of that religious belief doing that work at that establishment or where persons of that religious belief are under-represented amongst persons doing that work at that establishment.

As the scope of ‘affirmative action’ in FETO applies only in relation to Protestants and Roman Catholics, and as training under article 76 applies only in relation to a particular establishment, this otherwise very commendable package of measures probably does not go as far as is permitted under Article 7, Employment Framework Directive.

The Employment Framework Directive (Art.15(1)) provides a specific exception permitting positive action in recruitment into the police service of NI. The Police (Northern Ireland) Act 2000, requires that 50% of persons recruited to the NI Police Service as police trainees or support staff are to be Roman Catholics and 50% persons are to be persons who are not Roman Catholics; these measures were incorporated as part of the government’s response to the report of the Independent Commission on Policing for NI and are intended to overcome the historic under-representation of Roman Catholics in an important, highly visible and often controversial public service. These measures will expire on the third anniversary of their coming into force unless they are specifically renewed by an order made by the Secretary of State, who is expected to take account of progress that has been made in securing a more representative police force.

Race - GB and NI

The RRA and RRO permit positive action in the following contexts:

- a) allowing persons of a particular racial group access to facilities to meet their special needs in relation to their education, training and welfare (RRA s.35) (RRO art.35)
- b) permitting the provision of training or encouragement for persons of a particular racial group in respect of particular work where members of that racial group are underrepresented amongst persons doing that work (RRA ss 37-38) (RRO art.37); and
- c) permitting trade unions, employers’ or professional organisations to encourage membership among under-represented racial groups (RRA s.38) (RRO art.37).

Sexual Orientation – GB and NI

Exceptions for positive action are in SO Regulations (reg. 26) and NI SO Regulations (reg. 29), and take the following general form:

Nothing... shall render unlawful any act done in or in connection with –

- (a) affording persons of a particular sexual orientation access to facilities for training which would help fit them for particular work; or*
- (b) (b) encouraging persons of a particular sexual orientation to take advantage of opportunities for doing particular work,*

where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to sexual orientation suffered by persons of that sexual orientation doing that work or likely to take up that work.

Religion or Belief – GB

The RB Regulations (reg. 25) includes positive action provisions to prevent or compensate for disadvantages linked to religion or belief in terms identical to those above in the SO Regulations. The Equality Act 2006 contains no specific exceptions for positive action in the provision of goods and services.

Do measures of positive action exist in your country? Which are the most important?

The most important measures to secure positive action towards equality in the UK are embodied in the recent legislation imposing duties to promote equality on public authorities. The most comprehensive are the provisions in the Northern Ireland Act 1998 (NIA) which (s.75 and schedule 9) require public authorities of particular descriptions in carrying out their functions to have due regard to the need to promote equality of opportunity on nine separate grounds.¹¹¹ In GB, the Race Relations (Amendment) Act 2000 amended the RRA to include (s.71(1)) a statutory duty on all public authorities named or described in RRA Schedule 1A in carrying out their functions to have due regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups.

The Disability Discrimination Act 2005 has imposed, with effect from December 2006, a comparable duty on public authorities in GB to promote disability equality, and the government has introduced a similar duty in relation to sex equality in the Equality Act. This will come into force in April 2007. The Disability Discrimination (Northern Ireland) Order 2006 requires public authorities in NI to have due regard to the need to promote positive attitudes towards disabled persons and encourage participation by disabled persons in public life: in any case, public authorities in NI are also subject to the s. 75 duty discussed above, which covers disability.

The Employment Act 1989 introduced a statutory exception to the requirement to wear a safety helmet on a construction site for Sikhs who wear turbans when on such sites. The RB Regulations (reg.26) refers to this provision and provide that it would be unlawful indirect discrimination to apply a requirement, criterion or practice to a Sikh relating to the wearing of a safety helmet on a construction site if the person has no grounds to believe that the Sikh would not be wearing a turban when on the site.

See above the temporary provision in the Police (Northern Ireland) Act 2000 to increase representation of Roman Catholics in the police service, which is permitted as a special exception in the Employment Framework Directive (art.15(1)).

¹¹¹ Between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation, between men and women, between persons with a disability and persons without; and between persons with dependants and persons without.

Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma.

There are no disability quotas in operation in the UK, the previous quota scheme having been deemed a failure and abolished by the DDA. Similarly there are no affirmative action programmes as such for disabled people, so the question of breaches of equal treatment norms does not arise.

The Disability Discrimination Act is asymmetrical in nature, that is, it does not generally afford protection to non-disabled people. As a consequence, there is nothing to prevent a disabled person being treated more favourably than a non-disabled person.

The 'reasonable adjustment' duty on employers under the DDA, could be seen as specialised positive action on an individual by individual basis. In addition, the Department for Work and Pensions, through its Jobcentre Plus (combined job centre and social security office) supports a number of positive measures to assist disabled people enter employment, which are intended to prevent or compensate for disadvantages related to disability. The following are some key examples:

- *Job Introduction Scheme:* pays a sum of money to the employer for the first 6 weeks of employment provided that employment continues for 6 months; in exceptional cases it may be paid for 13 weeks.
- *Access to Work:* provides practical advice to help overcome work-related obstacles resulting from disability and makes grants towards extra employment costs, including: special aids or equipment, adaptations to premises/ equipment, help with travel to work, a support worker.
- *Work Preparation:* an individually-tailored programme to help a disabled person to return to work after a long period of sickness or unemployment.
- *New Deal for Disabled People:* a voluntary programme open to anyone receiving disability or health-related benefits; local "job brokers" helps them find and move into suitable work.
- *Disabled Person's Tax Credit:* a means-tested payment for people working people at least 16 hours/week who have a 'physical or mental disability which puts them at a disadvantage in getting a job'.
- *Disability Living Allowance:* a non-contributory benefit for disabled people who need help to care for themselves, or have mobility problems, or both. It is tax free, not means tested, and payable on top of any employment earnings.
- *WORKSTEP:* provides job support for disabled people who face complex barriers to getting and keeping a job but who can work effectively with the right support; it provides opportunities for disabled people to work for 16 hours or more in a supportive environment.

No affirmative action measures exist for Roma, but special educational facilities are available for Roma and Traveller children, and the positive race duty discussed above does extend to Roma and Travellers.

6. REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)? Are these binding or non-binding?

The UK anti-discrimination legislation (RRA ss. 53 – 57) (RRO arts. 51-54) (DDA ss.17A and 25) (FETO arts. 38-40) (RB Regulations regs 28 -32) (SO Regulations regs 28 -32) (NI SO Regulations regs 34-38) (s. 66 of the Equality Act 2006) includes provision enabling individuals who consider they have been discriminated against contrary to the Act/Order/Regulations to bring legal proceedings; complaints concerning employment-related discrimination (public sector and private sector) can be made to the employment tribunal (industrial tribunal or Fair Employment Tribunal in NI), and complaints concerning any other unlawful discrimination (by public sector or private sector bodies) can be made to the civil court (county court in England, Wales and NI and sheriff court in Scotland). The court/tribunal procedures are available to any person who considers s/he has suffered unlawful discrimination.

Employment/industrial tribunals were established to consider the full range of employment disputes. Each tribunal has a legally qualified chairman and two lay members, one ostensibly representing employers and the other, employees. In the county/sheriff court, cases are decided by a single judge; for cases under the RRA, however, the judge must be assisted by two lay assessors, that is people with experience of race relations problems selected from a list maintained by the Secretary of State, unless the parties agree that the judge should sit without assessors. (RRA s.67)

Orders by the tribunal or court are binding on the parties. There is a right of appeal on a point of law. In GB, appeals in employment cases proceed to the Employment Appeal Tribunal (one judge and two non-lawyer members), then to the Court of Appeal (England and Wales) or the Inner House of the Court of Session (Scotland) (three judges), then to the House of Lords (the highest court in the UK) (usually five judges). In NI appeals go directly to the Northern Ireland Court of Appeal (three judges), then to the House of Lords. Appeals from the county court go to the Court of Appeal and from the sheriff court to the Court of Sessions.

Employment/industrial/fair employment tribunals may also make non-binding recommendations (see 6.5 below).

Under the Disability Rights Commission Act 1999 (s.10) the DRC can refer complaints of disability discrimination under DDA Part III (discrimination in access to goods and services, including employment services and further and higher education) to conciliation which is carried out by a separate organisation under contract to the DRC, the Disability Conciliation Service. Approximately 70-80 cases are referred annually, of which nearly three-quarters result in an agreement between the parties. The ECNI has similar powers under the Equality (Disability, etc.) (Northern Ireland) Order 2000.

All claims to the employment tribunal for unfair dismissal or unlawful discrimination are referred to ACAS, or in NI the Labour Relations Agency, which has a statutory duty to promote a settlement. The ACAS officer attached to a claim will contact the parties who may or may not choose to enter into a discussion. A settlement agreed through ACAS is binding on the parties.

A complainant is able to use a statutory pre-action questionnaire to obtain information from the respondent. The questionnaire often helps the complainant or their adviser to assess the merits of a complaint before beginning legal proceedings; if a respondent fails to reply to the questionnaire, or his reply is evasive or equivocal, a court or tribunal may draw any inference from this fact including an inference of unlawful discrimination. (RRA s. 65) (RRO art. 63)(DDA s. 56)(SO Regulations reg. 33) (NI SO Regulations reg. 39)(RB Regulations reg. 33)(FETO art. 44).

c) *Can a person bring a case after the employment relationship has ended?*

Yes. In *Relaxion Group v Rhys-Harper plc*,¹¹² the House of Lords held that a complainant can bring an action in respect of discrimination that occurred after the employment relationship had terminated under the SDA, RRA and DDA, as long as some link existed between the discriminatory act and the period of employment itself.

Provisions in the regulations introduced to implement the 2000 Directives subsequently made explicit provision for this: see Regulation 27A of the Race Relations Act 1976 (Amendment) Regulations 2003, Regulation 21 of the Employment Equality (Sexual Orientation) Regulations 2003, Regulation 15 of the Disability Discrimination Act 1995 (Amendment) Regulations 2003, and Regulation 21 of the Employment Equality (Religion or Belief) Regulations 2003 [Note: there are equivalent provisions in the Employment Equality (Age) Regulations 2006]. The NI regulations make similar provision.

In relation to each, please note whether there are different procedures for employment in the private and public sectors.

There is no difference between the public and private spheres, in the context of employment.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?

Research consistently reveals that the majority of people who consider they have been victims of unlawful discrimination or harassment are very slow to seek legal redress. The main reasons are generally lack of confidence that they will be believed or fear that they will face some form of retaliation or victimisation.¹¹³

For individuals confident or determined enough to consider bringing legal proceedings, there are a number of barriers:

¹¹² [2003] UKHL 33

¹¹³ Aston J, Hill D, Tackey N., *The Experience of Claimants in Race Discrimination Employment Tribunal Cases* (2006) Department of Trade and Industry, Employment Relations Research Series, ERRS55.

There are statutory time limits for the initiating of complaints of discrimination, 3 months for employment-related cases and 6 months in the county/sheriff court. The court or tribunal may consider an application submitted outside these time limits if in all of the circumstances it considers that it is just and equitable to do so. New procedures¹¹⁴ now require that before an employee can present a discrimination claim to a tribunal, s/he must have made a complaint under the employer's grievance procedure. The grievance must be made not later than one month after the original time limit (normally 3 months), and the employee must wait 28 after his/her grievance is lodged before a claim can be presented to the tribunal. Where this procedure results in a late application, the tribunal can grant a 'just and equitable' extension. Many discrimination practitioners are concerned that employees will be deterred from complaining about unlawful discrimination by the prospect of having to attend an additional hearing held under the auspices of the alleged discriminator and at which they will not have the benefit of legal representation.

Employment tribunals do not normally order the unsuccessful party to pay the costs of the winner; a tribunal may order costs against a party for perceived time wasting or vexatious practice; new rules have broadened the grounds for awarding costs to include where the bringing or conducting of proceedings has been misconceived, i.e. with no reasonable prospect of success. This introduces an additional risk for unrepresented applicants for whom it may be difficult to know if their case is 'misconceived'. In the county/sheriff court there are fees from the outset, and, with few exceptions, an unsuccessful applicant will be ordered to meet the costs of the respondent.

Disabled people may have additional barriers to seeking legal redress; while the courts have a duty as service providers to make reasonable adjustments in anticipation of the needs of disabled people (s.21 DDA), there continue to be occasions when disabled people are significantly disadvantaged. Some courts and tribunals are not physically accessible, there are examples where no interpreters or unsuitable interpreters were provided, documents not provided in alternative formats, e.g. Braille, large font size.

The main barrier, however, is the lack of skilled, experience advice and assistance. Discrimination law is increasingly complex. Not only is most of the evidence in the hands of the respondent, but, in most cases, the respondent will have access to legal or other professional advice and representation; without comparable access to skilled case preparation and representation complainants are far less likely to succeed. Success rates for discrimination complaints are not high, even with representation; complaints of race discrimination are least likely to succeed, but on any of the grounds the rate of success for cases that are given a full hearing in the employment tribunal is likely to be between 20 – 30%.¹¹⁵ The equality commissions – CRE, EOC, DRC and ECNI assist relatively few applicants; public funding generally involves strict means testing and is not available for legal representation in employment tribunals. The lack of available skilled advice, assistance and representation in discrimination cases is a matter of growing concern, and a major issue in debates regarding the functions of the new GB Commission for Equality and Human Rights. Established by the Equality Act 2006 (See 7 below).

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

¹¹⁴ Employment Act 2002, Employment Act 2002 (Dispute Resolution) Regulations 2004 and Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2004.

¹¹⁵ Figures taken from research for the year 2001 published in Labour Research, April 2002

Please list the ways in which associations may engage in judicial or other procedures

a) in support of a complainant

b) on behalf of one or more complaints (please indicate if class actions are possible)

In the UK there is no scheme for the registration of NGOs. There are no restrictions under the normal rules of civil procedure on any organisation offering support to complainants in discrimination cases, where “support” is limited to advice, assistance in case preparation or financial assistance to secure external lawyers’ services. Some trade unions, the equality bodies (CRE, EOC, DRC, ECNI) and some specialised NGOs directly employ qualified lawyers and therefore can, potentially, offer full support to complainants.

Employment/industrial/fair employment tribunal and EAT procedures allow a complainant to represent him/herself or to be represented by any person. However, as stated above, many discrimination cases require preparation and advocacy by a person with relevant knowledge and experience. In county/sheriff courts a complainant may represent him/herself but otherwise representation in court must be by a lawyer.

In practice organisations likely to support discrimination complainants are the equality bodies (CRE, DRC, EOC, ECNI), trade unions, race equality councils, citizens advice bureaux or other voluntary sector advice agencies, complainant aid organisations.

b) on behalf of one or more complainants?

UK anti-discrimination legislation does not permit associations, organisations or other legal entities, including the equality bodies, to engage in proceedings on behalf of one or more complainants. Organisations cannot bring representative or “class” actions in the name of victims. In this respect UK legislation is not fully compliant with the Directives (arts. 7(2)/9(2)).

However, section 24 of the Equality Act 2006 permits the new Commission for Equality and Human Rights to seek injunctive relief to prevent a person from committing an unlawful act. This will come into force once the new Commission is established in October 2007.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

Each of the 2003 GB and NI regulations includes provision for shift of the burden of proof in relation to each of the grounds of discrimination and to all of the activities considered to be within the scope of the Directives¹¹⁶. (RRA ss. 54A and 57ZA, DDA s.17A(1C), RB Regulations regs. 29 and 32, SO Regulations, regs. 29 and 32, FETO 38A and 40A, RRO arts. 52A and 54B, NI SO Regulations regs. 35 and 38)

For example, RRA s.54A(2) states:

¹¹⁶ The shift of the burden of proof does not apply in cases under the RRA/RRO where the alleged discrimination is on grounds of colour or nationality, in cases under the RRA where the relevant activities are not specified in subsection 1(1B), in cases under FETO for activities outside art. 3(2B) and in cases under the DDA other than under Part II or employment services (s.21A). It also will not apply under the provisions of the Equality Act 2006 that prohibit discrimination on the grounds of religion or belief in employment.

“Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent –

- (a) has committed such [as specified in subsection (1)) an act of discrimination or harassment against the complainant, or*
- (b) is by virtue of section 32 [vicarious liability of employer] or 33 [aiding unlawful act] to be treated as having committed such an act of discrimination or harassment against the complainant,*

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed that act.”.

The draft age regulations make similar provision.

Recent cases concerning shift of the burden of proof and guidelines laid down by the EAT are discussed above under Case Law (0.3). It would appear that in this respect the UK legislation complies with the Directives.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, or person that help the victim of discrimination to present a complaint)

Victimisation under all of the UK anti-discrimination measures is prohibited as a form of unlawful discrimination. It appears in approximately the following form in each of the measures:

(1) A person ("A") discriminates against another person ("B") in any circumstances relevant for the purposes of any provision of this Order if – (a) he treats B less favourably than he treats or would treat other persons in those circumstances; and (b) he does so for a reason mentioned in paragraph (2).

(2) The reasons are that – (a) B has -

- (i) brought proceedings against A or any other person under this Act/Order/Regulations; or*
- (ii) given evidence or information in connection with such proceedings brought by any person; or*
- (iii) otherwise done anything under this Act/Order/Regulations in relation to A or any other person; or*
- (iv) alleged that A or any other person has (whether or not the allegation so states) contravened this Act/Order/Regulations; or*

(b) A knows that B intends to do any of those things or suspects that B has done, or intends to do, any of those things.

(3) Paragraph (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

Victimisation under UK legislation could apply to a wide range of people, the victim of the original act of discrimination or harassment, a witness, a third party who raised or supported a complaint on behalf of the victim. Further there is no requirement that the perpetrator of the

victimisation should have been involved in the original complaint, for example an employer who refused to employ a person who, in a previous job, had complained of discrimination or assisted a victim of discrimination.

The above provision enables the person victimised to seek redress once less favourable treatment has occurred, but offers no process to prevent it occurring. As there is a need to show less favourable treatment, the complainant will need to identify a real or hypothetical comparator. Case law has demonstrated how difficult it is for an individual to establish that because she/he had done one of the protected acts, she or he was treated “less favourably”, that is to find an appropriate comparator.¹¹⁷

The Directives (arts. 9/11) includes victimisation as separate from discrimination, providing that a person should not receive “adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment”. There is no indication that a comparator is required. The protection under UK legislation could result in awards of compensation but in most cases could not prevent adverse treatment being meted out; it is arguable that in this regard the UK legislation is not compliant with the Directives.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.

Are there any ceilings on the maximum amount of compensation that can be awarded?

Is there any information available concerning:

a) the average amount of compensation available to victims

Compensation awards vary across the grounds, and from context to context. As yet, it is too soon to assess average compensation awards for sexual orientation and religion/belief cases: some initial awards have been described in the 0.3 Case-law analysis above. In 2004, according to the Equal Opportunities Review (EOR) annual survey of compensation awards, the average award in disability discrimination cases was £28,889; for race discrimination, £13,720; and for sex discrimination (included here as a comparator) £11,898. Average compensation across all three grounds increased by 44% from 2003.

b) the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?

The anti-discrimination legislation specifies the remedies available where complaints of discrimination or harassment are upheld by a court or tribunal. The same remedies are available against public sector and private sector respondents. The main remedy is damages, which are calculated as in civil proceedings for tort, and may include “compensation for injury to feelings” whether or not damages are awarded for any other reason. Damages may be awarded for direct discrimination and harassment whether it was intentional or unintentional. In the case of indirect discrimination, if the employer or other respondent proves that the discrimination was unintentional, damages may only be awarded if the tribunal or court considers it ‘just and equitable’ to do so.

¹¹⁷ See, for example, *Aziz –v- Trinity Taxis* [1989] QB 463 and *Chief Constable of the West Yorkshire Police –v- Khan* [2001] IRLR 830.

There is no upper limit to the amount of compensation that can be awarded. In recent years the average total award in the employment tribunal has been approximately £8 - £10,000, with some awards of only a few hundred pounds and exceptional awards well in excess of £100,000.

In 2002, the Court of Appeal¹¹⁸ fixed a wide range for injury to feelings compensation -- from £500 to £25,000 -- divided into three bands depending on the seriousness of the case. An award can include aggravated damages to take account of the way the respondent treated the complainant or conducted their case.

County/sheriff courts in addition to the power to award damages (including damages for injury to feelings and aggravated damages) have all of the powers they would have in any other action in tort or (in Scotland) in reparation for breach of statutory duty. Levels of compensation in county/sheriff court claims are generally lower than in the employment tribunals (primarily because in most cases the victim's actual loss is likely to be less) and there is little evidence that the courts often use their powers to issue injunctions or other orders regulating the relationship of the parties. There are no reported case of which the author is aware in which the court has ordered the Defendant to take any measures to prevent future discrimination.

In addition to a declaration of the rights of the parties and an order for compensation, the employment/industrial/fair employment tribunal may make recommendations to protect the position of the complainant - to "*obviate or reduce the adverse effect on the complainant of any act of discrimination to which the complaint relates*"; the respondent is not bound to comply, but failure to do so can result in (increased) financial compensation to the complainant. The Fair Employment Tribunal has the additional power, when upholding a complaint, to make a recommendation that the respondent take action to prevent or reduce the adverse effect on a person other than the complainant (the author's emphasis) of any unlawful discrimination or harassment to which the complaint relates. None of the legislation, however, gives a tribunal the power to order a respondent to hire, promote or reinstate (after dismissal) the complainant or to take any steps to prevent discrimination in future.

Adverse media publicity following a successful complaint of racial discrimination can often be a more effective and dissuasive sanction than any formal order by a court or tribunal. In practice, it is the fear of adverse publicity that often influences respondents to settle complaints in advance of a hearing; the equality bodies have used the negotiations to settle cases as a means of securing agreement by respondents to take action to prevent future acts of discrimination. The effectiveness of such agreements depends, of course, on how well they are monitored once the ink is dry.

There is nothing in the UK anti-discrimination legislation that directly penalises organisations found persistently to discriminate unlawfully, for example by excluding them from the opportunity to be awarded Government contracts. The CRE, EOC, DRC and ECNI are able to use their powers of formal investigation to investigate organisations they believe are discriminating and, where they are satisfied that unlawful acts have been committed, they can serve a binding non-discrimination notice requiring the organisation to stop discriminating and to take action by specified dates to prevent discrimination from recurring. These same bodies can apply to the county/sheriff court for an injunction (RRA s.62, RRO art. 59, SDA s.71, FETO art. 41, Disability Rights Commission Act 1999 s.6, Equality (Disability, etc.) (NI) Order 2000 art. 6), either based on persistent discrimination after a finding of unlawful

¹¹⁸ *Vento v- Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102

discrimination or breach of non-discrimination notice; to the author's knowledge no such injunctions have ever been issued.

As discussed above, the Equality Act gives the new Commission for Equality and Human Rights the power to apply to a court to obtain an injunction to prevent discriminatory acts occurring.

Under the Human Rights Act, courts can issue injunctions to prevent breaches of the ECHR (as well as awarding damages), and can also grant similar forms of relief in administrative law to prevent discriminatory actions. There has as yet been no use of these powers or of the powers under the anti-discrimination legislation to grant injunctive relief to impose large-scale desegregation requirements or similar measures.

It should be noted that the FETO does contain sanctions on employers, including exclusion from public authority contracts, not for persistent discrimination but for failure to meet statutory reporting and workforce monitoring requirements, or for failure to comply with ECNI directions related to affirmative action; most commentators regard these as having a greater, long-term dissuasive impact than the sanctions available following successful litigation.

There are concerns that the existing remedies do not meet the standard of "effective, proportionate and dissuasive" set by the Directives. Arguably this is intrinsic in a scheme in which remedies are based on the principle of restitution – to put the victim in the position s/he would have been had the act of discrimination not been committed. Of course the payment of damages could have a deterrent effect, but the fact that certain organisations are repeatedly subject of discrimination proceedings suggests that more 'dissuasive' sanctions are required. One suggestion is that tribunals and courts could be given wider powers to order respondents to revise practices shown to be discriminatory.

7. SPECIALISED BODIES

Body for the promotion of equal treatment (Article 13 Directive 2000/43)

Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.

Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.

Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?

Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

Is the work undertaken independently?

If there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

Racial or Ethnic Origin

The RRA provided for the establishment of the Commission for Racial Equality (CRE), defined its functions and structure and the RR Order similarly provided for a CRE for NI (now ECNI) with identical duties and powers. On paper, these bodies, which are non-

departmental public bodies, would appear to meet the requirements of Article 13 of the Race Directive.

The duties of the CRE are to work for the elimination of unlawful discrimination and harassment, to promote equality of opportunity and good relations between persons of different racial groups and to keep the RRA under regular review; it has a general power to do anything necessary for the performance of these duties. The Commission is a body of between 8 and 15 people appointed by the Secretary of State for Home Affairs (the Home Secretary) for terms of not more than 5 years, although appointments can be renewed. The Chairman is full-time appointment and there are two part-time deputy Chairmen. Other commissioners are paid an allowance for time spent on CRE business. The CRE is fully funded by the Home Office; its annual budget must be approved by the Home Secretary.

The CRE has a duty to consider all applications by people seeking legal redress under the RRA and power to provide such assistance in a variety of forms including legal representation in court or tribunal. The CRE has powers to conduct formal investigations for any purpose connected with its duties, and can use its findings to make recommendations; where an investigation is based on a suspicion of unlawful discrimination the CRE can use statutory powers to require production of documents and information. The CRE has powers to bring proceedings in relation to discriminatory advertisements and instructions or inducement to discriminate.

Since the Race Relations (Amendment) Act 2000, the CRE has power to take enforcement action against public authorities who fail to comply with specific duties related to their duty to promote race equality (the ECNI has different powers in relation to the equality duties on public authorities under the Northern Ireland Act 1998). The CRE can also issue codes of practice in relation to employment, housing and compliance with the duty on public authorities to promote race equality. The CRE may undertake research or educational activities or support such work by others; the CRE can, with approval of the Secretary of State, provide financial assistance to organisations concerned with the promotion of equality of opportunity and good race relations.

Historically financial assistance has primarily been targeted either to racial equality councils (generally funding specified posts only) or to complainant aid organisations, which are organisations in different parts of the country that have demonstrated their ability to provide advice and assistance to victims of racial discrimination. Providing financial support to outside bodies has been a major part of the CRE's functions since it was created by the merger of the Race Relations Board (which dealt with complaints of discrimination) and the Community Relations Commission (which supported a network of local organisations both financially and in terms of their programmes of work).

Questions of the actual independence of the CRE from government are more likely to be raised in relation to priorities the CRE adopts for its promotional and enforcement work or issues it does, or carefully does not, raise publicly. However, in general, the CRE is widely perceived as being largely independent of government interference.

The Equality Commission for Northern Ireland (ECNI) was established under the Northern Ireland Act 1998 (s.73) to take over the functions of the separate equality bodies in NI, namely the CRE for NI, the Fair Employment Commission for NI, the Equal Opportunities Commission for Northern Ireland and the NI Disability Council. This meant that the ECNI has duties and powers comparable to the above in relation to race, religious belief and political opinion, sex and disability and, now, since the NI SO Regulations (regs.30 – 32),

most of the same powers and duties in relation to sexual orientation. The ECNI is again seen as independent in its work from government.

The continuing debate within the CRE and the ECNI concerns the relative priority to be given to 'promotional' work and to law enforcement including assistance to individual complainants. To provide legal representation in tribunal or court proceedings can be expensive, and neither body has unlimited resources. As a consequence of its new legal strategy which prioritises cases that clarify the law, create precedents, affect large numbers of people or help produce legislative change¹¹⁹ the CRE is providing legal representation to far fewer cases. The CRE annual report for 2003 states that in that year the CRE considered 1130 applications for assistance and granted full legal representation to 28, a 65% reduction compared to 2002.

As mentioned above, the CRE funds a number of specialist complainant aid organisations in different parts of the country that provide assistance in RRA cases. There is also a network of more than eighty race equality councils, funded in part by the CRE and otherwise funded by local public authorities, which are able to advise complainants, although it is reported that this is a decreasing part of their work.

The CRE's assistance to complainants is a crucial element in the UK's compliance with Article 13(2) of the Race Directive; there is concern that should the CRE (or the new Commission for Equality and Human Rights, see below) move too far away from this work, the UK will be required to have other bodies in place to maintain compliance.

Under section 36 of the Equality Act 2006, the CRE will be merged within and replaced by the new Commission for Equality and Human Rights by 31st March 2009. The Chair of the CRE, Trevor Phillips, has called for the work of the CRE in respect of good relations between different ethnic groups to be carried on by another government body, which would also focus on issues of integration and citizenship.

Sex

The Equal Opportunities Commission (EOC) was established by the SDA and the EOC for NI by the Sex Discrimination (Northern Ireland) Order 1976. The structure and functions of the EOC are basically the same as those of the CRE. It does not fund the same number of outside bodies as the CRE and it does not yet have powers in relation to sex equality duties of public authorities (since such duties have not yet been enacted), although the Equality Act gives this power to the EOC (from when this duty comes into force in April 2007) and then to the new Commission for Equality and Human Rights.

Disability

The Disability Rights Commission Act 1999 established the DRC with duties and powers comparable to those of the CRE outlined above, although not identical. As the CRE and EOC had been consulted during the drafting of the 1999 Act, certain provisions of that Act give the DRC greater and more explicit powers than the CRE or EOC, for example in relation to formal investigations or the securing of binding agreements from employers and others. The DRC has powers and duties identical to those of the CRE in relation to providing advice and assistance to complainants; for complaints outside the field of employment the DRC can make arrangements with an external body for the provision of conciliation services.

¹¹⁹ CRE Annual Report 2003 page 19

The Northern Ireland Human Rights Commission, established under the Northern Ireland Act 1998, has powers to support individuals who wish to bring human rights cases: this could include equality cases under the ECHR, in particular cases under Article 14 of the ECHR that are outside the scope of existing NI anti-discrimination legislation. The Human Rights Commission has signed a memorandum of understanding with the ECNI as to their respective roles.

The new single equality body for GB - the Commission for Equality and Human Rights

The Equality Act 2006 establishes a new single equalities and human rights body for GB, the Commission for Equality and Human Rights (CEHR), which will come into formal existence in October 2007. During 2004, the government consulted widely on its proposals for the role and structure of the CEHR, which were set out in a white paper "Fairness for all: a new Commission for Equality and Human Rights". It is expected that the CEHR, when it becomes operative in 2007, will take over all of the powers of the EOC and DRC and would have equivalent powers in relation to sexual orientation and religion or belief – and 'age' after anti-discrimination legislation is enacted. The CRE is at present to be merged with the new commission in 2009. In relation to human rights, the Act gives the CEHR would have a policy and promotional role, but no enforcement powers.

The Equality Act gives the CEHR a wide range of powers and functions, similar to those that can be exercised by the existing commissions, but more extensive in certain areas: it will be given a new power to seek injunctive relief to prevent discriminatory acts and will have wider powers to investigate how public authorities are complying with the positive equality duties. The intention is to ensure that in general there will be no diminution of the powers of the new commission when compared to the powers of the older commissions. Its introduction continues to attract controversy, with some concern that its establishment may see the specific needs of certain equality grounds being neglected, and that it may be slow to support many individual anti-discrimination cases. The chair of the CRE, Trevor Phillips, has proposed that a Commission for Integration be established to supplement the work of the CEHR. It remains to be seen if this proposal will be accepted by the UK government.

Like the bodies it would replace, members of the new Commission would be appointed by a Secretary of State to serve for a fixed term. Funding will be by the designated Secretary of State out of their departmental budget, and the CEHR will report annually to him/her. There is nothing to suggest that the CEHR will have any greater independence than the existing equality bodies, but neither does it appear that its independence will be less. However, it is worth noting that paragraph 42(3) in Schedule 1 to the Equality Act 2006 (which was inserted into the Bill to provide reassurance about the Commission's independence) provides that: "The Secretary of State shall have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining-

- (a) its activities,
- (b) its timetables, and
- (c) its priorities."

As its remit will also include human rights, there is a concern that real independence may be even more essential; during the consultation there were strong representations that the CEHR should report directly to parliament or a committee of parliament instead of to the executive.

8. IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The government committed itself to wide consultation on its proposals for implementation in GB of the Directives. As consultation requires a baseline of information, this has served as a way to disseminate information about the Directives. Well in excess of 10,000 copies of the first consultation document, were sent to a diverse range of organisations, including employers' organisations, public and private sector employers, trade unions, NGOs with a particular interest in any of the areas of discrimination within the Directives, lawyer's organisations, academics and others. In 2002-3 the government consulted in more detail on proposals for transposition, "Equality and Diversity – the Way Ahead". A separate consultation regarding legislation on age discrimination, "Age Matters" was carried out later in 2003; the government invited views on some of the difficult issues associated with age and employment. A similar consultation in NI was carried out between October 2003 and January 2004, "Prohibiting age discrimination in employment and training – Legislation for NI".

The government used its websites to make its consultation documents available to anyone interested, with links to versions of the consultation documents in Arabic, Hindi, Chinese and Gujarati, and a version prepared for persons with learning difficulties. The consultation documents are also available in Braille, large print and on tape. Similar steps have been taken for the draft age regulations, which have attracted a wide-ranging set of responses.

There was some press coverage when the RB Regulations and SO Regulations were approved and, later, when they came into force. Similarly some publicity was given to the DD Regulations when they came into force. It is the authors' perception, however, that far more publicity was and continues to be given to the provisions in the DDA regarding accessible premises of service. The draft age regulations have received some limited publicity.

The government made available £625,000 in 2003-4 and £1.45 million in 2004-5 to fund NGO awareness raising projects in relation to the SO and RB Regulations, including information materials, good practice guides, conferences and training. A further £2.5m is being provided for the period 2005-07. ACAS produced useful guidance on the SO Regulations and RB Regulations, in consultation with outside organisations. Similar steps are expected to be undertaken for the Age Regulations, when they come into force.

To a very considerable extent the governments in GB and NI rely on the CRE, EOC, DRC and the ECNI to increase public awareness of existing anti-discrimination laws and the Directives. All of these bodies publish a great deal of information about current protection against discrimination; all have an extensive range of publications, information and guidance available in hard copy and on their websites: www.cre.gov.uk, www.eoc.org.uk, www.drc-gb.org and www.equalityni.org. As indicated above, the government has itself undertaken major publicity campaigns in relation to new obligations under the DDA affecting employers and service providers.

It is relevant to note that the new complexity of the RRA, since the RR Regulations, makes providing simple guidance virtually impossible, and, regretfully, the government has done little in this regard. Government guidance on the RR Regulations does not make sufficiently clear the partial application of the new definitions; more comprehensive guidance by the

CRE is only available on the CRE website, and some of the CRE's other main publications offering guidance to the RRA have not been updated to include the new definitions.

b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

There exists in the UK a very large number of NGOs that represent or support particular groups or communities or special interests, concerned to combat discrimination.. Some receive some financial support from central or local government, most are dependent on non-government funding. There has been nothing to indicate that arrangements for consultation or 'dialogue' have been initiated in GB or NI specifically to meet the requirements of Article 12; it is more likely that the greater attention paid to NGOs has been to inform government and to seek to secure wider acceptance of its policies.

As indicated above, the government sought wide distribution of its consultation documents on transposition of the Directives, and encouraged responses from NGOs. This has been particularly true in respect of the draft age regulations and the Disability Discrimination Act 2005, where the government worked very closely with NGOs on a range of matters.

There are no formal structures for central government dialogue with NGOs, but there are no barriers to such dialogue. A government department often establishes ad-hoc groups by means of which Ministers or senior officials can consult with NGOs on difficult or controversial issues. For example after disturbances involving Asian and white youths in several towns in the North of England in 2001, a number of groups were called together to discuss community cohesion, including representatives from NGOs as well as representatives from relevant public authorities. The Department of Trade and Industry, which has lead responsibility for the proposed Commission for Equality and Human Rights, has sought to maintain good links with a range of NGOs covering all of the grounds within the EC Directives. The positive race and disability duties require public authorities to consult on the equality impact of their policies and practices, which has encouraged greater engagement with civil society and local communities.

Implementation of the s. 75 positive duty in Northern Ireland has seen widespread consultation with community groups. In NI, NGOs have established themselves as significant stakeholders in any discussions on equality issues. They were involved in the initial consultation on a Single Equality Bill and in the recent consultation in which proposals reflected some of the earlier response. They have also played an active role in consultation on measures to transpose the Directives. NGOs act as effective watchdogs of the performance by public authorities of their equality duties under s. 75 of the Northern Ireland Act 1998, which requires public authorities to consult on the equality impact of their policies and practices, and many NGOs with specialised interest, for example in disability issues, are more likely to be listened to within the equality impact assessment carried out by NI public authorities.

c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

The British Trades Union Congress (TUC), in its response to the December 2001 consultation document¹²⁰, welcomed the inclusion of Articles 11/13 in the Directives and the recognition of the potential role of collective bargaining to achieve good employment practice. The TUC

¹²⁰ TUC, Implementing the Employment and Race Directives, March 2002 (paragraphs 3.1 – 3.5)

stated that the provisions of Article 11 “... reflect, accurately in our view, that equal treatment is often better achieved and sustained not through litigation but by the parties involved dealing with each other honestly and openly”. The TUC response asked for further information as to what measures will be proposed for compliance with Articles 11/13.

In the various consultation documents concerning transposition of the Directives and establishment of a single equality body in GB, it appear that one aim of the government has been to reassure business and employers generally that neither the existing nor the proposed legislation should be unduly burdensome, that guidance and support will be available and, more positively, that equality is good for business. This message has not included a role for trade unions in combating discrimination or promoting equality in the workplace, through collective agreements, joint working or any other methods. Again, however, the positive equality duties may have an impact in this respect.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment?

There are specific provisions for this purpose in the anti-discrimination legislation for each of the relevant grounds: RRA (ss 72 and 72A), DDA s.17C and Schedule 3A), GB Religion and Belief Regulations (art. 35 and Schedule 4) GB SO Regulations (art. 35 and Schedule 4), FETO (articles 100, 100A and 100B), RRO (arts. 68, 68A and 68B) NI SO Regulations (art. 42 and Schedule 4).

b) Are any laws, regulations or rules contrary to the principle of equality still in force?

It is not unreasonable to assume that there are laws, regulation or rules contrary to the principle of equality that are still in force; nothing in the UK anti-discrimination legislation has the effect of striking out or disapplying primary or secondary legislation.

However, as part of the transposition process, Government Departments were required to review the legislation for which they are responsible to ensure that any which was contrary to the Directive's principles of equal treatment in relation to disability, religion or belief and sexual orientation was repealed or amended. That procedure was repeated in respect of age. Legislative provisions found contrary to the principle of equal treatment on grounds of age are being repealed or, retained, where they can be objectively justified under the provisions of the Directive.

Prior to the 2003 regulations, the RRA, the RRO and the FETO stated that the prohibition of discrimination did not apply to acts done in compliance with other legislation passed before or after these measures. The 2003 regulations have deleted that exception in the RRA, RRO and FETO within the scope of the Directives, but have not repealed any existing conflicting legislation. The Equality Act retains this exception.

An exception for acts done under statutory authority also remains part of the DDA in GB and NI. In the RB Regulations there is no general reference to other legislation, but art. 39 states that the regulations are without prejudice to ss. 58 – 60 of the School Standards and Framework Act 1998 (which permit religious discrimination in appointment and dismissal of teachers in schools with a religious character, without the need to show legitimate aim or

proportionality – see above 4.2(a)) and s.21 of the Education (Scotland) Act 1980 (management of denominational schools).

9. OVERVIEW

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.

This could also be used to give an overview on the way (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

The decisions by the UK government to transpose the Directives by way of secondary legislation, pursuant to s.2 of the European Communities Act 1972, which restricted the legislation to the contents of the Directives, instead of primary legislation without such restriction, has resulted in an unduly complex mosaic of anti-discrimination law that lacks coherence and consistency and is difficult if not impossible for employers and employees, service providers and service users and the public generally to understand.

For example, the RRA, RRO and FETO now all have a two-track structure in which different definitions of indirect discrimination and harassment, and different exceptions for genuine occupational requirement and different rules on the burden of proof apply. To know which provisions apply in particular circumstances is not necessarily straightforward. It may depend on, for example, whether the discrimination is alleged to be on grounds of being black, or African, or Nigerian or whether the discrimination occurred when the police were assisting the victim or arresting or searching him/her.

In addition, there are major inconsistencies between different anti-discrimination laws, with wider protection and better means of enforcement for some grounds.

Given the vast array of inconsistent anti-discrimination law, and a growing consensus in favour of a single equality act, the announcement at the end of February 2005 of a governmental review of discrimination law was widely welcomed. The Discrimination Law Review was announced in parallel with a wider Equalities Review and both are envisaged as leading towards a Single Equality Bill.

There is a growing consensus that the development and enactment of a single equality laws for GB and NI respectively is urgently required. The process is considerably further ahead in NI, where, towards the end of 2004, there was a second consultation on a single equality bill. The large number of Acts, statutory instruments, regulations, orders, codes of practice and guidance, dealing with often subtle differences, benefiting no one, not even the employer or service provider who pays little heed to the law and carries on with practices that perpetuate disadvantage and inequality.

The extension of protection against discrimination by the Equality Act 2006 and the Disability Discrimination Act 2005 is very welcome, and has gone some way down the road towards establishing more a coherent legislative framework: however, UK anti-discrimination law remains fragmented, unclear and deeply confusing.

10. COORDINATION AT NATIONAL LEVEL

Which government department/ other authority is responsible for dealing with or coordinating issues regarding anti-discrimination on the grounds covered by this report?

At governmental level in GB there is less than complete clarity as to which government department is responsible for anti-discrimination measures. Consultation on proposals for transposition of the Directives has been led by the Department of Trade and Industry. The Home Office, however, retains responsibility for issues relating to race and religion, and the Department for Work and Pensions has lead responsibility for disability issues. Transposition of provisions on age discrimination is being led by the Department of Trade and Industry. The Department for Education and Skills has lead responsibility for vocational training matters.

[Note: in May 2006, a new Department for Communities and Local Government assumed responsibility for the Commission for Equality and Human Rights, including issues relating to gender, sexual orientation, race and religion."]

In NI, proposals to transpose the Race Directive and Framework Directive were published by the Office of the First Minister and Deputy First Minister (OFMDFM). The Northern Ireland Assembly has been suspended since October 2002 returning, temporarily, legislative powers to the UK Parliament in Westminster. Responsibility for transposition of the Directives in NI lies with the Minister with responsibility for equality issues in the Office of the First Minister Deputy First Minister.

Annex

1. Table of key national anti-discrimination legislation
2. Table of international instruments
3. Schedule of abbreviations used in this report

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: United Kingdom

Date: January 2006

Date January 2005

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services	e.g. prohibition of direct and indirect discrimination or creation of a specialised body
Race Relations Act 1976 www.homeoffice.gov.uk/docs/racerel1.html	1977	Racial grounds, including grounds of colour, race, nationality (including citizenship), ethnic origins, national origins	Civil law (included criminal offence of inciting racial hatred; when the 1986 Public Order Act included offences of inciting racial hatred this was deleted from the 1976)	all sectors of employment and employment related activities, access to goods facilities and services, disposal and management of premises, education. Applies to GB.	Prohibition of direct, indirect discrimination and victimisation, rights of individual to seek legal redress, creation of Commission for Racial Equality as specialised body
Race Relations (Amendment) Act 2000 www.legislation.hmso.gov.uk/acts/acts2000/20000034.htm	April 2001	Racial grounds	Civil law	Extends scope of 1976 Act to include all functions of public authorities. Applies to GB.	Wider protection against discrimination. Imposes statutory duty on public authorities to promote race equality

<p>Race Relations Act 1976 (Amendment) Regulations 2003</p> <p>www.legislation.hmso.gov.uk/si/si2003/20031626.htm</p>	July 2003	Race and ethnic origins and national origins	Civil law	All sectors of employment and employment related activities, education, access to goods, facilities and services, disposal and management of premises, social security, health care, other forms of social protection, social advantage. Applies to GB.	Amends RRA to include new definitions of indirect discrimination, harassment, new GOR, shift of burden of proof for certain grounds and activities seen as within scope of Race Directive
<p>Disability Discrimination Act 1995</p> <p>http://194.128.65.3/acts/acts1995/Ukpga_19950050_en_1.htm</p>	Various dates from Nov. 1995	On grounds of being, or having been, a disabled person within the definition in the Act	Civil law	all sectors of employment and employment related activities,, access to goods, facilities and services, further and higher education, some aspects of transport. Applies to GB and NI.	Prohibits discrimination unless can justify, requires reasonable adjustments unless can justify failure to do so, victimisation, right to seek legal redress
<p>Disability Rights Commission Act 1999</p> <p>http://www.opsi.gov.uk/acts/acts1999/19990017.htm</p>	August 1999	Disability	Civil	Applies to GB.	Creates Disability Rights Commission for GB (specialised body)

Disability Discrimination Act 1995 (Amendment) Regulations 2003 http://194.128.65.3/si/si2003/20031673.htm	Oct. 2004	on grounds of being, or having been, a disabled person within the definition in the DDA	Civil law	Extends scope of employment provisions to all sectors of employment, except the Armed Forces. Applies to GB and NI.	Amends DDA in relation employment, adding direct discrimination (without justification) and harassment, removes justification re failure to make reasonable adjustment in employment, and requires shift of burden of proof
Disability Discrimination Act 1995 (Pensions) Regulations 2003 www.opsi.gov.uk/si/si2003/20032770.htm	Oct. 2004	on grounds of being, or having been, a disabled person within the definition in the DDA	Civil law	Occupational Pensions. Applies to GB and NI.	Inserts non-discrimination provision into all pension schemes, imposes duty to make reasonable adjustments
Special Educational Needs and Disability Act 2001 http://www.opsi.gov.uk/acts/acts2001/10010--a.htm	Sept. 2002	On grounds of being a disabled person within the definition of the DDA as a pupil/student or prospective pupil/student	Civil law	Schools, local education authorities, providers of statutory youth and community services. Applies in the main to GB and NI, with some provisions applying to GB only.	Prohibits discrimination by bodies responsible for schools, further & higher education, youth services re disabled prospective and existing pupils/students.
Employment Equality (Religion or Belief) Regulations 2003 http://www.legislation.hmso.gov.uk/si/si2003/20031660.htm	Dec. 2003	Religion or belief	civil law	all sectors of employment and employment related activities, further and higher education. Applies	Prohibits direct and indirect discrimination, harassment, victimisation, right to seek legal redress, shift of burden of proof

				to GB.	
<p>Employment Equality (Sexual Orientation) Regulations 2003</p> <p>http://www.legislation.hmso.gov.uk/si/si2003/20031661.htm</p>	Dec. 2003	Sexual orientation	Civil law	all sectors of employment and employment related activities, further and higher education. Applies to GB.	Prohibits direct and indirect discrimination, harassment, victimisation, right to seek legal redress, shift of burden of proof
<p>The Fair Employment and Treatment (NI) Order 1998</p> <p>www.legislation.hmso.gov.uk/si/si1998/19983162.htm</p>	Various from Dec. 1998	Religious belief and political opinion	Civil law	All sectors of employment and employment related activities, further and higher education, access to goods, facilities and services, disposal and management of premises. Applies to NI, and replaced previous legislation.	Prohibits direct and indirect discrimination, victimisation, right to seek legal redress, establishes specialised body, requires employers to register, monitor workforce
<p>Race Relations (NI) Order 1997</p> <p>http://194.128.65.3/si/si1997/1970869.htm</p>	Various from March 1997	Racial grounds as the RRA and grounds of belonging to Irish Traveller community	civil law	all sectors of employment and employment related activities, education, access to goods facilities and services, disposal and management of premises. Applies	Prohibits direct and indirect discrimination, victimisation, right to seek legal redress, creates CRE for NI, specialised body.

				to NI.	
Northern Ireland Act 1997 http://www.opsi.gov.uk/acts/acts1998/19980047.htm	1 st January 2000	On the grounds of religious belief, political opinion, racial group, age, marital status, sexual orientation, gender, disability and dependant status	Civil law	Activities of public authorities and the performance of public functions	Prohibits discrimination on the grounds of religion or belief in the performance of public functions (s. 76), and imposes a duty upon NI public authorities to promote equality of opportunity (s. 75)
Fair Employment and Treatment Order (Amendment) Regulations (NI) 2003 www.northernireland-legislation.hmsso.gov.uk/sr/sr2003/20030520.htm	Dec. 2003	Religious belief and political opinion	Civil law	All sectors of employment and employment related activities, further and higher education. Applies to NI.	Amends FETO adding new def. of indirect discrimination,, harassment, shift of the burden of proof applying to employment and further and higher education but not other activities within FETO
Race Relations Order (Amendment) Regulations (NI) 2003 www.northernireland-legislation.hmsso.gov.uk/sr/sr2003/20030341.htm	July 2003	Race and ethnic origins and national origins (includes origins within Irish	civil law	All sectors of employment and employment related activities, access to goods facilities and services, education,	Amends RRO extending scope to meet that of the Race Directive, new definition of indirect discrimination, harassment, shift of the burden of proof

		Traveller community)		disposal and management of premises, social security, healthcare, other social protection, social advantage. Applies to NI.	
Employment Equality (Sexual Orientation) Regulations (NI) 2003 www.northernireland-legislation.hmsso.gov.uk/sr/sr2003/20030497.htm	Dec. 2003	Sexual orientation	Civil law	all sectors of employment, employment related activities, further & higher education. Applies to NI.	Prohibits direct and indirect discrimination, harassment, victimisation, right to seek legal redress, shift of burden of proof
Disability Discrimination Act 1995 (Amendment) Regulations (NI) 2004 www.northernireland-legislation.hmsso.gov.uk/sr/sr2004/20040055.htm	Oct. 2004	On grounds of being a disabled person within the definition in the DDA	Civil law	All sectors of employment, further and higher education. Applies to NI.	Amends DDA to prohibit direct discrimination (without justification), removes justification when fail to make reasonable adjustment, harassment, shift of burden of proof
Equality (Disability, etc.) (NI) Order 2000 www.opsi.gov.uk/si/si2000/20001110.htm	April 2000			Applies to NI.	Gives ECNI powers and duties in relation to disability discrimination equivalent to those of the DRC
Disability Discrimination Act 2005 http://www.opsi.gov.uk/acts/acts2005/20050013.htm	5 December 2005, with the positive duty coming into force in December 2006	Disability	Civil	Public authorities, housing, transport, definition of disability. Applies to GB.	Prohibits discrimination in the performance of public functions, imposes positive duty to promote equality upon public authorities, an extends scope of DDA

The Disability Discrimination (Northern Ireland) Order 2006 http://www.opsi.gov.uk/si/si2006/20060312.htm	Not yet announced.	Disability	Civil	Public authorities, housing, transport, definition of disability. Applies to NI	Prohibits discrimination in the performance of public functions, imposes certain requirements to promote equality upon public authorities, an extends scope of DDA
Equality Act 2006 http://www.opsi.gov.uk/acts/acts2006/20060003.htm	Most of the provisions of the Act relating to the establishment of the new Commission for Equality and Human Rights will come into force on 18 th April 2006, with the Commission itself being formally established in October 2007 . The provisions in respect of the gender duty and prohibiting discrimination by public authorities in the performance of public	Religion and belief, sexual orientation, all grounds	Civil	Enforcement and promotion; goods and services, housing; education; functions of public authorities. Applies to GB only, except its provisions giving power to the Secretary of State to prohibit discrimination on the grounds of sexual orientation in the provision of goods and services, which apply to GB and NI.	Extends protection against discrimination on grounds religion/belief and sexual orientation to provision goods and services, housing, education, public functions. Also establishes new Commission for Equality and Human Rights.

	functions on gender grounds will come into force on 6 th April 2007. The provisions prohibiting religious discrimination in the provision of goods and services are expected to come into effect in October 2006.				
Employment Equality (Age) Regulations 2006 http://www.dti.gov.uk/er/equality/age.htm	1st October 2006	Age	Civil	Employment and Vocational Training. Applies to GB	Transposes age provisions of the Directive
Employment Equality (Age) Regulations (Northern Ireland) 2006 http://www.ofmdfmi.gov.uk/index/equality/age.htm	1st October 2006	Age	Civil	Employment and Vocational Training. Applies to NI.	Transposes age provisions of the Directive

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: United Kingdom

Date: January 2006

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Yes	Yes	A derogation from article 5(1) to permit the UK to detain foreign nationals indefinitely under the Anti-Terrorism, Crime and Security Act 2001 was withdrawn on 16 March 2005	yes	Incorporated into UK law by Human Rights Act 1998
Protocol 12, ECHR	No	No			No
Revised European Social Charter	Yes	No		Ratified collective complaints protocol? No	No
International Covenant on Civil and Political Rights	Yes	Yes		No	No
Framework Convention for the Protection of National Minorities	Yes	Yes			No

International Convention on Economic, Social and Cultural Rights	Yes	Yes		No	No
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes		No	No
Convention on the Elimination of Discrimination Against Women	Yes	Yes		Proposed but not yet approved	No
ILO Convention No. 111 on Discrimination	Yes	Yes		No	No
Convention on the Rights of the Child	Yes	Yes	A reservation: "Where at any time there is a lack of suitable accommodation or adequate facilities for a particular individual in any institution in which young offenders are detained, or where the mixing of adults and children is deemed to be mutually beneficial, the United Kingdom reserves the right not to apply article 37 (c) in so far as those provisions require children who are detained to be accommodated separately from adults."	No	No

ANNEX 3: SCHEDULE OF ABBREVIATIONS USED IN THIS REPORT

CEHR – Commission for Equality and Human Rights

CRE - Commission for Racial Equality

DDA - Disability Discrimination Act 1995

DD Regulations - Disability Discrimination Act 1995 (Amendment) Regulations 2003

DRC - Disability Rights Commission

EAT - Employment Appeal Tribunal

ECNI - Equality Commission for Northern Ireland

EOC - Equal Opportunities Commission

FETO - Fair Employment and Treatment (Northern Ireland) Order 1998

FETO Regulations - Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003

GB – Great Britain

LGB - lesbian, gay or bi-sexual

NI – Northern Ireland

NI DD Regulations - Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004

NI SO Regulations - Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003

RB Regulations - Employment Equality (Religion or Belief) Regulations 2003

RRA - Race Relations Act 1976

RR(A)A - Race Relations (Amendment) Act 2000

RR Regulations - Race Relations Act 1976 (Amendment) Regulations 2003

RRO - Race Relations (Northern Ireland) Order 1997

RRO Regulations - Race Relations Order (Amendment) Regulations (Northern Ireland) 2003

SDA - Sex Discrimination Act 1975

SO Regulations - Employment Equality (Sexual Orientation) Regulations 2003

2003 Regulations - all of the above mentioned regulations approved in 2003 and the NI DD Regulations approved in 2004