



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

**COUNTRY REPORT 2008**

**UNITED KINGDOM**

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**State of affairs up to 31 December 2008**

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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.<sup>1</sup> 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 through both primary legislation [Acts of Parliament] and secondary laws [Statutory Instruments]. These laws are subsequently 'interpreted' by the courts to create a body of case-law which 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 (England, Wales, Scotland and Northern Ireland) 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 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. After a period of political uncertainty, during which this Assembly was at times suspended while its devolved powers reverted to the Westminster Parliament, the Assembly has been again re-established following the St Andrew's Agreement in 2006 and currently exercises its wide-ranging devolved powers.

By signing the Treaty of Rome in 1972 the UK impliedly accepted some limitation on the sovereignty of the UK and the Westminster 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 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, this procedure limits the scope of regulations to that of the relevant directive.

<sup>1</sup> 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 (or Act), which came into force on 11 March 2004. This legislation has been replaced by the Equal Opportunities Act 2006, transposing the equal opportunities directives. The Gibraltar legislation is not discussed in this report.



Where existing UK legislation on the same matter is wider in scope than the directive being implemented, this has tended to result in anomalies and inconsistencies in the resulting UK law post-incorporation. This are discussed and analysed at length in the government consultation paper *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (Department for Communities and Local Government, London) published in June 2007: examples include the different definitions of indirect discrimination that apply when discrimination on the grounds of race or ethnicity is at issue (which is covered by the Directives) compared to the definition that is applied when discrimination on the grounds of skin colour or nationality is involved, and the absence of a justification defence to a failure to make reasonable accommodation in employment (as required by the Framework Equality Directive), but the continued existence of such a defence in the area of access to goods and services.

However, the UK government has recently introduced a legislative proposal (the Equality Bill 2009), which is intended to remove many of these inconsistencies and make GB discrimination law more accessible and effective: when and if enacted, this legislation will codify key elements of GB discrimination law in a single legislative instrument and eliminate many of the complexities that currently plague GB discrimination law.

The Northern Irish Executive is currently considering whether to introduce similar legislation in Northern Ireland.

The enactment of the Human Rights Act 1998 (HRA), which incorporated the European Convention on Human Rights (ECHR) into UK law, has also had a significant 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 within the UK (England and Wales, Scotland and Northern Ireland) are similar but not identical. In each there are first instance tribunals in which all employment-related cases are heard, and separate civil courts (county courts in NI and England and Wales, sheriff courts in Scotland) for other civil claims. The final civil appeal court for all three jurisdictions is the Judicial Committee of the House of Lords, which will become the new UK Supreme Court in October 2009.

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 (imposed by the Race Relations Act 1976 s.71; Disability Discrimination Act 2005 s. 3; Disability Discrimination (NI) Order 2006 Article 5; Equality Act 2006 s. 84; Northern Ireland Act 1998, 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 legislation imposing these positive duties can be enforced by the new Equality and Human Rights Commission (EHRC) (which commenced its work on 1<sup>st</sup> October 2007) in the lower county/sheriff courts.



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 where an accused is charged with the offence of inciting racial hatred or (since 2007) the new offence of inciting religious hatred, or offences including harassment, assault and criminal damage which 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 Overview/State of implementation

*List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.*

*Please clearly and briefly indicate whether the Member State had taken advantage of the option to defer implementation of Directive 2000/78 EC to 2 December 2006 in relation to age and disability?*

*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.*

*Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.*

The UK took advantage of the option to defer implementation of Directive 2000/78/EC until December 2006 in respect of age, but legislation is now in place which had been enacted to meet the transposition requirements of Directive 2000/43 and Directive 2000/78. The legislation giving effect to the Directives came into force in July and December 2003, October 2004 and, for the age provisions, 1 October 2006 and 1 December 2006.

Extensive legislation covering race and sex discrimination in the areas of employment, occupation and access to goods and services has been in place since the mid 1970s, with disability discrimination legislation having been introduced in the 1995. This legislation has generated a complex and extensive case-law, partially generated by activist NGOs and the presence in the UK of equality commissions since the late 1970s. As a result, there is extensive knowledge of discrimination law on the part of lawyers, trade unions, courts and tribunals. Therefore, for example, claims of indirect discrimination are commonplace in UK law.

However, the extent and variety of this case-law has generated a complex framework of legal norms and precedents, and the technical, detailed and precise nature of UK legislative drafting has further contributed to this complexity.





In addition, 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 meant that the implementation legislation was restricted to the contents and scope of the Directives, has also contributed to the creation of what is now an unduly complex if far-reaching mosaic of anti-discrimination law. This framework lacks coherence and consistency in places: it also can be difficult 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, 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.

The extension of protection against discrimination by recent legislation such as the Equality Act 2006, the Disability Discrimination Act 2005 and the Equality Act (Sexual Orientation) Regulations of 2006 and 2007 has been 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 confusing. As a result, there is a growing consensus that the development and enactment of a single, clear and comprehensive code of equality law for GB and NI respectively is urgently required.

The announcement at the end of February 2005 of a governmental review of GB discrimination law was therefore widely welcomed. This Discrimination Law Review was announced in parallel with a wider Equalities Review which examined the role of social policy in combating inequality. Both Reviews produced reports in mid 2007. The Discrimination Law Review resulted in the publication of a consultation paper *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (Department for Communities and Local Government, London) in June 2007, which proposed both a consolidation of GB discrimination law and an assortment of specific adjustments to the existing law. However, this consultation paper attracted criticism from its lack of ambition from trade unions, the equality commissions and NGOs, despite its welcome proposal for a simplification and codification of the complex mess of UK anti-discrimination law within a single equality act. The reforms to the existing legislation proposed by the Review were seen as too cautious by its critics, especially the proposal not to impose equality duties upon private sector bodies, which is particularly important given the ongoing privatisation of functions previously performed by public bodies.





The UK government in its detailed response to the consultation, *The Equality Bill – Government Response*, published in July 2008, indicated that the forthcoming Equality Bill would adhere to the general approach set out by the Discrimination Law Review: however, the government did indicate it would be prepared to legislate to ensure more transparency in equal pay matters in the private sector, expand the available scope of positive action, extend protection against age discrimination to the area of goods and service provision, impose a cross-ground positive equality duty on all public authorities and introduce a set of policy measures to ensure more effective enforcement of GB discrimination law and to encourage a greater emphasis on equality in the private sector.

The text of the Equality Bill was finally published in April 2009 and contains these proposed reforms: it also codifies, simplifies, extends and clarifies the existing law. In general, the text of the Bill has received a relatively positive response from NGOs and activists, although aspects of the proposed legislation have been criticised as insufficiently ambitious. The Bill is currently proceeding through the House of Commons: further amendments to its text are likely, and it is not expected to become law before January 2010 at the earliest.

Political discussions about introducing codified and extended equality legislation are also underway in NI, where, between June 2004 and November 2004, there was a second consultation on a single equality bill. However, this process has been delayed by ongoing political difficulties in Northern Ireland and so far no agreed legislative proposal has been published.

The authors and other discrimination law experts consider that in a limited 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 to the requirements of the Directives. The areas of possible concern are as follows:

- The definition of indirect discrimination in much of the UK legislation appears to be narrower in some respects than that used in the Framework Equality and Race Directives, and the test potentially less rigorous, although the UK courts should be able to correct this flaw if it presents a genuine obstacle to applicants by applying the legislation in line with the requirements of the Directives. (In addition, the recently introduced Equality Bill taken together with recent legislation (the Race Relations Act 1976 (Amendment) Regulations 2008, SI no. 3008) may in any case correct this problem to some extent by making it possible for ‘anticipated’ forms of indirect discrimination to be challenged, i.e. provisions, criteria or practices which may have an adverse impact on protected groups may now be challenged even if they have yet to be applied to a particular individual),
- Self-employment and occupation may not be fully covered; the test to justify genuine occupational requirement in UK legislation may be a little 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 recently introduced Equality Bill does not appear to alter the existing legal position.)

- Indirect discrimination on the grounds of disability is not currently prohibited. The requirement to make reasonable accommodation in UK law *may* close this gap to a sufficient extent, as Art. 2(2)(b) of the Framework Equality Directive appears to contemplate. In addition, the UK Disability Discrimination Act (DDA) prohibits both direct discrimination against persons with disabilities and ‘less favourable treatment’ of a person with a disability for a reason related to their disability, which had been interpreted by the UK courts as capable of covering certain forms of discrimination that would in other contexts be classified as indirect discrimination. However, a recent decision by the House of Lords in the case of *London Borough of Lewisham v Malcolm* has made it more difficult to establish the existence of less favourable treatment related to disability, reversing the approach previously adopted by the lower courts. As a result, the protection of persons with disabilities in UK law may not conform fully to the requirements of the Directive. The text of the recently introduced Equality Bill prohibits direct discrimination on the grounds of disability, treatment which is detrimental to a disabled person on account of their disability and which cannot be objectively justified, and also indirect discrimination on the grounds of disability (with the ban on discrimination arising from a person’s disability and indirect disability discrimination replacing the previous prohibition on disability-related discrimination which was weakened as a result of the *Malcolm* decision). It is as yet unclear whether these proposed new provisions will ensure that GB law can be said to be in full conformity with the provisions of the Directive.
- There is at present no general statutory right for *individuals* to seek legal redress for instructions to discriminate: in most cases, only the EHRC 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 in the context of employment and occupation. (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.) Both the GB and NI Age Regulations 2006 provide for a statutory right for an individual to seek legal redress for instructions to discriminate: however, if individuals do not suffer direct detriment as a result of the instructions to discriminate, they may not be able to bring a legal action. This appears to be potentially incompatible with the Directives: however, the recently introduced Equality Bill provides that individuals will be able to bring a discrimination case in GB against a person who issues instructions to discriminate, if a sufficient relationship of proximity exists between the discriminator and the claimant.
- 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 which gives a considerable degree of freedom to schools to discriminate on the grounds of religious belief in employing staff; the imposition of a “reasonableness test” in the definition of harassment may conflict with the non-regression principle in the Directives. (The recently introduced Equality Bill does not appear to alter the existing legal position.)
- UK legislation prohibits harassment ‘on the grounds’ of race and ethnicity, sexual orientation, religion or belief, disability or age: however, Article 2(3) of Directive 2000/78/EC refers to harassment ‘related to’ any of these grounds. This difference in wording may mean that there is a possibility that the Regulations do not prohibit all the forms of discrimination covered by the Directive.

This issue arose in *English v Thomas Sanderson Blinds Ltd*,<sup>2</sup> where the Employment Appeals Tribunal (EAT) dismissed a claim for harassment brought by a man who was not gay and who was known by his harassers not to be gay, but who was nevertheless subject to homophobic abuse. On appeal, the Court of Appeal overturned the initial decision of the EAT and took the view that as the harassment occurred ‘on the grounds of’ the applicant’s sexual orientation, in the sense of being based upon or linked to his real or imagined sexual orientation, that was sufficient to bring the complaint within the scope of the 2003 Regulations.<sup>3</sup> Nevertheless, even though the majority of the Court of Appeal adopted a broad approach to the interpretation of the phrase ‘on the grounds of’ in this case, it remains uncertain as to whether the Regulations cover all forms of discrimination that are ‘related to’ the prohibited grounds as the Directive requires. However, the recently introduced Equality Bill prohibits harassment that is ‘related to’ a protected characteristic: when and if enacted, this should address some of the potential issues of incompatibility that arise in GB law.

- There is no provision permitting organisations to engage in proceedings on behalf of a complainant. Section 24 of the Equality Act 2006 permits the EHRC to seek injunctive relief to prevent a person from committing an unlawful act and the EHRC can also bring judicial review proceedings against public authorities who act in an unequal manner. The UK government is currently consulting on whether representative actions should be permitted in discrimination cases as part of a wider review of legal standing rules. However, at present, no proposals to allow organisations to engage in proceedings on behalf of victims are likely at present to be included in the Equality Bill.<sup>4</sup>
- The definition of victimisation in UK law requires a comparator: it therefore may be difficult at times to show that a person who has brought a discrimination complaint has been treated worse than others. In addition, the definition is also retrospective: this means that courts and tribunals may lack the ability to require that preventative measures be taken to avoid victimisation taking place. However, the recent UK government consultation exercise, the Discrimination Law Review, proposed the abolition of the comparator requirement in victimisation cases and the recently introduced Equality Bill will when and if enacted make provision for this reform in GB.
- Case law has demonstrated that the sanctions for unlawful acts of discrimination and harassment that are available for use by tribunals and courts may at times not be effective, proportionate and dissuasive, in particular due to the fact that compensation for ‘unintentional’ indirect discrimination is restricted. The forthcoming Equality Bill will allow employment tribunals in GB to make wide-ranging recommendations in discrimination cases in addition to awarding the standard remedies such as damages: this will allow tribunals to indicate steps that employers should take to prevent discriminating against employees and the steps that they should take to prevent other discrimination cases arising. However, these recommendations will not be legally binding, which may limit their impact.

<sup>2</sup> UKEAT/0556/07/LA

<sup>3</sup> [2008] EWCA Civ 1421

<sup>4</sup> See UK Equalities Office, *The Equality Bill – Government Response to the Consultation*, July 2008, Ch. 6, 79-82.

- 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 UK legislation did not protect people who are perceived as disabled or associated with a disabled person against discrimination. The same issue arises in the context of the Employment Equality (Age) Regulations 2006. However, the European Court of Justice in the case of *Coleman v Attridge Law* UKEAT/0417/06/DM has held that national legislation must prohibit discrimination on the grounds of association with a disabled person, and UK tribunals have therefore interpreted the DDA as prohibiting such discrimination.<sup>5</sup> A similar approach may be adopted in cases involving discrimination on the basis of association with persons of a particular age. The current text of Equality Bill attempts to implicitly make statutory provision for discrimination on the basis of association to be prohibited across all the six equality grounds in GB law, including sex, disability and age, with the intention in particular of protecting individuals with caring responsibilities and those that are seen to look ‘too old’ or ‘too young’.<sup>6</sup> However, judicial interpretation of the relevant provisions to ensure conformity with the *Coleman* decision may still be necessary, as the proposed statutory text lacks clarity on this point
- In addition, discrimination on the basis of perceived disability or age is not covered by UK legislation. The provisions of the Disability Discrimination Act 2005 and the Disability Discrimination (Northern Ireland) Order 2006 have widened the definition of disability to include certain specific types of perceived disability: nevertheless, there is at present no general prohibition in UK law as such on discrimination based on perceived disability or age. The current text of Equality Bill attempts to implicitly make statutory provision for discrimination on the basis of perception to be prohibited across all the six equality grounds in GB law, including disability and age, in the fields of employment and occupation and also in the sphere of access to goods, facilities and services: however, the proposed statutory text may lack clarity on this point..
- 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 religions than is provided for in Art. 4(1) Employment Framework Directive (but see the relatively narrow interpretation given to these provisions in *R (on application of Amicus & others) –v- Secretary of State for Trade and Industry*, discussed under 0.3 Case Law below, which was adopted to ensure conformity with the requirements of EU law);
- The Employment Equality (Age) Regulations 2006 and the Employment Equality (Age) Regulations (Northern Ireland) 2006 may not fully transpose the age requirements of the Directive by permitting employers to impose a mandatory retirement age of 65.

<sup>5</sup> See *Coleman v Attridge Law*, Case No. 2303745/2005, 30<sup>th</sup> September 2008, ET.

<sup>6</sup> See the written Ministerial Statement by Harriet Harman MP, House of Commons Debates, 2nd April 2009, col. 88WS, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090402/wmstext/90402m0003.htm#09040249000024> (last accessed 3th April 2009).

This question was referred to the ECJ by the Employment Tribunal,<sup>7</sup> which in the case of *Age Concern v Secretary of State for Business, Enterprise and Regulatory Reform* (also known as ‘Heyday’) has set out the required approach to assessing whether such retirement age provisions can be objectively justified.<sup>8</sup> This approach will now be applied by the UK courts when the *Heyday* case is determined at domestic level.

- Also, concerns have been expressed that the continued use of age distinctions in statutory redundancy pay schemes and in fixing minimum wages for younger workers may not be objectively justified, especially in light of the decision of the ECJ in *Mangold v Helm* [2005] E.C.R. 22-31.
- Some uncertainty also surrounds the exemption of many forms of age distinctions used in occupational pensions schemes from the scope of the Regulations: while many of these exemptions come within Article 6(2) of the Directive and may therefore be valid, some other exceptions may fall outside the scope of this provision.
- UK law does not appear to make provision for a full shift in the burden of proof in victimisation cases. In *Oyarce v Cheshire County Council*,<sup>9</sup> the EAT held that the shift in the burden of proof could not be applied in cases of victimisation linked to race discrimination claims. This startling conclusion was based on the EAT’s finding that Article 9 of the 2000 Racial Equality Directive did not require a shift in the burden of proof in victimisation cases, which meant in turn that the relevant UK regulations implementing the Directive, which did make provision for the reversal of the burden in such cases, were *ultra vires* and therefore could not be applied. This decision was appealed to the Court of Appeal, who in May 2008 upheld the decision of the EAT. This decision is potentially open to serious criticism: it could be argued that the Court of Appeal has adopted a very limited and narrow view of the purpose and aims of the Directive. However, the recently introduced Equality Bill provides that the shift in burden of proof will apply in victimisation cases in GB.
- Following the decision of the ECJ in Case C-54/07 *Firma Feryn*, it appears as if the UK may have to clarify or perhaps even modify its approach to discriminatory advertising. Discriminatory job advertisements are currently only explicitly prohibited when they relate to the race, gender and disability grounds (and in NI under the fair employment legislation), and in addition only the EHRC and the ECNI have the power to bring enforcement action in respect of such advertisements, i.e. individuals cannot bring enforcement actions. Also, the prohibition on discriminatory advertising does not apply to the sexual orientation, age and religion or belief grounds, and there is no legislative prohibition on discriminatory statements. However, individuals may bring legal claims in respect of discriminatory advertisements if they are actually subject to less favourable treatment on a prohibited ground, by for example applying for the posts in question and being rejected on the grounds of race, gender or disability. Perhaps on this basis, the UK government has indicated that it considers that UK law is in conformity with the *Feryn* decision. However, it is unclear at present when individuals from the affected groups have the legal standing to bring a discrimination claim in such a situation: in particular, it is unclear whether an individual who is deterred from applying for a post on the basis of a discriminatory advertisement or statement can bring a legal claim, as that individual might be held not have been subject to any tangible form of less favourable treatment.

<sup>7</sup> CO/5485/2006.

<sup>8</sup> Case C-388/07, Judgment of 5 March 2009.

<sup>9</sup> [2007] UKEAT 0557/06





Courts and tribunals could interpret the direct discrimination provisions of the RRA, RRO, FETO, DDA, SO, RB and Age Regulations as covering such a situation, in order to ensure conformity with *Feryn*. In addition, the Equality Bill attempts to clarify via its definition of direct discrimination that an individual who suffers detriment or who is deterred from applying for a job due to discriminatory advertisement may bring a discrimination claim: however, the wording of the Bill at present lacks clarity on this point and judicial interpretation of the legislation may be necessary to ensure conformity with the *Feryn* decision.

- In UK law, a claimant has to show that they suffered discrimination on the basis of one of the six grounds of discrimination prohibited under EU and UK law: if she does not produce enough evidence to show that one of these forms of discrimination took place, she will not be able to argue that the evidence she does have is sufficient to show that some discrimination may have existed on a combination of these grounds. In other words, multiple discrimination claims cannot be brought under UK law. At present, the government is consulting on whether to include a prohibition on certain forms of multiple discrimination in the final text of the recently published Equality Bill.

The analysis above concerns UK discrimination law as it currently stands. The recently introduced Equality Bill will alter the legal position in GB in several important respects. For example, a single objective justification test will replace the different versions of such tests that exist at present throughout the complex framework of GB discrimination law. (This test may still fall short of the test set out in the Directives, however.) Other proposed changes that this Bill will produce in GB law include the introduction of a single genuine occupational requirement defense across all the equality grounds (with the exception of disability), the removal of some technical exceptions to the legislation, the removal of the requirement to use a comparator in victimisation claims and other changes to the legislation designed to simplify and clarify the law. In addition, the Bill widens the permitted scope of positive action, extends the prohibition of harassment in GB law and imposes a single positive equality duty to promote equality of opportunity should be imposed on all GB public authorities. It also prohibits age discrimination in access to goods and services, transport, education and other non-employment areas. Where relevant, the proposed alterations are noted in the text below.

However, the Bill may leave certain issues of potential non-conformity unresolved, and judicial interpretation of the new legislative framework may still be required to ensure compliance with the Directives. In addition, the Equality Bill's provisions will for the most part not apply in NI, so many of the issues of incompatibility identified above which may be partially or wholly resolved in the context of GB by the Bill may still be an issue in NI.

### 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:*

**Name of the court**

**Date of decision**

**Name of the parties**

**Reference number** (or place where the case is reported).

**Address of the webpage** (if the decision is available electronically)



**Brief summary** of the key points of law and of the actual facts (no more than several sentences)

➔ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)

Please describe trends and patterns in cases brought by Roma and Travellers , and provide figures – if available.

With thousands of discrimination cases a year and more than thirty years of case-law precedent, the UK case-law is too extensive to set out in detail here. The following are significant recent cases, broken down by subject area.

### Sexual Orientation

**Name of the court:** High Court

**Date of decision:** 2004

**Name of the parties:** R (on the application of Amicus and others) –v- Secretary of State for Trade and Industry

**Reference number:** [2004] EWHC 860 (Admin)

**Address of the webpage:** [www.bailii.org/ew/cases/EWHC/Admin/2004/860.html](http://www.bailii.org/ew/cases/EWHC/Admin/2004/860.html)

**Brief summary:** Amicus and six other leading UK 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.)





**Name of the court:** Stratford Employment Tribunal

**Date of decision:** 28 January 2005

**Name of the parties:** Whitfield v Cleanaway Ltd

**Reference number:** ET 3201666/04

**Address of the webpage:** N/A

**Brief summary:** An employment tribunal decided that the claimant had suffered harassment on the grounds of his sexual orientation, and awarded £35,000 (41, 128 euros) in damages. This is the first successful case on the sexual orientation ground under the 2003 legislation that transposes the Directive.

**Name of the court:** EAT

**Date of decision:** 19 December 2006

**Name of the parties:** Lewis v HSBC Ltd

**Reference number:** EAT/0412/06/RN

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKLAT/2006/0364\\_06\\_1912.html](http://www.bailii.org/uk/cases/UKLAT/2006/0364_06_1912.html)

**Brief summary:** A former senior banker at HSBC bank, who was gay, was dismissed following an internal investigation into allegations that he had sexually harassed another member of staff. An employment tribunal found that he had not been discriminated against on the grounds of his sexual orientation but considered that some aspects of the internal investigation had been tainted by stereotyping based on Mr Lewis's sexual orientation. Subsequently, due to procedural issues, the Employment Appeal Tribunal has ordered that this decision be re-heard again before a fresh tribunal, and the case was eventually settled.

**Name of the court:** Court of Appeal

**Date of decision:** 19 December 2008

**Name of the parties:** English v Thomas Sanderson Blinds Ltd

**Reference number:** [2008] EWCA Civ 1421 (19 December 2008)

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2008/1421.html>

**Brief summary:** The EAT dismissed a claim for harassment brought by a man who was not gay and who was known by his harassers not to be gay, but who was nevertheless subject to homophobic abuse. The EAT took the view that the claimant was not subject to harassment 'on the grounds of' his actual sexual orientation, as required by the Regulations. On appeal, the Court of Appeal overturned the decision of the EAT and took the view that as the harassment occurred 'on the grounds of' the applicant's sexual orientation, in the sense of being based upon or linked to his real or imagined sexual orientation, that was sufficient to bring the complaint within the scope of the 2003 Regulations.<sup>10</sup>

### Disability

**Name of the court:** ET/EAT/ECJ

**Date of decision:** 31 January 2008 (ECJ)/30 September 2008 (ET)

**Name of the parties:** Coleman v Attridge Law

**Reference number:** 2008] EUECJ C-303/06 (ECJ)/ Case No. ET/2303745/2005 (ET/EAT)

**Address of the webpage:** [http://www.bailii.org/eu/cases/EUECJ/2008/C30306\\_O.html](http://www.bailii.org/eu/cases/EUECJ/2008/C30306_O.html) (ECJ)

**Brief summary:** A secretary claimed that she was discriminated against because of her association with her disabled son, who needed considerable care from her.

<sup>10</sup> [2008] EWCA Civ 1421



The Croydon Employment Tribunal decided that as Ms Coleman was not ‘disabled’ within the DDA definition, she could not bring a claim for disability discrimination as the DDA did not prohibit discrimination based upon association with a person with a disability. However, the tribunal considered that a strong case existed that the UK legislation was not compatible with the Framework Equality Directive on this ground, and referred the question directly to the European Court of Justice. The ECJ has now confirmed that the prohibition contained in Articles 1 and 2 of the Directive on discrimination based ‘on the grounds of’ disability includes direct discrimination and harassment based on association. The Employment Tribunal has subsequently decided that the DDA can be read in conformity with the judgment of the ECJ and that Ms Coleman’s case can be adjudicated under the framework of existing UK disability discrimination law.<sup>11</sup> The case will now proceed for a full hearing.

**Name of the court:** EAT

**Date of decision:** 23 July 2007

**Name of the parties:** Paterson v Commissioner of Police for the Metropolis

**Reference number:** [2007] IRLR 763, EAT

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKCAT/2007/0635\\_06\\_2307.html](http://www.bailii.org/uk/cases/UKCAT/2007/0635_06_2307.html)

**Brief summary:** In this case, the Employment Appeals Tribunal (EAT) interpreted the definition of disability contained in the UK Disability Discrimination Act 1995 (the ‘DDA’) in line with the approach adopted by the ECJ in the *Chacon Navas* case, which emphasised that disability should be understood as a ‘limitation which results in particular from physical, mental or psychological impairments and hinders the participation of the person concerned in professional life’. On this basis, the EAT held that the complainant’s dyslexia was sufficient to constitute a disability which interfered with his job as a police officer in that it hindered his chances of promotion.

**Name of the court:** Court of Appeal

**Date of decision:** 30 March 2007

**Name of the parties:** O’Hanlon v Commissioners for HM Revenue and Customs

**Reference number:** [2007] IRLR 404

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2007/283.html>

**Brief summary:** The Court of Appeal held that it would be rare that an employer would be obliged under the requirement to make reasonable adjustment to continue to pay full sick leave allowance to a person who was sick for a long time period as a result of their disability.

**Name of the court:** House of Lords

**Date of decision:** 25 June 2008

**Name of the parties:** London Borough of Lewisham v Malcolm

**Reference number:** [2008] UKHL 43

**Address of the webpage:** <http://www.bailii.org/uk/cases/UKHL/2008/43.html>

**Brief summary:** This case involved a tenant who rented a flat from a public housing authority and who suffered from schizophrenia. He was not permitted to sub-let his property (as it was subsidised public housing), but did so anyway, while he lived elsewhere.

<sup>11</sup> See *Coleman v Attridge Law*, 30<sup>th</sup> September 2008, ET.



When the local authority brought eviction proceedings against him, the tenant claimed that he had only sub-let the property because he had not been taking medication for his schizophrenia, and his lawyers argued that any eviction would constitute less favourable treatment of the tenant for a reason related to his disability, contrary to the Disability Discrimination Act 1995 (the DDA). The local authority argued that there was no less favourable treatment, as it would have evicted any tenant who had unlawfully sub-let their property. In addition, it did not know about M's schizophrenia at the time. The House of Lords reversed the earlier decision of the Court of Appeal and decided the case in favour of the local authority.

In so doing, their judgment has had potentially very restrictive impact on the scope of the UK legislative prohibition of unjustified 'less favourable treatment' related to disability. The House of Lords reversed a decade of case-law that had been decided on the basis that the test to identify the correct comparator in cases involving claims of less favourable treatment related to disability is different from the standard comparator test applied in direct discrimination cases across the six different equality grounds. (The DDA prohibits both direct discrimination on the grounds of a person's disability and less favourable treatment related to a person's disability, with the latter capable of being justified: see below.) In an earlier case of *Clark v TDG Ltd t/a Novacold*, the Court of Appeal had ruled that the appropriate comparator in 'less favourable treatment' cases was a non-disabled person to whom the reason for the less favourable treatment in question did not apply. In this case, this would have meant that the comparator would be a person who had not sub-let his flat. However, the House of Lords decided that the wrong interpretation of the legislation had been adopted in *Novacold*: in determining whether less favourable treatment has occurred, the treatment of a person with a disability should be compared with the treatment of a non-disabled person to whom the same circumstances apply.

This meant that in this case, the treatment of the tenant was compared with the treatment of a non-disabled person who had sub-let his flat, with the result that the local authority was able to show that no less favourable treatment had occurred. In addition, the House of Lords established that a defendant will not be liable for discrimination if it does not know about the disability (or could not reasonably have known), or where the treatment in question was not based on the existence of a disability. Taken together, these two elements of the *Malcolm* decision have made it more difficult to establish the existence of 'less favourable treatment' related to disability.

### Age

**Name of the court:** ET/EAT/ECJ

**Date of decision:** 5 March 2009 (ECJ)

**Name of the parties:** R v Secretary of State for Trade and Industry, ex p. Heyday/ R(Age Concern) v Secretary of State for Business, Enterprise and Regulatory Reform

**Reference number:** Case C-388/07.

**Address of the webpage:** <http://www.bailii.org/eu/cases/EUECJ/2009/C38807.html>

**Brief summary:** A coalition of age equality campaigning group challenged the Employment Equality (Age) Regulations 2006 on the basis that they permitted an employer to have a mandatory retirement age for employees after they reach 65 and this was contrary to the requirements of Article 6 of the Framework Equality Directive.

With the consent of government lawyers, the matter was been referred to the ECJ for resolution by the English High Court. In its recent judgment, the ECJ has set out the required approach to assessing whether such retirement age provisions can be objectively justified,<sup>12</sup> which will now be applied by the UK courts when the Heyday case (now renamed Age Concern) is determined at domestic level.

**Name of the court:** Employment Tribunal

**Date of decision:** 9 October 2007

**Name of the parties:** Bloxham v Freshfields Bruckhaus Deringer

**Reference number:** 2205086/2006 (ET)

**Address of the webpage:** N/A

**Brief summary:** An Employment Tribunal upheld the introduction of special transitory pension arrangements for partners of a leading London law firm over the age of 55 (which reduced or in some cases effectively eliminated future payments into their already generous pension fund) on the basis that this measure was objectively justified as necessary to maintain the financial well-being of the law firm's pension scheme.

**Name of the court:** High Court

**Date of decision:** 17 October 2008

**Name of the parties:** Rolls Royce Plc v Unite

**Reference number:** 2008] EWHC 2420 (QB)

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWHC/QB/2008/2420.html>

**Brief summary:** In this case, the High Court held that an employer's use of length of service as part of a scheme used to select employees for redundancy was lawful under the Employment Equality (Age) Regulations 2006. In this case, Rolls Royce's redundancy selection scheme was established under a union-agreed collective agreement. Under the scheme, employees scored one point for each year of service, as well as scoring points for other criteria e.g. expertise. The employees with the fewest points were selected for redundancy. The effect was that younger workers were more likely to be selected for redundancy than older workers. In general, selecting an employee for redundancy based on length of service could constitute indirect age discrimination, unless it can be objectively justified. However, Regulation 32 of the Age Regulations provides an exemption that an employer can lawfully award 'benefits' to employees based on length of service provided that (a) it is in relation to up to 5 years' service; or (b) if it is in relation to more than 5 years' service, it must reasonably appear to the employer to fulfil a business need (for example, by encouraging the loyalty or motivation or rewarding the experience of some or all of its staff). This establishes a lower justification threshold for individual employers than is required under the 'standard' objective justification test for age discrimination, which the UK government justifies on the basis that it provides clarity for employers and can be objectively justified as a general policy measure.)

In this case, the High Court held that awarding points for length of service constituted the award of a 'benefit' under Regulation 32, and that the fact that the redundancy scheme had been negotiated with a union would satisfy the requirement of 'reasonably satisfying a business need' under Regulation 32.

<sup>12</sup> Case C-388/07, Judgment of 5 March 2009.



In addition, the Court considered that even if the scheme did not fall with Reg. 32, it would be objectively justified on the basis that the redundancy scheme has been the product of a negotiated process of consultation with the union. However, the High Court also stated that the use of redundancy selection schemes that was based solely on the principle of 'last in first out' ('LIFO') would be less likely to satisfy the objective justification test. (The case is curious in that the employer was arguing that their own redundancy scheme was unlawful in order to end the existing collective agreement and to negotiate another one more favourable to the employer's interests, while the union was defending the scheme.)

**Name of the court:** EAT

**Date of decision:** 27 October 2008

**Name of the parties:** Chief Constable of West Yorkshire Police v Homer

**Reference number:** [2009] ICR 223, [2009] IRLR 262

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKCAT/2008/0191\\_08\\_2710.html](http://www.bailii.org/uk/cases/UKCAT/2008/0191_08_2710.html)

**Brief summary:** A police officer with extensive experience began working as a legal adviser for the Police National Legal Database (PNLD). In 2005, when the complainant was 61, West Yorkshire Police introduced a new three tier pay grading structure for PNLD employees. To be classified as coming within the third and highest pay grade, it was decided that it was necessary for an employee to have a law degree, which the complainant did not have. The West Yorkshire Police offered to pay for the complainant to complete a part-time law degree, but as he intended to retire at 65, the completion of the degree would come too late for him. He therefore alleged that he had been subject to indirect age discrimination, on the basis that the requirement to have a law degree for promotion to the third pay grade was a provision or criterion that put people of his age group (between 60 and 65) at a disadvantage because they could not complete a degree before retirement at age 65.

The Employment Tribunal agreed that the complainant had been indirectly discriminated against on grounds of age, concluding that the law degree requirement had a disproportionate negative impact on older workers and that this degree requirement could not be objectively justified as it was not proportionate: it concluded that the legitimate aim of ensuring a high degree of expertise in senior grades could equally have been achieved by requiring employers to have a high level of practical and theoretical legal experience equivalent to a law degree.

However, the Employment Appeal Tribunal (EAT) overturned the decision, on the basis that there was no disproportionate impact suffered by those between 60 to 65 as the requirement for a degree was applied to all staff and it was no more difficult for an older person to obtain a law degree than it was for any one else over the course of their career.

**Name of the court:** EAT

**Date of decision:** 19 December 2008

**Name of the parties:** Seldon v Clarkson Wright and Jakes

**Reference number:** [2009] IRLR 267

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKCAT/2008/0063\\_08\\_1912.html](http://www.bailii.org/uk/cases/UKCAT/2008/0063_08_1912.html)

**Brief Summary:** The Employment Appeal Tribunal (EAT) held that the provisions of the Employment Equality (Age) Regulations 2006 that permit employers to require employees to retire at 65 did not apply to partnerships, which must justify the use of mandatory retirement age on a case-by-case basis. In this case, in finding that a compulsory retirement age of 65 in a partnership deed was not justified, the EAT gave some general observations on how the justification test would be applied in this context.



The EAT held that the need to open up possibilities for entering into the partnership and to facilitate business planning constituted legitimate aims which could justify the use of mandatory retirement rules. However, the EAT held that reliance upon stereotypical assumptions, such that older partners would inevitably perform less well after the age of 65, could not constitute a legitimate basis for applying mandatory retirement. The partnership had relied partially on such assumptions in requiring partners to retire at 65, and partially on other considerations: therefore, the EAT sent the case back to the first instance employment tribunal to decide whether the other more legitimate aims of the partnership in imposing such an age limit could justify its application.

In this decision, the EAT also made some important general statements about the application of age discrimination legislation in GB law. It took the view that the test for justifying direct age discrimination is not fundamentally different to that which applies to other forms of discrimination, an approach subsequently also adopted by the ECJ in the *Heyday* decision. However, it also considered that first instance employment tribunals should not adopt the approach that it is only in very exceptional cases that direct age discrimination be permitted: the normal principles of legitimate aim and proportionality must be applied in every case. The EAT also suggested that the overall discriminatory effect of a measure will necessarily be greater where there is direct as opposed to indirect discrimination and this would be a material factor when considering proportionality. It also took the view that an employer can justify a policy even if they never considered the impact of the age discrimination legislation nor addressed the justification for the policy, and that while it was also not possible to contract out of the right to a principle of non discrimination, the gains obtained by retiring partners and by the partnership as a whole from any agreement that established a mandatory retirement age could be relevant in applying the objective justification test.

### Religion or Belief

**Name of the court:** EAT

**Date of decision:** 30 March 2007

**Name of the parties:** Azmi v Kirklees Metropolitan Council

**Reference number:** ([2007] ICR 1154

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKEAT/2007/0009\\_07\\_3003.html](http://www.bailii.org/uk/cases/UKEAT/2007/0009_07_3003.html)

**Brief summary:** A Muslim classroom assistant was suspended by a primary school for wearing a face-veil (or *niqab*) in lessons, after she had refused to remove the veil following complaints by students that they found it hard to understand her through the face covering. The Employment Tribunal dismissed Ms Azmi's claims of direct and indirect religious discrimination and harassment. The Tribunal concluded that she had not been less favourably treated than a non-Muslim comparator would have been in similar circumstances, and, while discrimination on the basis of wearing clothing associated with a particular religion could constitute indirect religious discrimination, the Tribunal considered that her employer had been objectively justified in asking her to remove the face-veil in the interests of maintaining the education of the children. However, the Tribunal considered that her employers had subjected her to victimization in how they had handled the case and ordered the payment of £1100 (1292 euros) in damages. The Tribunal's decision was subsequently upheld by the EAT.



**Name of the court:** EAT

**Date of decision:** 31 October 2007

**Name of the parties:** McClintock v Department of Constitutional Affairs

**Reference number:** [2008] IRLR 29,

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKCAT/2007/0223\\_07\\_3110.html](http://www.bailii.org/uk/cases/UKCAT/2007/0223_07_3110.html)

**Brief summary:** The Employment Appeals Tribunal (EAT) held that a magistrate (a lay judge) who resigned from his post after he has informed that he could be required if necessary to make orders approving the adoption of children by gay couples was not subject to indirect discrimination on the grounds of his religious beliefs. The EAT considered that the magistrate's views were not based on religious beliefs but on concerns about child welfare. It also took the view that if the magistrate had been subject to indirect discrimination, it would have been justified by the importance of requiring judges to adhere faithfully to the obligation to administer the law.

**Name of the court:** EAT

**Date of decision:** 17 January 2007

**Name of the parties:** Glasgow City Council v McNab

**Reference number:** [2007] IRLR 476.

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKCAT/2007/0037\\_06\\_1701.html](http://www.bailii.org/uk/cases/UKCAT/2007/0037_06_1701.html)

**Brief summary:** In this case, an atheist who applied for a temporary position as acting head of a Catholic state school was not successful on the basis that he was not Catholic. The EAT held that this constituted a violation of the RB Regulations 2003, as the school could not establish that being a Catholic was a genuine occupational requirement for that particular post and it was not necessary for an acting principal to be Catholic to maintain the religious nature of the school. This shows that the employment tribunals may give a narrow interpretation to the permitted 'ethos' exceptions to the prohibition on discrimination based on religion or belief.

**Name of the court:** High Court

**Date of decision:** 29 July 2008

**Name of the parties:** R (Watkins-Singh) v Governing Body of Aberdare Girls School

**Reference number:** [2008] EWHC 1865 (Admin)

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWHC/Admin/2008/1865.html>

**Brief summary:** A Sikh girl wished to wear a 'Kara bangle', a Sikh religious symbol, while going to school: Sikhs are expected as a matter of religious belief to wear these bangles as an expression of their faith. The school had a uniform policy which prohibited the wearing of all forms of personal jewellery and therefore excluded the Sikh girl when she refused to remove the bangle. However, the High Court held that the exclusion of the Sikh girl constituted indirect race discrimination and indirect religious discrimination, as the ban on wearing such a religious symbols disproportionately placed members of the Sikh ethnic group (who are also a faith group) at a disadvantage and it could not be justified in the circumstances. The school argued that it was necessary to have a uniform policy applicable to all students to ensure that differences in wealth, ethnic background and status could not be expressed through the wearing of certain types of body ornaments: the High Court held that this justification was insufficient to justify the substantial disadvantage inflicted on Sikh pupils. The school was also found to have violated the positive race equality policy imposed on public authorities in the UK, on the basis that it had no effective equality policy in place, and was ordered to re-admit the girl.





**Name of the court:** ET

**Date of decision:** 29 May 2008

**Name of the parties:** Noah v Sarah Desrosiers (trading as Wedge)

**Reference number:** ET 2201867/2007

**Address of the webpage:** N/A

**Brief summary:** Bushra Noah, a Muslim hairdresser, succeeded in her claim that she had been indirectly discriminated against on grounds of religion as a result of her employer's requirement that she remove her headscarf while at work. The employment tribunal found that the requirement for hairdressers to have their own hair visible was not a proportionate means of achieving a legitimate aim.

**Name of the court:** EAT

**Date of decision:** 19 December 2008

**Name of the parties:** Islington v. Ladele

**Reference number:** [2008] UKEAT 0453\_08\_1912)

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKEAT/2008/0453\\_08\\_1912.html](http://www.bailii.org/uk/cases/UKEAT/2008/0453_08_1912.html)

**Brief summary:** In this important case, the applicant was a registrar employed by the London Borough of Islington: part of her duties was to conduct weddings. When the Civil Partnerships Act 2004 came into force, which enables gay partners to enter into a 'civil partnership' that has equivalent legal rights as marriage, she refused to participate in registering any civil partnerships, because to do so was inconsistent with her Christian religious beliefs. The council insisted that she should undertake at least some of the duties associated with registering civil partnerships. When she refused, the council disciplined her and threatened her with dismissal. Ms Ladele then alleged that she had been subjected to direct discrimination, indirect discrimination and harassment on the grounds of her religious belief. At first instance, an Employment Tribunal upheld her claim on all three grounds, finding in particular that the failure to accommodate Ms Ladele's beliefs meant that she had been subjected to less favourable treatment as a result of her religious beliefs. However, on appeal, the EAT held that there was no direct discrimination as Ms Ladele had not been discriminated against or subjected to harassment on the basis of her religious beliefs: she had been disciplined solely on the basis that she had failed to perform work duties. It also concluded that there was no indirect discrimination, on the basis that the requirement in question that all registrars perform civil partnerships, while adversely affecting persons who shared Ms Ladele's religious beliefs, could be objectively justified as a proportionate measure designed to give effect to the principle of equality of treatment that public authorities were expected to respect.

**Name of the court:** EAT

**Date of decision:** 20 November 2008

**Name of the parties:** Eweida v British Airways plc

**Reference number:** [2008] UKEAT 0123\_08\_2011, [2009] ICR 303

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKEAT/2008/0123\\_08\\_2011.html](http://www.bailii.org/uk/cases/UKEAT/2008/0123_08_2011.html)

**Brief summary:** Nadia Eweida, a devout Christian, was employed by British Airways as a member of its check-in staff. BA's uniform policy permitted an employee to wear any item of jewellery he or she wished under the uniform, provided it was not visible: however, items of religious clothing such as hijabs or turbans which could not be concealed under the uniform were allowed to be worn.

In 2006, Ms Eweida began wearing a silver Christian cross on a necklace outside her uniform. When she refused to conceal the cross, she was suspended. Ms Eweida then brought claims of direct discrimination, indirect discrimination and harassment against BA. At first instance, the Reading employment tribunal dismissed the case, finding in particular that the key claim of indirect discrimination was not established on the basis that the British Airways' policy did not disadvantage Christians as a group. However, the tribunal went on to suggest that *if* BA's policy had given rise to such group disadvantage, then the policy would not have been objectively justified. On appeal, the Employment Appeals Tribunal (EAT) took the view that the onus was on Ms Eweida to prove group disadvantage. It considered that while in some cases (such as Sunday working), a tribunal could assume the existence of a group disadvantage that would affect some Christian groupings, this was not the case where a disadvantage stemmed from 'subjective personal religious views' particular to the claimant. In this case, there was no evidence of any form of group disadvantage stemming from BA's policy. However, the EAT also agreed with the employment tribunal that had there been evidence of group disadvantage, the inflexibility of BA's policy would not have been a proportionate response to a legitimate aim. There was no discussion in this case of whether the employer could have reasonably accommodated Ms Eweida's desire to wear a cross: no such requirement exists in GB law at present.

### Race

**Name of the court:** House of Lords

**Date of decision:** 21 November 2007

**Name of the parties:** Ahsan v Watt (Formerly Carter)(sued on his own behalf and on behalf of other members of the Labour Party)

**Reference number:** [2007] UKHL 51, HL.

**Address of the webpage:** <http://www.bailii.org/uk/cases/UKHL/2007/51.html>

**Brief summary:** In this case, the complainant alleged that he had been discriminated against by the UK Labour Party during the process of selecting candidates for parliamentary elections. The House of Lords upheld his claim, clarifying that discrimination in the selection of a parliamentary candidate should be classified as a case of discrimination within a private association. (This form of discrimination is explicitly prohibited by the Race Relations Act 1976.) Previously, the Court of Appeal had taken the view that the wish of the Labour Party not to select a candidate that was very closely associated with a particular community was a objective justification for the exclusion of the complainant from selection, when there were legitimate concerns that members of that community were involved in attempts to fix the selection process. However, the House of Lords held that discrimination on the grounds of association with a particular ethnic group could not be excused or classified as 'legitimate', with the result that the claim was upheld.



**Name of the court:** EAT

**Date of decision:** 30 May 2007

**Name of the parties:** Mehmet t/a Rose Hotel Group v Aduma

**Reference number:** (2007) 832 IDS

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKCAT/2007/0573\\_06\\_3005.html](http://www.bailii.org/uk/cases/UKCAT/2007/0573_06_3005.html)

**Brief summary:** The Employment Appeals Tribunal (EAT) held that a Nigerian national suffered discrimination on the grounds of his national origin when he was paid less than the national minimum wage and was being pressurised by his employer not to apply for a national insurance number: the EAT considered that a British national would not have been treated the same way.

**Name of the court:** ET

**Date of decision:** 6 April 2006

**Name of the parties:** Husain v Chief Constable of Kent

**Reference number:** N/A

**Address of the webpage:** N/A

**Brief summary:** In *Husain v Chief Constable of Kent*, Employment Tribunal, , Kent Police twice rejected job applications from Shujaat Husain, of south London, for employment as an intelligence analyst in 1999 and 2000. Following this, the Kent police prepared a report on Mr Husain, on the basis that there had been 'material differences' between his applications for the two jobs: the report specifically suggested that he had falsified elements of his academic qualifications and professional experience. The report was circulated to other police forces, and warned them to be aware of a 'potentially fraudulent' application. Mr Husain was then later arrested and detained for 10 hours when he applied for a job at Avon and Somerset police force. The employment tribunal decided that Mr Husain had been subject to serious race discrimination by Kent police. In particular, the tribunal found that the difference in his applications for the two jobs, which had caused the report to be prepared by the Kent Police, was the result of Mr Husain taking steps in the period between the two applications to become more familiar with the job of an intelligence analyst: therefore, the suggestion by the police that he was falsifying his qualifications was the result of racial stereotyping. The tribunal considered that this case should result in exemplary damages due to the seriousness of the discrimination at issue, and awarded Mr Husain £65,000 UK sterling (76,361 euros) in damages, including £25,000 (29,369 euros) for injury to feelings, £4,000 (4,698 euros) in aggravated damages resulting from his detention, and £5,000 (5,873 euros) in exemplary damages to directly penalise the Kent police. Such damages are rare in the UK legal system, and reflect the seriousness of the case.

### Multiple Discrimination

**Name of the court:** Court of Appeal

**Date of decision:** 30 July 2004

**Name of the parties:** Bahl v Law Society

**Reference number:** [2004] EWCA Civ 1070.

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2004/1070.html>

**Brief summary:** In this case, the Vice-President of the Law Society of England and Wales, was dismissed from office on the basis that she had bullied and harassed junior staff.

She claimed that her dismissal was actually based on discrimination based on her identity as a British Asian woman: she alleged that senior officers in the Law Society had been prejudiced against her on the basis that she did not conform to their expectations as to how a British Asian woman would behave. The Law Society strongly denied this allegation. The Court of Appeal decided that in such a case of ‘intersectional’ or multiple discrimination, the evidence that Bahl had been discriminated against on the basis of her ethnic origin and gender had to be considered separately and tribunals would have to decide whether the evidence was sufficient to show that one or the other type of discrimination existed. Bahl was not able to argue that she had been subject to a particular form of discrimination based on her status as a British Asian woman: she had to show that either race or sex discrimination had occurred, which she was unable to do.

This case highlights a problem to which many UK academics and lawyers have drawn attention. In UK law, a claimant has to show that they suffered discrimination on the basis of one of the six grounds of discrimination prohibited under EU and UK law: if she does not produce enough evidence to show that one of these forms of discrimination took place, she will not be able to argue that the evidence she does have is sufficient to show that some discrimination may have existed on a combination of these grounds. There has been considerable pressure from NGOs on the UK government to amend the law to accommodate such ‘intersectional’ claims. In the consultation paper produced by the Discrimination Law Review, the UK government stated that it would consult on this issue, while indicating that it did not consider that there are many circumstances where a claim for intersectional discrimination could not succeed on the basis of one of the six discrimination grounds. However, in its response to the consultation that followed, the government has since indicated that it is open to considering how to enable multiple discrimination claims to be brought, and how this could be achieved through the new codified framework to be introduced in the Equality Bill.<sup>13</sup>

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

**Name of the court:** Court of Appeal

**Date of decision:** 18 February 2005

**Name of the parties:** Igen Ltd. and Others v Wong

**Reference number:** [2005] IRLR 258, EWCA.

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2005/142.html>

**Brief summary:** In *Barton –v- Investec Henderson Crosthwaite Securities Ltd*,<sup>14</sup> 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.

<sup>13</sup> UK Equalities Office, *The Equality Bill*, July 2008, Ch. 6, para. 6.20-6.28.

<sup>14</sup> [2003] IRLR 332

Such cases included *University of Huddersfield –v- Wolff*<sup>15</sup>, *Chamberlin Solicitors –v- Emokpae*<sup>16</sup>, and *Igen Ltd. and Others –v- Wong*.<sup>17</sup> 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*<sup>18</sup> (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.<sup>19</sup>

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.

<sup>15</sup> 2004] IRLR 534

<sup>16</sup> [2004] IRLR 592

<sup>17</sup> UKEAT/0944/03/RN

<sup>18</sup> *Igen Ltd. & others –v- Wong; Chamberlin & Anor. –v- Emokpae; Brunel University –v- Webster* [2005] IRLR 258, EWCA

<sup>19</sup> 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.





**Name of the court:** Court of Appeal

**Date of decision:** 26 January 2007

**Name of the parties:** Madarassy v Nomura International Plc

**Reference number:** [2007] EWCA Civ 33 .

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2007/33.html>

**Brief summary:** Here the Court of Appeal clarified elements of the approach set out in *Igen*, stating that the burden of proof should only shift to the defendant when the claimant had provided sufficient material from which a reasonable tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. If the defendant was unable to provide an adequate explanation for the behaviour in question, this only became relevant if a *prima facie* case is proved by the complainant, i.e. the defendant's inability to give a satisfactory explanation for his conduct would only establish liability when sufficient evidence existed to shift the burden. The Court of Appeal also concluded that the same approach to the burden of proof should apply where a hypothetical comparator was used.

**Name of the court:** Court of Appeal

**Date of decision:** 31 July 2006

**Name of the parties:** Aziz v CPS

**Reference number:** [2006] EWCA Civ 1136.

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1136.html>

**Brief summary:** A solicitor employed by the Crown Prosecution Service (CPS) since 1991 was at Bradford Magistrates' Court in September 2001 and a security guard joked that she was a risk to security. She joked back that she was a friend of Osama Bin Laden and went on to describe her disgust at the 9/11 attacks but also to criticise the USA. Her remarks were overheard by some men who were in court for public order offences arising from racial disturbances in Bradford and this caused some additional disturbance. This was reported to her employer, the CPS, and resulted in her suspension. However, she was cleared of gross misconduct and she brought an employment tribunal claim that the treatment she had suffered constituted unfavourable treatment on grounds of race. The Court of Appeal ruled in her favour, considering that the CPS's failure to conduct the disciplinary proceedings properly by failing to inform Ms Aziz that she was entitled to be represented and also failing to carry out appropriate enquiries entitled the Court to infer the existence of racial discrimination.

**Name of the court:** EAT

**Date of decision:** 16 December 2005

**Name of the parties:** Diem v Crystal Service plc

**Reference number:** [2005] UKEAT 0398\_05\_1612

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKEAT/2005/0398\\_05\\_1612.html](http://www.bailii.org/uk/cases/UKEAT/2005/0398_05_1612.html)

**Brief summary:** A claimant in a race discrimination case was of Vietnamese ethnic or national origin. During the course of the claimant's cross-examination before the employment tribunal, the chairman had enquired whether she was seeking to expand her claim of race discrimination to include less favourable treatment on the grounds of her skin colour, as well as her original claim of discrimination based upon her Vietnamese ethnic and national origin. The chairman asked whether she was claiming to be non-white and said that her skin colour was as white as the English, pointing to the skin of his other hand and adding that 'your skin looks whiter than mine'.



The claimant appealed to the Employment Appeal Tribunal, alleging that she had not received a fair hearing before the employment tribunal, as the questioning by the chairman was racially insensitive and would appear to be offensive to any reasonable person. The Employment Appeal Tribunal (EAT) decided that a fair-minded observer, having considered the facts, would have concluded that there was a real possibility that the tribunal (or a member of it) was biased. The fair-minded observer would have concluded that the remarks made were likely to cause the claimant to feel unsettled, humiliated and embarrassed. This meant that under the common law, the decision had to be overturned and the case sent back to another employment tribunal to be reheard.

**Name of the court:** EAT

**Date of decision:** 16 October 2008

**Name of the parties:** Abbey National Plc v Chagger

**Reference number:** UKEAT/0041/08.

**Address of the webpage:** [http://www.bailii.org/uk/cases/UKEAT/2008/0606\\_07\\_1610.html](http://www.bailii.org/uk/cases/UKEAT/2008/0606_07_1610.html)

**Brief summary:** Here an Employment Tribunal held at first instance that an employee who had been dismissed by an employer had suffered discrimination on the basis of his skin colour, on the basis that the failure by the employer to follow the appropriate statutory procedure together with some other background factors were sufficient to shift the burden of proof to the employer to show that no discrimination had occurred, which the employer had failed to do. However, the employer appealed on the basis that the shift in the burden of proof as required by GB race discrimination legislation and the Race Equality Directive 2000 should not have been applied in this case, as the 2000 Directive did not cover discrimination based on skin colour, but only applied to discrimination based on ethnic or racial origin. However, the EAT held that it was inconceivable that the Directive was not intended to apply to discrimination on colour grounds, and that the same shift of burden of proof rule should apply to discrimination based on skin colour, as well as in cases involving discrimination based on ethnic origin and the grounds covered by the 2000 Directive.

**Name of the court:** Court of Appeal

**Date of decision:** 02 May 2008

**Name of the parties:** Oyarce v Cheshire County Council

**Reference number:** [2008] EWCA Civ 434 (02 May 2008).

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2008/434.html>

**Brief summary:** The Court of Appeal took the view that that the wording of Articles 2 and 8 of the Racial Equality Directive read together clearly confined the shift of the burden of proof to situations where discrimination on the grounds of race, national origin or ethnic origin was at issue, while victimisation was to be treated separately as a distinct form of discrimination to which the burden of proof provisions contained in the Directive did not apply. The relevant UK legislation, Section 54A of the UK Race Relations Act 1976 (originally inserted in order to transpose the Directive), therefore should be read as not making provision for such a shift of the burden of proof in victimisation cases.





### Other cases on the interpretation of the existing UK legislative framework

**Name of the court:** Court of Appeal

**Date of decision:** 10 October 2006

**Name of the parties:** R (Elias) v Secretary of State for Defence

**Reference number:** [2006] EWCA Civ 1293.

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1293.html>

**Brief summary:** This case 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. On appeal, the Court of Appeal upheld the decision of the High Court,<sup>20</sup> with Arden LJ emphasising that the ‘whole tenor of the preamble [to the Race Equality Directive] is that great importance is to be attached to the elimination of racial discrimination’ and that the level of intensity of scrutiny to be given by courts to assessing whether a measure alleged to constitute indirect race discrimination was objectively justified should reflect this emphasis.

**Name of the court:** Northern Ireland Court of Appeal

**Date of decision:** 08 March 2006

**Name of the parties:** In The Matter of an Application by Peter Neill for Judicial Review

**Reference number:** [2006] NICA 5

**Address of the webpage:** <http://www.bailii.org/nie/cases/NICA/2006/5.html>

**Brief summary:** 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. The Court of Appeal in Northern Ireland subsequently confirmed this decision, but also confirmed that the normal route for challenging failures by public authorities to comply with the duty to promote equality imposed by the 1998 Act would be the investigatory power of the ECNI and not via a judicial review by an individual member of the public.

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<sup>20</sup> [2006] EWCA Civ 1293



**Name of the court:** Court of Appeal

**Date of decision:** 5 November 2004

**Name of the parties:** Roads v Central Trains

**Reference number:** [2004] EWCA Civ 1541.

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2004/1541.html>

**Brief summary:** Here 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, the performance of public functions, the activities of private clubs above a certain size and public transport.) Subsequently, in *Ryanair v Ross and Stansted Airport*,<sup>21</sup> 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.

**Name of the court:** House of Lords

**Date of decision:** 1 July 2004

**Name of the parties:** Archibald v Fife County Council

**Reference number:** [2004] UKHL 32

**Address of the webpage:** <http://www.bailii.org/uk/cases/UKHL/2004/32.html>

**Brief summary:** In this important case, 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

**Name of the court:** House of Lords

**Date of decision:** 26 May 2005

**Name of the parties:** R v Secretary of State for Work and Pensions, ex p. Reynolds/ R v Secretary of State for Work and Pensions, ex p. Carson

**Reference number:** [2005] UKHL 37

**Address of the webpage:** <http://www.bailii.org/uk/cases/UKHL/2005/37.html>

**Brief summary:** In one (*Reynolds*) of these two combined Article 14 ECHR cases, 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. Having considered the case-law of the European Court of Human Rights, 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 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.

<sup>21</sup> [2004] EWCA Civ 1751 (21 December 2004)



**Name of the court:** Court of Appeal

**Date of decision:** 25 July 2005

**Name of the parties:** Copsey v WWB Devon Clays Ltd

**Reference number:** [2005] EWCA Civ 932

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2005/932.html>

**Brief summary:** 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 and 14 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.

**Name of the court:** House of Lords

**Date of decision:** 22 March 2006

**Name of the parties:** R (on the application of Begum) v Denbigh High School

**Reference number:** [2006] UKHL 15

**Address of the webpage:** <http://www.bailii.org/uk/cases/UKHL/2006/15.html>

**Brief summary:** 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.

**Name of the court:** High Court

**Date of decision:** 29 July 2008

**Name of the parties:** R (Kaur and Shah) v Ealing

**Reference number:** [2008] EWHC 2062 (Admin)

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWHC/Admin/2008/2062.html>

**Brief summary:** A successful administrative law action was brought against a decision by Ealing Council in London to withdraw funding that they had previously provided for support services provided by a prominent NGO, the Southall Black Sisters, for black and minority ethnic women who had been victims of domestic violence. Ealing Council justified its decision on the basis that it was more appropriate and efficient for public money to be used to fund general support services for the victims of domestic violence, and not to support services targeted primarily at particular minority groups, such as those provided by the Southall Black Sisters. However, the High Court held that the Council in considering the impact of its decision had failed to give due weight to the statutory duty to promote race equality which has been imposed upon public authorities in GB, and that the duties imposed upon local authorities to promote community cohesion and good relations between different ethnic groups should not be interpreted as requiring local authorities to stop funding services targeted at particular ethnic groups. At present, funding has been restored to the NGO.



**Name of the court:** House of Lords

**Date of decision:** 8 March 2006

**Name of the parties:** Secretary of State for Work and Pensions v M

**Reference number:** [2006] UKHL 11.

**Address of the webpage:**

<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd050714/kehoe-1.htm>

**Brief summary:** The House of Lords rejected a discrimination claim under Article 14 by M, who argued that she had been discriminated against as she had not been entitled to a reduction in child support payments she was paying that she would have been entitled to if she had been in a heterosexual relationship rather than being in a homosexual partnership, as she was. However, the Law Lords held that the issue did not come within the scope of Article 14 ECHR. (Now, the position has changed in law and homosexual and heterosexual couples are treated equally – this case referred to the legal position before the change in law in the Civil Partnerships Act 2004.)

**Name of the court:** House of Lords

**Date of decision:** 12 July 2006

**Name of the parties:** Majrowski v Guy's and St Thomas's NHS Trust

**Reference number:** [2006] UKHL 34.

**Address of the webpage:** <http://www.bailii.org/uk/cases/UKHL/2006/34.html>

**Brief summary:** The House of Lords in this case established that the Protection from Harassment Act 1997, which gives individuals protection in both the criminal and civil law against harassment by others, can apply to workplace bullying and harassment. Before this decision, it was not clear that the Act, which was introduced to deal with stalkers, covered harassment and bullying at work. This case involved a claim that an employer was vicariously liable for the homophobic bullying the worker had experienced from his manager. The Law Lords ruled that an employer could be held to be vicariously liable and ordered to pay damages for harassment of one worker by another, as long as the bullying was closely linked to performance of the duties of the job.

**Name of the court:** High Court (Northern Ireland)

**Date of decision:** 11 September 2007

**Name of the parties:** Re The Christian Institute and Others

**Reference number:** [2007] NIQB 66

**Address of the webpage:** <http://www.bailii.org/nie/cases/NIHC/QB/2007/66.html>

**Brief summary:** In this case, Weatherup J. analysed the provisions of the Equality Act (Sexual Orientation) (Northern Ireland) Regulations 2007, which prohibit discrimination and harassment on the grounds of sexual orientation in access to goods and services, education and the performance of public functions. He considered that these provisions were in conformity with the right to freedom of religion in Article 9 ECHR and other ECHR rights such as freedom of expression. However, he noted that these Regulations should if necessary be interpreted in a manner to ensure conformity with the Convention. In addition, as the harassment provisions in the Regulations had been introduced without proper consultation, these provisions were set aside as having no legal effect: this means that at present, there is no explicit prohibition on harassment on the grounds of sexual orientation outside of the context of employment and occupation in Northern Ireland, a situation which is the same as that in place in Britain and which may remain unaltered despite the forthcoming reform of GB discrimination law.



## Cases on Roma and Travellers

The majority of cases involving Travellers (a generic term, which includes Irish Travellers, Bargees, New Age Travellers and ‘Gypsies’, who are a distinct group from the Roma) in the UK in recent years have involved issues of housing and accommodation rights. Many of these cases (perhaps the majority) have involved eviction proceedings brought against Traveller families for illegal encampments, which is a serious and persisting problem. Traveller groups have also occasionally brought judicial review actions (administrative review) against local authority housing policies, resulting in a complex case-law emerging in respect of issues such as housing allocation and the treatment of Traveller families in the planning permission process.

**Name of the court:** Court of Appeal

**Date of decision:** 29 April 2004

**Name of the parties:** First Secretary of State v Chichester District Council

**Reference number:** [2004] EWCA Civ 1248

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2004/1248.html>

**Brief summary:** 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.<sup>22</sup> 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.<sup>23</sup>

However, the Court of Appeal in the later case of *Price v Leeds*<sup>24</sup> 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*<sup>25</sup> 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 referred this apparent conflict of precedent to the House of Lords for resolution. In *Kay v Lambeth; Price v Leeds*,<sup>26</sup> the House of Lords held that while Article 8 would not normally be available as a defence to eviction proceedings against members of the Traveller community illegally occupying land, there might be circumstances where a local government policy or regulation could be challenged under the ECHR before the administrative courts. Recent decisions by the European Court of Human Rights and the House of Lords in the related context of social housing have further complicated the legal position.

<sup>22</sup> [2004] EWCA Civ 1248. See also *Clarke v Secretary of State for the Environment* [2001] EWHC Admin 800

<sup>23</sup> [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).

<sup>24</sup> [2005] EWCA Civ 289

<sup>25</sup> [2003] UKHL 43

<sup>26</sup> [2006] UKHL 10





**Name of the court:** Court of Appeal

**Date of decision:** 22 January 2009

**Name of the parties:** Basildon District Council v McCarthy & Ors

**Reference number:** [2009] EWCA Civ 13

**Address of the webpage:** <http://www.bailii.org/ew/cases/EWCA/Civ/2009/13.html>

**Brief summary:** In *Basildon District Council v McCarthy & Ors*,<sup>27</sup> the appellant local authority appealed against a High Court judgment which had overturned the authority's decision under planning control legislation to enforce compliance with enforcement notices requiring Irish Traveller and Gypsy families resident on unauthorised sites in the Council's district to leave these sites. The trial judge held that the local authority could not evict the families, as the authority had failed to give due consideration in reaching its decision to the general lack of sufficient camping sites for the UK's Gypsy and Traveller population. However, the Court of Appeal held that the Council had not erred in failing to give adequate consideration to the lack of camping sites or other forms of suitable accommodation for the Gypsy and Traveller population. The Court took the view that the local authority had discharged its statutory obligations by considering the impact of eviction on each individual family and their duties under the UK's homelessness legislation: no wider consideration of housing matters was required. Policy factors also considered by the Court in reaching its decision included the fact that the Gypsy and Traveller families remained on the sites in question in conscious defiance of the relevant planning law, and also that there was no positive obligation in UK legislation on local authorities to provide the number of camping sites sought by the UK's Gypsy and Traveller communities.

**Name of the court:** Court of Appeal in Northern Ireland

**Date of decision:** 17 January 2007

**Name of the parties:** McDonagh v Thom (t/a The Royal Hotel Dungannon)

**Reference number:** [2007] NICA 3

**Address of the webpage:** <http://www.bailii.org/nie/cases/NICA/2007/3.html>

**Brief summary:** There have also been cases that concern the exclusion of Travellers from bars and restaurants, especially in Northern Ireland. For example, in *McDonagh v Thom (t/a The Royal Hotel Dungannon)*,<sup>28</sup> the Northern Irish Court of Appeal found that a refusal by a hotel to book any more functions organised by particular Irish Traveller families following an outbreak of violence at a previous function did not constitute race discrimination in the circumstances, as the hotel's actions were motivated by fear of violence and not by racial prejudice. Other decisions, however, have resulted in findings of discrimination in similar circumstances.

Prior to EU enlargement, the bulk of cases concerning Roma in the UK involved immigration and asylum claims, including the *Prague Airport* case decided by the House of Lords in 2003 which decided that UK immigration officers in Prague Airport had engaged in direct race discrimination by subjecting Roma travellers to the UK to extra scrutiny based on their ethnic origin.<sup>29</sup> This decision was subsequently cited by the ECHR in *DH v Czech Republic* in 2007. Since EU enlargement, there appear to be few if any cases involving Roma, and none in superior courts of record involving a claim of discrimination.

<sup>27</sup> [2009] EWCA Civ 13

<sup>28</sup> (17 January 2007),

<sup>29</sup> *European Roma Rights Centre & Ors, R (on the application of) v Immigration Officer at Prague Airport* [2004] UKHL 55



## 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?*

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 devolved government has been established in NI 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 and parliamentary legislation. Discussions are ongoing in both GB and NI as to the desirability of having a Bill of Rights to clarify and reinforce individual rights protection, but at present no such constitutional rights instrument forms part of either GB or NI law.

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 to international human rights or direct application in domestic courts. (The UK has acceded to the inquiry procedure in Articles 8 and 9 of the Optional Protocol to CEDAW.) The 1998 Human Rights Act (HRA),<sup>30</sup>, 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.

<sup>30</sup> See <http://www.hms0.gov.uk/acts/acts1998.htm>.

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.<sup>31</sup> The exclusion of these Gurkha soldiers from this compensation scheme was therefore held to be an irrational decision.<sup>32</sup> 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.

Public authorities are prohibited from discriminating on the grounds of race, disability, religion or belief and sexual orientation in the performance of their public functions (s. 19B RRA; Article 20 A RRO; s. 2 Disability Discrimination (Amendment) Act 2005, s. 52 of the Equality Act 2006; Reg. 8 of Equality Act (Sexual Orientation) Regulations 2007 and Reg. 12 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006). This serves as a legal control on their activities but these legislative provisions cannot override other legislative provisions which may require or mandate discriminatory treatment.

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 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, with the exception of NI, where the s. 75 duty already covers this ground.<sup>33</sup>

The report of the Discrimination Law Review produced by the UK government in 2007 suggested that a single positive equality duty should be imposed on GB public authorities covering all the equality grounds recognised in EU law. The recently introduced Equality Bill when and if enacted will introduce a new 'streamlined' general equality duty which will apply across all the equality grounds and to all GB public authorities: it will replace the existing duties with a wider duty which will nevertheless be structured along similar lines to the existing duties in terms of the requirements and obligations it will impose upon public authorities.

<sup>31</sup> [2002] EWHC 2463 Admin.

<sup>32</sup> There is no specific definition of what exactly constitutes discrimination for the purposes of this common law principle.

<sup>33</sup> 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.



The ‘devolved’ representative bodies that have been established in London, Wales and Northern Ireland are also subject to duties to promote equality. In Northern Ireland, sections 6(2)(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.<sup>34</sup>

*b) Are constitutional anti-discrimination provisions directly applicable?*

See above – the UK has no written constitution, but the 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. The ECHR can also be applied to the acts of public authorities via the Human Rights Act 1998 (HRA), who are also subject to positive equality duties.

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

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.

<sup>34</sup> Scotland Act 1998, Schedule 5, Part II, L2.



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.





## 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: age, 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.

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?*  
*Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?*



## 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*<sup>35</sup> 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'.<sup>36</sup>

<sup>35</sup> [1983] IRLR 209

<sup>36</sup> DDA section 1 (1)



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.<sup>37</sup> Under the DDA an impairment is only taken to affect a person's ability to carry out normal day-to-day activities 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.<sup>38</sup>

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)*.<sup>39</sup> This requirement was widely criticised, and section 18 of the Disability Discrimination Act 2005 has now removed it. The Disability Discrimination (Northern Ireland) Order 2006 did likewise in NI when it came into force in October 2007). 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 conditions<sup>40</sup>, 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.

The legislative definition of disability adopted in the DDA is broadly similar to that adopted by the European Court of Justice in case C-13/05, *Chacón Navas*, paragraph 43, according to which 'the concept of "disability" must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'. In certain respects, the UK definition may be broader, as the ECJ referred to 'impairments... which hinders ...participation...in professional life', while the UK definition adopts the broader reference point of hindrance in 'day to day activities'. The ECJ did not explicitly establish that a disability had to be a condition which was long-lasting, although at para. 45 it noted that it was probable that a condition would be long-lasting before it would qualify as a disability. The UK definition requires that an impairment has 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. This requirement that a disability is of a particular duration may constitute a potential issue of incompatibility, as the ECJ appeared to leave open the possibility that a condition need not in some circumstances be long-lasting: however, this aspect of the *Navas* decision remains unclear.

However, in *Paterson v Commissioner of Police for the Metropolis*,<sup>41</sup> the Employment Appeals Tribunal (EAT) interpreted the definition of disability contained in the DDA in line with the approach adopted by the ECJ in the *Chacon Navas* case.

<sup>37</sup> DDA Schedule 1 Para. 2.

<sup>38</sup> DDA Schedule 1 Para 4(1)

<sup>39</sup> *Morgan v Staffordshire University*, [2002, IRLR 190].

<sup>40</sup> The Disability Discrimination Act 2005 provides that certain progressive conditions should be treated as a disability from the point of diagnosis.

<sup>41</sup> [2007] IRLR 763, EAT

Applying the *Navas* approach, the EAT considered that the concept of ‘day-to-day activities’ must be given a meaning ‘which encompasses the activities which are relevant to participation in professional life’. This meant that if the effect of a disability would adversely affect promotion prospects, then it could be said to affect day to day activities, as it would hinder participation in the claimant’s professional life. On this basis, the EAT held that the complainant’s dyslexia was sufficient to constitute a disability which sufficiently interfered with his job as a police officer to qualify as a disability under the DDA, in that it hindered his chances of promotion. It remains to be seen how willing courts and tribunals are to depart from the strict requirements of the DDA definition to reflect the approach adopted by the ECJ in *Navas*. However, the expanded approach adopted by the EAT in *Paterson* to the definition of disability has been applied in several subsequently, including *Noor v Home Office (Border & Immigration Agency)*.<sup>42</sup>

There has been criticism that the DDA definition involves too much focus on what the applicant *cannot* do, rather than on what they *can* do.<sup>43</sup> This focus on the negative aspects of the disability has been criticised, as it places the onus on applicants to show that they are disabled within the definition used in the Act, and can expose them 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 tribunals to hear medical evidence as to whether impairment objectively exists, although whether the impairment is substantial remains a question of fact for the tribunal alone to determine.<sup>44</sup>

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, including social security legislation, or satisfies the eligibility conditions for certain disability-related benefits or concessions. However, people who are registered as blind or partially sighted in a register maintained by, or on behalf of, a local authority are deemed to be disabled for the purposes of the DDA, without satisfying the criteria of the DDA definition. Also, sections 1 and 3 of the UK Disability Discrimination Act (DDA) 1995 read together require that a person must be disabled according to the definition of a ‘disability’ used in the Act before they can bring an action under this legislation (with the exception of victimisation actions: see below).

In the employment case of *Coleman v Attridge Law* UKEAT/0417/06/DM, a secretary claimed that she was discriminated against because of her *association* with her disabled son, who needed considerable care from her. The Croydon Employment Tribunal decided that as Ms Coleman was not ‘disabled’ within the DDA definition, she could not bring a claim for disability discrimination. However, the tribunal, and subsequently the Employment Appeals Tribunal, considered that a case existed that the UK legislation was not compatible with the Framework Equality Directive in this respect, and referred the question directly to the European Court of Justice. The ECJ has now confirmed that the prohibition contained in Articles 1 and 2 of the Framework Equality Directive on discrimination based ‘on the grounds of’ disability includes direct discrimination and harassment based on association (see below).

<sup>42</sup> [2008] UKEAT 0252\_08\_0312 (3 December 2008)

<sup>43</sup> *Abedeh v British Telecommunications plc*, [2001, 156 ICR].

<sup>44</sup> *Abedeh v British Telecommunications plc*, [2001, 156 ICR].



The Employment Tribunal has subsequently decided that the DDA can be read in conformity with the judgment of the ECJ and that Ms Coleman's case can be adjudicated under the framework of existing UK disability discrimination law.<sup>45</sup> In other words, she can come within the 'protected' class of those who can bring cases under the DDA.

The Discrimination Law Review proposed to simplify and clarify the existing definition of disability by removing the list of capacities in the legislation that currently is used as an aid in defining what are 'normal day-to-day activities'. The recently introduced Equality Bill makes provision for this minor reform, but does not make substantial changes to the existing legislative definition of 'disability'.

Various legislative provisions regulating entitlement to social security and social assistance make provision for assistance to be given to specific categories of disabled person. For example, the test of incapacity for work (which if fulfilled entitles a person to incapacity benefit) is based at present on the following definition of a person's 'incapacity' to engage in their own occupation: 'The own occupation test is whether he is incapable by reason of some specific disease or bodily or mental disablement of doing work which he could reasonably be expected to do in the course of the occupation in which he was so engaged' (s. 171B Social Security Contributions and Benefits Act 1992, inserted by s. 5 of the Social Security (Incapacity for Work) Act 1994). The definition of 'disability' in the DDA is separate from these technical definitions in the social welfare legislation, each of which is only applied within their specific spheres of application.

The provisions of Recital 17 of the Directive are reflected in the DDA through the ability of employers to justify discrimination related to a person's disability and the requirement that accommodation be 'reasonable': see below. Note also that the duties imposed on service providers to make reasonable accommodation are limited to some extent by s. 21(6) DDA, which states that nothing requires a service provider to take any steps which would fundamentally alter the nature of the service in question or the nature of his trade, profession or business.<sup>46</sup>

### **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".<sup>47</sup> Similar wording is used in the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

<sup>45</sup> See *Coleman v Attridge Law*, Case No. 2303745/2005, 30<sup>th</sup> September 2008, ET.

<sup>46</sup> Paragraph 4.28 of the *Code of Practice (Revised): Rights of Access to Goods, Facilities and Premises* produced by the former Disability Rights Commission gives some examples of when this exception would apply: for example, nightclubs would not have to adjust their interior lighting to accommodate customers who are partially sighted if this would fundamentally change the atmosphere or ambience of the club.

<sup>47</sup> Employment Equality (Sexual Orientation) Regulations 2003 Explanatory Memorandum, Annex B, para. 5.





No definition is used in the Equality Act (Sexual Orientation) Regulations 2007, that concern discrimination outside of the context of employment and occupation.

### **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 –*

- 1) His supposed religious belief or political opinion; and*
- 2) 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):

*“ ‘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) defined “religion or belief” as “any religion, religious belief or similar philosophical belief”. Some commentators 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 clarified 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”. As yet, there has been little case-law on what constitutes a religion or belief. However, courts and tribunals in cases such as *Eweida v BA* (discussed above) have been ready to adopt a broad approach to what can constitute a ‘belief’.



## Age:

The Employment Equality (Age) Regulations 2006 and the Employment Equality (Age) Regulations (Northern Ireland) 2006, which prohibit age discrimination in employment, do not contain any definition of the term ‘age’, leaving it open to the courts and tribunals to define the term if necessary.

Both sets of regulations do define the term ‘age group’ as a ‘group of persons defined by reference to age, whether by reference to a particular age or a range of ages’: this may be important in indirect age discrimination claims.

*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’; or a “disability”, sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*

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 Wales<sup>48</sup> 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:-

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.

<sup>48</sup> 17 November 1999; [www.charity-commission.gov.uk/registration/pdfs/cosfulldoc.pdf](http://www.charity-commission.gov.uk/registration/pdfs/cosfulldoc.pdf)

See the previous section for the legislative definition of disability, and its (limited) relationship with entitlement to disability benefit in social security law.

There is no direct equivalent of recital 17 of Directive 2000/78/EC in UK legislation against discrimination, which instead makes use of the genuine occupational requirement defence, the comparator requirement for direct discrimination and the ability to demonstrate objective justification in indirect discrimination cases in its place.

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)?*

The Employment Equality (Age) Regulations 2006 and the Employment Equality (Age) Regulations (Northern Ireland) 2006 contain no restrictions related to the scope of ‘age’ or any minimum or maximum age limits to the scope of the regulations. However, it should be noted that the provisions of the new Equality Bill that prohibit age discrimination in the provision of goods and services and the performance of public functions will only apply to discrimination suffered by adults over the age of 18: children under this age will not be protected by this extension of age discrimination legislation.

d) *Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*  
*- Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

Research has shown that the problem of multiple discrimination, or ‘intersectional discrimination’, may be relatively widespread.<sup>49</sup> For example, the former Equal Opportunities Commission investigated the problems experienced by Bangladeshi, Pakistani and Black Caribbean women at work, and concluded that these groups are more likely to be unemployed than comparable white English women, a result that may be partially due to the impact of multiple discrimination.<sup>50</sup>

This problem has also been recognised by leading politicians. Patricia Hewitt, formerly a senior UK minister, has argued that ‘As individuals, our identities are diverse, complex and multi layered. People don’t see themselves as solely a woman, or black, or gay and neither should our equality organisations.’<sup>51</sup> This need to find solutions to the problem of multiple discrimination has been one of the main reasons for the establishment of the single Equality and Human Rights Commission (EHRC), which has attempted to develop internal strategies for addressing multiple discrimination in its case-work and promotional activities, while also emphasising the importance of human rights law as a tool for addressing problems of intersectional and cross-ground exclusion. However, little has been done to develop legal rules to address this problem.

<sup>49</sup> See Sandra Fredman, ‘Double trouble: multiple discrimination and EU law’, *European Anti-Discrimination Law Review*, issue no 2, 2005, pp13-18, at p. 14.

<sup>50</sup> <http://www.eoc.org.uk/Default.aspx?page=17693>

<sup>51</sup> DTI press release 12/5/04.

There have been few cases where multiple discrimination points have been argued, and these cases show the problems that exist in UK law in this area. These problems often mean that lawyers try to avoid making multiple discrimination arguments and concentrate upon ‘traditional’ anti-discrimination arguments instead. For example, in the case of *Perera v Civil Service Commission (No. 2)*,<sup>52</sup> Mr Perera was turned down for the job because of a variety of factors, which included his lack of experience of working in the UK, some uncertainty about his standard of English, his nationality (Sri Lankan) and his age. He had to make separate discrimination claims on the grounds of race, ethnicity and national origin, and was unsuccessful with each individual claim, as there was insufficient evidence to make out a successful case in respect of any one of these separate claims.

The requirement in UK law to show that a comparator would not have been so affected generates constant problems in this area. In *Bahl v the Law Society*,<sup>53</sup> an Asian woman claimed that she had been subjected to discriminatory treatment on the combined grounds that she was Asian and also because she was a woman. At the first stage of the case, an employment tribunal ruled that she could compare herself to a *white man*, so that the combined effect of her race and her sex could be considered together. However, both the Employment Appeal Tribunal and the Court of Appeal ruled that this was not possible under the existing law. The Court of Appeal made it clear that each ground of discrimination had to be separately considered and ruled upon as an individual claim, even if the applicant had experienced the different forms of prejudice as completely linked together. So, the applicant had to show that a white person would not have been affected as she was, or separately show that a man would not have been so affected, which made her chance of success much less.

Academic and political discussions on how to resolve this problem continue. Some have advocated that courts and tribunals should place less reliance upon the comparator test and instead focus more on whether and how disadvantage has occurred – if disadvantage has occurred due to a combination of factors, then that should be enough to make out a claim. Others argue that the various pieces of UK anti-discrimination legislation should be amended to specifically provide that a claim can be made where discrimination is based on more or more grounds of discrimination. The debate on this issue continues.

In the consultation paper produced by the Discrimination Law Review, the UK government stated that it would consult on whether the existing GB legislation should be amended to address multiple discrimination. However, the document indicated that the UK government does not consider that there are many circumstances where a claim for multiple discrimination could not succeed on the basis of one of the six discrimination grounds.<sup>54</sup> This view was criticised by many NGOs and others who responded to the review’s conclusions.

As a result, the UK government has since indicated that it is open to considering how to make it possible to incorporate protection against multiple discrimination in GB law, and has considered how this could be achieved through the new codified framework to be introduced in the Equality Bill.<sup>55</sup>

<sup>52</sup> [1983] IRLR 166

<sup>53</sup> [2004] IRLR 799

<sup>54</sup> Paras. 7.31-7.34.

<sup>55</sup> UK Equalities Office, *The Equality Bill*, July 2008, Ch. 6, para. 6.20-6.28.



The UK government is currently consulting on a proposal to permit direct discrimination claims that can be based on a combination of two protected characteristics (e.g. race and gender, or age and religion etc.), which it is considering inserting into the Equality Bill as it proceeds through Parliament. This proposal may however not be sufficient to cover all circumstances of multiple discrimination, as it will not cover cases based upon a combination of more than two grounds, and it will also not cover indirect multiple discrimination.

Nevertheless, it is clear that without European or domestic legislative reform, it is likely that courts and tribunals will struggle to address issues of multiple discrimination.

- e) *How have multiple discrimination cases involving one of Art. 13 grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

See the discussion on *Bahl v Law Society* above: UK law appears to require cases to be brought and argued under the separate grounds, even if the applicant has suffered discrimination on a combination of grounds.

### 2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

UK law on disability discrimination does not prohibit discrimination based on assumed or perceived characteristics as a disabled person; the text of 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). The provisions of the Disability Discrimination Act 2005 and the Disability Discrimination (Northern Ireland) Order 2006 have widened the definition of disability to include certain specific types of perceived or assumed disability, such as being of HIV positive status: nevertheless, there is at present no general legislative prohibition in UK law as such on discrimination based on perceived disability.

In contrast, 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 perceived or assumed characteristics. 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”.

Thus, in *Mandla –v- Lee*,<sup>56</sup> 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.”*

<sup>56</sup> [1983] IRLR 209





Direct discrimination “*on grounds of sexual orientation / religion or belief*” can therefore include discrimination based on A’s perception of B’s sexual orientation / religion or belief, whether the perception is right or wrong. Thus, in the Explanatory Notes accompanying the SO and RB Regulations, the government advised:

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...

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.

Reg. 3 of the Employment Equality (Age) Regulations 2006 (and an equivalent provision in the Employment Equality (Age) Regulations (Northern Ireland) 2006) explicitly prohibits discrimination on the grounds of a person’s ‘apparent age’.

In the interesting case of *English v Thomas Sanderson Blinds Ltd*,<sup>57</sup> the Employment Appeals Tribunal (EAT) dismissed a claim for harassment brought by a man who was not gay and who was known by his harassers not to be gay, but who was nevertheless subject to homophobic abuse. The EAT took the view that the claimant was not subject to harassment ‘on the grounds of’ his actual sexual orientation, as required by the Regulations, as the harassers knew he was not gay. However, the Court of Appeal subsequently overturned the decision of the EAT and took the view that as the harassment occurred ‘on the grounds of’ the applicant’s sexual orientation, in the sense of being based upon or linked to his real or imagined sexual orientation, that was sufficient to bring the complaint within the scope of the 2003 Regulations.<sup>58</sup>

### *Legislative Reform*

Following the decision of the ECJ in the case of *Coleman v Attridge Law*, the UK government announced that the Equality Bill would explicitly prohibit direct discrimination and harassment on the grounds of association or perception in GB across all six of the ‘equality grounds’, including disability, in the fields of employment and occupation and also in the sphere of access to goods, facilities and services, with the particular intention of protecting individuals with caring responsibilities for older, younger or disabled persons.<sup>59</sup>

<sup>57</sup> UKEAT/0556/07/LA

<sup>58</sup> [2008] EWCA Civ 1421

<sup>59</sup> See the written Ministerial Statement by Harriet Harman MP, House of Commons Debates, 2nd April 2009, col. 88WS, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090402/wmstext/90402m0003.htm#09040249000024> (last accessed 3th April 2009).



The text of the recently introduced Bill attempts to give effect to this reform by adopting a common definition of direct discrimination for all the grounds: direct discrimination is defined in the text of the Bill as discrimination ‘on the grounds of’ a prohibited characteristic, which should mean that the existing case-law that establishes that discrimination based on association or perception is treated as discrimination ‘on the grounds of’ a prohibited characteristic will now be applied to all the grounds, including disability. The UK government has described this reform measure as extending protection for those with caring responsibilities (via the extension of the prohibition on association to cover the disability and age grounds) and as protecting individuals against discrimination based on their appearance and assumed age (via the prohibition of perception-based age and disability discrimination). However, some NGOs have suggested that it would provide more legal clarity and certainty if the legislation expressly prohibited discrimination based on association and perception.

### *Discrimination on the Basis of Perception Outside of Employment and Occupation*

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 expressly prohibits discrimination of this type on the basis of perceived or assumed belief. These provisions came into effect in April 2007 in Britain: NI already has similar provisions in force by virtue of FETO 1998. Similar provisions have been introduced in respect of perceived or assumed sexual orientation: see Reg. 3 Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and Reg. 3 of the Equality Act (Sexual Orientation) Regulations 2007: the power to make such regulations was conferred upon the government by sections 81 and 82 of the Equality Act 2006. The RRA and RRO also prohibit discrimination based on association and perception in the sphere of access to goods and services, housing, transport and other areas outside of employment. The new Equality Bill when and if enacted appears to prohibit discrimination based upon association and perception on the grounds of disability and age in these areas as well, as a result of i) the wider definition of direct discrimination contained in the Bill (which will particularly affect disability as discussed in the previous paragraph) and ii) its extension of protection against age discrimination outside the sphere of employment and occupation.

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

The prohibition on 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*.<sup>60</sup>

<sup>60</sup> [2003] UKHL 34. 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)



As a consequence, as discussed above, this approach will be applied to direct discrimination on the grounds of association with someone of a particular sexual orientation and religion or belief. However, UK law on disability discrimination did not prohibit discrimination based on association with a disabled person; as noted above, the text of 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).

However, the absence of protection against “association” was the subject of a reference to the ECJ in the case of *Coleman v Attridge Law*, where as discussed above a secretary claimed that she was discriminated against because of her association with her disabled son, who needed considerable care from her. The Croydon Employment Tribunal decided that as Ms Coleman was not ‘disabled’ within the DDA definition, she could not bring a claim for disability discrimination. Nevertheless, the tribunal, and subsequently the Employment Appeals Tribunal, considered that a case existed that the UK legislation was not compatible with the Framework Equality Directive in this respect, and referred the question directly to the European Court of Justice. The European Court of Justice held that national legislation must prohibit discrimination on the grounds of association with a disabled person. When the *Coleman* case returned to the Employment Tribunal, the tribunal took the view that it was possible to interpret the DDA as prohibiting such discrimination to ensure conformity with EU law.<sup>61</sup>

As with disability, discrimination on age grounds against persons associated with a person of a particular age was not prohibited by the text of the Age Regulations, which only apply to discrimination against a person directly on account of their own particular or apparent age. Following the interpretation of the Framework Equality Directive 2000 adopted by the ECJ in the disability case of *Coleman v Attridge Law*, it appears likely that courts and tribunals will interpret the Age Regulations as applying to discrimination based on association.

### *Legislative Reform*

As noted above, the text of the recently introduced Equality Bill adopts a common definition of direct discrimination for all the grounds: direct discrimination is defined in the text of the Bill as discrimination ‘on the grounds of’ a prohibited characteristic, which should mean that the existing case-law that establishes that discrimination based on association or perception is treated as discrimination ‘on the grounds of’ a prohibited characteristic will now be applied to all the grounds, including age and disability. This should ensure protection against discrimination on the basis of association, and the UK government has stated that this reform should protect individuals with caring responsibilities for older, younger or disabled persons.<sup>62</sup> However, some NGOs have suggested that it would provide more legal clarity and certainty if the legislation expressly prohibited discrimination based on association and perception.

<sup>61</sup> See *Coleman v Attridge Law*, Case No. 2303745/2005, 30<sup>th</sup> September 2008, ET.

<sup>62</sup> See the written Ministerial Statement by Harriet Harman MP, House of Commons Debates, 2nd April 2009, col. 88WS, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090402/wmstext/90402m0003.htm#09040249000024> (last accessed 3th April 2009).



## *Discrimination on the Basis of Association Outside of Employment and Occupation*

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 with someone of a particular religion or belief. These provisions came into effect in April 2007 in Britain: NI already has similar provisions in force by virtue of FETO 1998. Similar provisions have been introduced in respect of association with a person of a particular sexual orientation: see Reg. 3 Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and Reg. 3 of the Equality Act (Sexual Orientation) Regulations 2007. (The power to make such regulations was conferred upon the government by sections 81 and 82 of the Equality Act 2006.) The RRA and RRO also prohibit discrimination based on association and perception in the sphere of access to goods and services, housing, transport and other areas outside of employment. The new Equality Bill when and if enacted appears to prohibit discrimination based upon association and perception on the grounds of disability and age in these areas as well, as a result of i) the definition of direct discrimination contained in the Bill and ii) its extension of protection against age discrimination outside the sphere of employment and occupation.

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

#### *a) How is direct discrimination defined in national law?*

##### ***Disability***

There are at present **three** definitions of discrimination in the DDA, as 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.

However, the House of Lords in the decision of *London Borough of Lewisham v Malcolm*<sup>63</sup> has made it more difficult to establish the existence of less favourable treatment of a person related to their disability ((1) above): while previous case-law had established that the appropriate comparator in such cases was a person to whom the reason for the less favourable treatment did not apply, the House of Lords held that the standard comparator approach used in direct discrimination cases should also be applied in 'less favourable treatment' cases. In other words, the *Malcolm* decision established that in deciding whether a person with a disability had been subject to less favourable treatment related to their disability, the treatment by the employer of that person should be compared to the treatment by the employer of a person in a similar position as the person with the disability.

This decision has attracted criticism. It makes it more difficult to establish the existence of less favourable treatment: in the example given above, the job applicant with severe arthritis would have to show that they suffered less favourable treatment than a non-disabled person who nevertheless also had difficulty in performing some of the tasks associated with the job. In addition, as noted above, the prohibition of unjustified less favourable treatment was intended to cover situations where it was not possible to compare persons equally able to do the job: the re-introduction of a standard comparator approach in *Malcolm* therefore contradicts this policy objective.

<sup>63</sup> [2008] UKHL 43





As a result, the UK government consulted as to whether should remove the prohibition of less favourable treatment ((1) above) and replace it with a prohibition on indirect discrimination on the grounds of disability.<sup>64</sup> This attracted some NGO criticism, on the basis that banning indirect discrimination might not ensure the same level of protection offered by the prohibition on less favourable treatment related to disability. As a result, the text of the recently introduced Equality Bill prohibits four types of disability discrimination: a) direct discrimination on the grounds of disability, b) treatment which is detrimental to a disabled person on account of their disability and which cannot be objectively justified, c) indirect discrimination on the grounds of disability and d) failure to make reasonable accommodation, which is currently already classified as a form of disability discrimination: see below. The new prohibitions on discrimination arising from a person's disability and indirect disability discrimination will replace the previous prohibition on disability-related discrimination, weakened as a result of the *Malcolm* decision. The UK government suggests that this reform will ensure a better level of legal protection for persons with disabilities and a clearer, more precise law. It is as yet unclear whether these proposed new provisions will in fact adequately replace the previous prohibition on disability-related discrimination, and therefore ensure that the non-retrogression principle is respected in this complex area of law. Much will depend on the approach of courts and tribunals and how they will apply the prohibition on indirect discrimination and discrimination arising from a person's disability, if the Bill becomes law.

- 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, age, 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 2006; Reg. 3 of the Equality Act (Sexual Orientation) Regulations 2007; Reg. 3 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

'Segregation' under RRA s.1(2) and RRO art. 3(2) is defined as constituting a form of direct discrimination.

Reg. 3 of the Employment Equality (Age) Regulations 2006 (and an equivalent provision of the Employment Equality (Age) Regulations (Northern Ireland) 2006) adopts 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.

<sup>64</sup> See the consultation document issued by the UK Office for Disability Issues, *Improving protection for From Disability Discrimination*, November 2008, available at <http://www.officefordisability.gov.uk/docs/indirect-discrimination.pdf> (last accessed 19th April 2009).

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; Reg. 3(2) of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) Regulations 2006 and the Equality Act (Sexual Orientation) Regulations 2007; Reg. 3(2) of the Employment Equality (Age) Regulations 2006 and an equivalent provision of the Employment Equality (Age) Regulations (Northern Ireland) 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 of<sup>65</sup>. This was reinforced in the *Prague Airport* case,<sup>66</sup> 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. The House recently confirmed this approach in *Ahsan v Watt (Formerly Carter)(sued on his own behalf and on behalf of other members of the Labour Party)*.<sup>67</sup>
- As the definition says "treats or would treat" a hypothetical comparator is acceptable.<sup>68</sup> 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.<sup>69</sup> Again, this was recently confirmed by the House of Lords in *Ahsan v Watt (Formerly Carter)(sued on his own behalf and on behalf of other members of the Labour Party)*.<sup>70</sup>

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."*

<sup>65</sup> *James –v- Eastleigh Borough Council* [1990] 2 AC 751

<sup>66</sup> *R -v- Immigration Officer at Prague Airport & Anor.ex parte ERRC and others* [2004]UKHL 55

<sup>67</sup> [2008] IRLR 243, HL

<sup>68</sup> *Chief Constable of West Yorkshire –v- Vento* [2001] IRLR 124

<sup>69</sup> *Balamoody –v- UK Central Council for Nursing, Midwifery and Health Visiting* [2002] IRLR 288

<sup>70</sup> [2008] IRLR 243, HL



b) *Are discriminatory statements or discriminatory job vacancies announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)*

Discriminatory job advertisements, whether published by the potential employer or circulated by a third party publisher, are explicitly prohibited only under the race, sex and disability discrimination legislation (and in NI under FETO): Section 29(4)(a) RRA; Reg. 29 RRO 1997; Reg. 34 FETO; Section 38(4) SDA; s.16B DDA.

For example, s. 16A DDA makes it unlawful to publish or cause to be published an advertisement inviting applications for (amongst other things) "*employment, promotion or transfer of employment*" if it indicates "*or might reasonably be understood to indicate*" that an application will or may be determined to any extent by reference to the applicant not being disabled or not having any particular disability. An "advertisement" for this purpose includes every form of advertisement or notice, whether to the public or not. (S. 16B(6).) The advertisement will also be unlawful if it suggests reluctance to make reasonable adjustments to accommodate an applicant's disability.

Under the RRA, RRO, FETO, SDA and DDA, there is a defence for third party publishers if they can prove that, in publishing an advertisement, they placed reasonable reliance on a statement about the lawfulness of the advertisement made by the person who placed it. It also makes it an offence for a person knowingly or recklessly to make a false or misleading statement about the lawfulness of an advertisement, carrying on summary conviction a fine not exceeding level 5 on the standard scale (currently £5000 sterling – approx. 5800 euros).

S. 54 of the Equality Act 2006 also prohibits advertisements that indicated an intention to discriminate on the basis of religion or belief in the fields of provision of goods, facilities and services, education, housing and the performance of public functions: Reg. 10 of the Equality Act (Sexual Orientation) Regulations 2007 and Reg. 20 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 made similar provision in respect of sexual orientation. Similar defences and criminal offences apply under these provisions as are applied under the RRA, SDA and DDA.

However, the RRA, RRO, SDA, FETO, DDA, the Equality Act 2006 and the 2007 Regulations do not give individual job applicants the right to take legal action in respect of discriminatory job advertisements, on the basis that unless a person had actually been discriminated against in the recruitment process, the individual would not have suffered 'less favourable treatment'. The power to take legal action against discriminatory advertisements was only given to the equality commissions, and now is vested in the Equality and Human Rights Commission (ECHR) and the Equality Commission for Northern Ireland (ECNI). (In 2002, the former Commission for Racial Equality (CRE) dealt with 31 cases of discriminatory advertisements outside the field of employment, and in 2003, they dealt with 26 such cases.)

In addition, the SO Regs 2003, the RB Regs 2003 and the Age Regulations 2006 did not prohibit discriminatory advertisements. Also, discriminatory statements have not been explicitly prohibited under UK discrimination law, unless they constitute incitement to racial or religious hatred, harassment or direct discrimination (i.e. where an individual has been subject to 'less favourable treatment' as a result of their possession of a protected characteristic).



Individuals may bring legal claims in respect of discriminatory advertisements or statements if they are actually made subject to less favourable treatment on a prohibited ground as a consequence, i.e. if an individual applied for the advertised posts in question and was rejected on account of a protected characteristic, which would constitute direct discrimination. This would apply across all the equality grounds. Perhaps on this basis, the UK government has indicated that it considers that UK law is in conformity with the *Feryn* decision.

However, it is unclear at present when individuals would have legal standing to bring a discrimination claim where discriminatory advertisements or statements have been published. In particular, it is unclear whether an individual who is deterred from applying for a post on the basis of a discriminatory advertisement or statement can bring a legal claim, as that individual might be held not to have been subject to any tangible form of less favourable treatment. This view was adopted by the EAT in the case of *Cardiff Women's Aid v Hartup* (1984), where it held that placing a discriminatory advertisement merely indicated an 'intention' to discriminate but was not an act of discrimination in itself. A similar approach was adopted by an employment tribunal in *GPS (Great Britain) Ltd v Clarke* (2007), who decided that only an applicant who had actually been subject to less favourable treatment could bring a legal claim for discrimination in response to an advert that discriminated on the basis of age.

Courts and tribunals could interpret the direct discrimination provisions of the RRA, RRO, FETO, DDA, SO, RB and Age Regulations as covering situations where individuals were deterred from applying for a post, in order to ensure conformity with *Feryn*. In addition, the Equality Bill attempts to clarify via its definition of direct discrimination that an individual who suffers detriment or who is deterred from applying for a job due to discriminatory advertisement may bring a discrimination claim: however, the wording of the Bill at present may not fully succeed in this aim. There may be a need for greater clarity in the legislation, and for explicit provisions that ensure conformity with the *Feryn* decision.

It should be also noted that, as discussed below, 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 (only the equality commissions can bring enforcement action). In addition, the EHRC is also able to seek an injunction to prevent someone committing an unlawful discriminatory act.<sup>71</sup> These provisions may cover some situations where discriminatory statements are made.

- c) *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).*

<sup>71</sup> See s. 24 of the 2006 Act. The EOC had previously only the power to seek an injunction against bodies with a previous 'track-record' of illegal discrimination, and even then this power was limited: see the almost indecipherable provisions of s. 73 of the Sex Discrimination Act 1975.



Other than in respect of the first definition of disability discrimination ('less favourable treatment related to a disability' - 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, with the exception of the age ground, where Reg. 3 of the Employment Equality (Age) Regulations 2006 and an equivalent provision of the Employment Equality (Age) Regulations (Northern Ireland) 2006 permits direct discrimination on grounds of age if it can be objectively justified, as provided for by Article 6 of Directive 2000/78/EC.<sup>72</sup> 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.

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 Practice<sup>73</sup> 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.

As discussed above, following the decision of the House of Lords in *Malcolm*, the text of the recently introduced Equality Bill prohibits direct discrimination on the grounds of disability, treatment which is detrimental on account of a person's disability and which cannot be justified, also indirect discrimination on the grounds of disability. If enacted, it remains to be seen how these new provisions will be interpreted by courts and tribunals.

d) *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?*

The Employment Equality (Age) Regulations 2006 and the Employment Equality (Age) Regulations (Northern Ireland) 2006 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.

<sup>72</sup> *Ratcliffe –v- North Yorkshire CC* [1995] IRLR 439

<sup>73</sup> 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.





In the initial draft regulations, draft reg. 3(2) of the GB age regulations did give examples of treatment which could be deemed to be objectively justified, but the regulations finally laid before and approved by Parliament in 2006 do not include examples of such treatment. However, non-statutory guidance provided with the 2006 Regulations include some such examples.

### 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?. For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation?*

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 across all the equality grounds 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. However, lawyers do have concerns that introducing certain forms of situational testing evidence in certain situations may be problematic, as this evidence may be excluded on the grounds of irrelevance or unfairness in some cases, as has apparently happened in at least one Scottish case.<sup>74</sup> This means that some caution exists about its use, but there are no actual procedural or legal barriers to the admissibility of relevant and probative situational testing evidence.

- b) *Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

Anti-discrimination lawyers do have concerns that introducing certain forms of situational testing evidence in certain situations may be problematic, as this evidence may be excluded on the grounds of irrelevance or unfairness in some cases, as has apparently happened at the pre-trial stage in one unreported Scottish case.<sup>75</sup> This means that some caution exists about its use, but there are no actual procedural or legal barriers to the admissibility of relevant and probative situational testing evidence. The greater focus on situational testing in other European countries has resulted in the (now defunct) Commission for Racial Equality and anti-discrimination lawyers considering whether its use could become more common in the UK context, but some doubts remain about its usefulness and utility in current conditions in the UK (see below). Case-law from other countries has had little or no influence in this area.

- c) *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.

<sup>74</sup>Information obtained by the author from the Commission for Racial Equality, July 2006.

<sup>75</sup>Information obtained by the author from the Commission for Racial Equality, July 2006.



However, the House of Lords in *R (European Roma Rights Centre) v Chief Immigration Officer, Prague Airport*<sup>76</sup> were willing to accept evidence obtained through situational testing as relevant and admissible testimony, along with other forms of evidence.

d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs, equality body, etc)*

‘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: it would be very unusual for example for a night-club or bar to maintain a full ‘colour-ban’ or to exclude all of a particular group. 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. Disability rights groups do use situational testing to some extent to assess compliance with the DDA, and the Commission for Racial Equality (CRE) produced some internal guidance for its staff on the use of situational testing, including examples of where and when it could be used. However, the equality commissions by and large have refrained from making use of situation testing, tending to take the view that it would be of limited practical use in the UK context and perhaps also be of limited evidential value.

### 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)<sup>77</sup>, and in the RRA and RRO to grounds of race and ethnic and national origins, but not grounds of colour or nationality.

<sup>76</sup> [2004] UKHL 55

<sup>77</sup> 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).

Reg. 3 of the 2006 age regulations uses a similar definition as that used in the 2003 Regulations, while the Equality Act 2006 contain 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. Finally, as the ultimate example of the complexity of UK law in this area, different definitions are included in the Equality Act (Sexual Orientation) Regulations 2007 and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, which prohibit discrimination the grounds of sexual orientation in the area of education, goods and services and the RRA (for grounds of colour or nationality).

The report of the Discrimination Law Review in 2007 proposed that a single harmonised definition of indirect discrimination should be applied in GB law across all the equality grounds, which would use the terms “provision, criterion or practice”, “particular disadvantage” and “proportionate means of achieving a legitimate aim” in all circumstances.<sup>78</sup> In other words, the definition applied in the 2003 Regulations implementing the Directive was proposed to be the standard test across all the different grounds. Some NGOs and the Trade Union Congress criticised the Review for not directly adopting the test used in the Directive itself, in particular the requirement in Article 2(2)(b)(1) for a practice to be ‘appropriate and necessary’. However, in its response to the consultation that followed the Review, the UK government has taken the view that the phrase ‘appropriate and necessary’ could be given an excessively stringent interpretation in GB law which would go beyond the requirements of the EU Directives: as a consequence, the UK government has retained the test of “proportionate means of achieving a legitimate aim” in the standard definition of indirect discrimination that is included and applied across all the equality grounds in GB law by the recently introduced Equality Bill.<sup>79</sup>

### ***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.”*

This definition will be similar to the standard definition of indirect discrimination to be introduced into GB law by the recently introduced Equality Bill, if and when it is enacted.

<sup>78</sup> Paras. 1.30-1.45.

<sup>79</sup> UK Equality Unit, *The Equality Bill – Government Response to the Consultation*, June 2008, para. 7.26.

The original (pre-2000 Directives) 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(1B) 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 – (a) 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 (b) 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 (c) which is to the detriment of that other because he cannot comply with it*

This definition will be replaced by the standard definition of indirect discrimination to be introduced into GB law by the Equality Bill.

#### *Racial and ethnic origin and religious 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).<sup>80</sup>

#### *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.*

This definition will be similar to the standard definition of indirect discrimination to be introduced into GB law by the Equality Bill.

<sup>80</sup> 3(2B) The provisions mentioned in paragraph (2A) are - (Italics are the author's)

- (a) Part III; (*employment and employment related activities*)
- (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)."

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.

- 1) *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,*
- 2) *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),*
- 3) *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*
- 4) *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: this definition will in any case be replaced by the standard definition of indirect discrimination to be introduced into GB law by the Equality Bill, if and when it is enacted.

In the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, that extends protection against sexual orientation discrimination to the provision of goods and services, the following definition is used in Reg. 3(1):

*A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same sexual orientation as B; but — (i) Which puts or would put persons of the same sexual orientation as B at a particular disadvantage when compared with other persons; (ii) Which puts B at a disadvantage; and (iii) Which A cannot show to be a proportionate means of achieving a legitimate aim; or (c) A applies to B a requirement or condition which he applies or would apply equally to persons not of the same sexual orientation as B; but — (i) which is such that the proportion of persons of the same sexual orientation as B who can comply with it is considerably smaller than the proportion of persons not of that sexual orientation who can comply with it; and (ii) Which he cannot show to be justifiable irrespective of the sexual orientation of the person to whom it is applied; and (iii) Which is to the detriment of B because he cannot comply with it.*

Reg. 3 of the Equality Act (Sexual Orientation) Regulations 2007 contains a similar definition. This definition appears to try to combine both the ‘old’ pre-2000 Directives definition with the newer definition.

#### *Age – GB and NI*

Reg. 3 Employment Equality (Age) Regulations 2006 (and the equivalent provision of the Employment Equality (Age) Regulations (Northern Ireland) 2006) use 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.<sup>81</sup>

This definition will be similar to the standard definition of indirect discrimination to be introduced into GB law by the Equality Bill.

### *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.

The Discrimination Law Review proposed to retain this position. However, as discussed above, following the decision of the House of Lords in *Malcolm*, the text of the recently introduced Equality Bill if enacted in its current form will prohibit (in GB law alone) direct discrimination on the grounds of disability, treatment which is detrimental on account of a person’s disability and cannot be justified, and also indirect discrimination on the grounds of disability.

*b) What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

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*<sup>82</sup> 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*<sup>83</sup> 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.

<sup>81</sup> See *Coming of Age*, (London: DTI, 2005), p. 23.

<sup>82</sup> Case 170/[1986] ECR 160

<sup>83</sup> [1990] IRLR 302



To justify indirect discrimination under the 2003 Regulations and the subsequent 2006 age regulations, the alleged discriminator must show that the provision, criterion or practice in question is a proportionate means of achieving a legitimate aim. Decisions such as *Azmi v Kirklees Metropolitan Council*, Employment Tribunal 19<sup>th</sup> October 2006 (see above) have seen the employment tribunals adopt a similar approach to the ‘appropriate and necessary’ test contained in the 2000 Directives as was applied in *Bilka* and indirect discrimination cases under the ‘old’ definition.

There are no higher court decisions as yet 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, or on the complex indirect discrimination provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

A wide range of legitimate aims have been recognised in UK case-law over the years. Ensuring good education for children (*Azmi v Kirklees Metropolitan Council*), respect for a school uniform policy (*X v Y*)<sup>84</sup>, control of costs and limiting financial exposure (*Secretary of State for Defence v Elias*)<sup>85</sup> are all examples.

It is very unusual to have an aim classified as illegitimate: see however the recent House of Lords decision in *Ahsan v Watt (Formerly Carter)*(sued on his own behalf and on behalf of other members of the Labour Party),<sup>86</sup> where the aim of the Labour Party to select a candidate that was not closely linked to the Pakistani community was treated as illegitimate. See also the EAT decision in the age discrimination case of *Seldon v Clarkson Wright and Jakes* (discussed above),<sup>87</sup> where the employer’s aim to avoid age-linked deterioration in performance by requiring partners to retire at 65 was treated as illegitimate as it was based on stereotyping.

Controversy has surfaced from time to time about whether the weight accorded to legitimate aims is greater than that sometimes accorded to the equality principle. This was certainly seen as a major concern in the 1970s and 1980s, where court decisions were often criticised as downplaying the importance of equality. However, higher court decisions in recent years have seen considerable emphasis placed on the importance of equality as a general principle of law and as a core human right: see e.g. the decisions in *Amicus* and *Secretary of State for Defence v Elias*. There has been a notable shift in the jurisprudence of the UK courts on this point over the last decade, which is also reflected in human rights cases under the ECHR.

As discussed, the test for what constitutes an ‘appropriate and necessary’ measure is that laid down by the ECJ in *Bilka Kaufhaus*, which the UK courts adhere to reasonably faithfully.

### c) *Is this compatible with the Directives?*

The new, wider, definition of indirect discrimination contained in the 2003 Regulations was introduced into UK legislation for purposes of compliance with the Directives.

<sup>84</sup> [2007] EWHC 298 (Admin) (21 February 2007)

<sup>85</sup> [2006] EWCA Civ 1293

<sup>86</sup> [2008] IRLR 243, HL

<sup>87</sup> 2009] IRLR 267



Nevertheless, this definition of indirect discrimination could be potentially seen as narrower than that in the Directives, since, unlike the Directives, it would not apply to disadvantage which could be anticipated before the provision, criterion or practice was actually applied. The provisions of the Race Relations Act 1976 (Amendment) Regulations 2008, SI no. 3008, have altered this position in respect of race, ethnicity and national origins by providing that it will constitute discrimination when a practice, provision or criterion "would put" the claimant at a particular disadvantage. However, the position remains unchanged for the other grounds, and the courts and tribunals may be called upon to disregard the apparently narrow scope of UK law in this area to give effect to the provisions of the Directives.

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.

Also, 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. Thus far, no clear examples of divergent case-law on this point can be identified.

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?*

As noted above, Reg. 3 of the GB and the equivalent provision of the NI age regulations 2006 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.<sup>88</sup>

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" (Reg. 3(3) in both the GB and NI Regs). Aside from this, the regulations do not specify how a comparison is to be made.

*e) Have differences in treatment based on language been perceived as indirect discrimination on the grounds of racial or ethnic origin?*

<sup>88</sup> See *Coming of Age*, (London: DTI, 2005), p. 23.



Differences in treatment based on language can constitute indirect discrimination on the grounds of racial or ethnic origin, if the difference in treatment cannot be shown to be objectively justified. Several cases have established this. For example, in *Toor v Air Canada*, a woman of South Asian ethnic origin was employed by Air Canada in its catering section at Heathrow. English was not her first language. When the catering section was sold to an external company, Air Canada identified a number of posts which would continue to be filled by Air Canada employees. The selection process for these posts involved a 15 minute written test with 20 questions in English. Mrs Toor, who had four years experience as an aircraft cleaner, failed the test and claimed that she had been subject to indirect race discrimination. She won her case and was awarded damages. The Employment Tribunal held that even though the discrimination in question was completely unintentional, a written test in English was one which considerably fewer people of her racial group could successfully pass than was the case with the ethnic groups to which the other applicants belonged. Therefore, she with other members of her ethnic group had been placed at a substantial disadvantage, and the application of the English language criterion could not be objectively justified given the nature of the job, which did not require excellent English.

### 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, which are subject only to standard data protection requirements.

- b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*

The use of statistical evidence is common, especially in race and gender cases where its utility may be greatest. There are no real obstacles to the use of statistical evidence in the courts, if the evidence is probative and relevant: the influence of European sex discrimination law is strong here, as is experience from the USA and Commonwealth countries. However, of course, there may be circumstances where lawyers or applicants face difficulty in finding relevant statistical evidence.

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

In *West Midlands Passenger Transport Executive v Singh*,<sup>89</sup> 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.

<sup>89</sup> [1988] IRLR 186



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.<sup>90</sup> 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*,<sup>91</sup> and *Perera v Civil Service Commissioners*.<sup>92</sup>

d) *Are there national rules which permit data collection? Please answer in respect to all 5 grounds. The aim of this question is whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

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 refuse to reveal personal data.<sup>93</sup> 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.<sup>94</sup> 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.

<sup>90</sup> [1999] IRLR 364

<sup>91</sup> [1989] IRLR 8

<sup>92</sup> [1977] IRLR 291

<sup>93</sup> 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.

<sup>94</sup> See Employment Tribunal Rules rule 4(3)





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. The ECNI monitors compliance with these duties: the Commission may report employers who fail to comply to the Secretary of State for Northern Ireland, who may bar such employers from bidding for public sector contracts (a major source of business revenue in Northern Ireland).

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 published 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.<sup>95</sup> 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 community or Roma ethnicity to be included in these categories.

The DRC issued similar guidance for monitoring in accordance with the disability equality duty, which came into force in December 2006.<sup>96</sup> 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 have been imposed under this duty. This came into effect in April 2007.

The EHRC now has responsibility for monitoring compliance with these duties and giving guidance to employers. In addition, the Commission has been given legal powers to secure compliance with these duties.

The forthcoming Equality Bill will impose a general equality duty upon all GB public authorities which will extend across all the six equality grounds: however, how authorities collect statistics and data may vary from ground to ground, and it is expected that the UK government will regulate this through the imposition of specific duties upon public authorities by means of secondary legislation in late 2009.

<sup>95</sup> See <http://www.cre.gov.uk/duty/ethnicmonitoring.html> (last accessed 31st January 2006) for the detailed guidelines.

<sup>96</sup> See DRC, *Code of Practice on the Disability Equality Duty*, available at <http://www.drcgb.org/thelaw/publicsectordutycodes.asp>



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. The Equality Commission for Northern Ireland has issued guidance on monitoring and may enforce compliance with this duty.

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.

Statistics are regularly used in both the public and private sectors to design positive action schemes (within the limits of UK law). The positive duties outlined above require the collection of data and its use to formulate positive action planning. Private bodies also are increasingly using data to develop positive action on a voluntary basis. The data collected is taken from equal opportunities monitoring, which is commonplace now in the UK: this involves the use of voluntary monitoring mechanisms, whereby job applicants and individuals applying for promotion, service users and others provide anonymous data on their ethnic background, gender, disabled status, age and other indicators. This information is scrutinised and conclusions drawn about where, when and how positive action needs to be taken.

Both the EHRC and ECNI use statistical evidence in their research, promotional and enforcement activity, in particular evidence obtained from public sector bodies under the positive equality duties (and from private sector bodies under the NI FETO duty).

## 2.4 Harassment (Article 2(3))

- a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

A definition of harassment has been incorporated into the RRA, the RRO, the DDA and the FETO and is included in the SO Regulations in GB and NI and the RB Regulations in GB, as well as in the 2006 age regulations:

- (1) *A person ('A') subjects another person ('B') to harassment where, on racial grounds/on grounds of sexual orientation/religion or belief/age, 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 NI, the same definition of harassment applies to the grounds of “religious belief” and “political opinion” - see Article 3A of FETO 1998.

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.*
- (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 1980s on, 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 1986<sup>97</sup> the Scottish Court of Sessions, as a court of appeal, established that sexual harassment could constitute direct discrimination, and in the context of employment<sup>98</sup>, sexual harassment could constitute a *detriment*<sup>99</sup> 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 Lords<sup>100</sup> 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.

In addition, 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 SDA<sup>101</sup>, the EAT offered guidance to employment tribunals:

<sup>97</sup> *Strathclyde Regional Council –v- Porcelli* [1986] IRLR 134

<sup>98</sup> 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”.

<sup>99</sup> 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’.

<sup>100</sup> *Macdonald –v- Advocate General for Scotland and Pearce –v- Governing Body of Mayfield Secondary School* [2003] IRLR

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<sup>101</sup> *Reed and Bull Information Systems Ltd. –v- Stedman* [1999] IRLR 299

*“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, 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 may conflict with Article 6.2 of the Race Directive.

Another potential issue of conformity with the Directives lies in the fact that the UK legislation prohibits harassment ‘on the grounds’ of race, sexual orientation, religion or belief, disability or age, while Article 2(3) of Directive 2000/78/EC refers to harassment ‘related to’ any of these grounds may again mean that UK law is incompatible with the Directive in this area. In *English v Thomas Sanderson Blinds Ltd*,<sup>102</sup> the Employment Appeals Tribunal (EAT) reluctantly dismissed a claim for harassment brought by a man who was not gay and who was known by his harassers not to be gay, but who was nevertheless subject to homophobic abuse. However, the Court of Appeal subsequently reversed this decision, taking the view that as the harassment occurred ‘on the grounds of’ the applicant’s sexual orientation, in the sense of being based upon or linked to his real or imagined sexual orientation, that was sufficient to bring the complaint within the scope of the 2003 SO Regulations.<sup>103</sup> In addition, the recently introduced Equality Bill when and if enacted will prohibit harassment that is ‘related to’ a protected characteristic, thereby removing one issue of potential incompatibility with the Directives in this area in relation to GB law.

Harassment in the form of words or physical acts that demonstrates hostility against LGB persons will be caught by reg. 5(1) of the SO Regulations, as unwanted conduct ‘on grounds of sexual orientation’, whether or not it involves unwelcome sexual advances.

<sup>102</sup> UKEAT/0556/07/LA

<sup>103</sup> [2008] EWCA Civ 1421



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 etc.) In *English v Thomas Sanderson Blinds Ltd*,<sup>104</sup> the Court of Appeal as noted above took the view that repeated harassment of a man known not to be gay but which nevertheless was homophobic in nature occurred 'on the grounds of' the applicant's sexual orientation, in the sense of being based upon or linked to his real or imagined sexual orientation, which was sufficient to bring the complaint within the scope of reg. 5(1).<sup>105</sup>

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.<sup>106</sup>

For grounds of colour and nationality under the RRA and RRO, for activities under the RRA not specified in subsection 1(1B) RRA and for activities under FETO outside art. 3(2B) FETO (i.e. activities that fall outside the scope of the Directive), 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, continues to apply. The Equality Bill will extend in GB law the legislative prohibition of harassment on the grounds of race and ethnicity currently contained in the RRA to the grounds of colour (which is effectively absorbed within the ground of ethnicity in this codification measure) and nationality, as a standardisation measure.

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, due to uncertainty as to what would constitute harassment in this context: in particular, when would religious evangelisation count as 'harassment' when it occurs during the provision of goods and services?

There was however an explicit prohibition on harassment on the grounds of sexual orientation in the provision of goods and services in Reg. 3(3) of the Equality Act (Sexual Orientations) Regulations (Northern Ireland) 2006.

<sup>104</sup> UKEAT/0556/07/LA

<sup>105</sup> [2008] EWCA Civ 1421

<sup>106</sup> 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).



In the Northern Irish decision of *Re The Christian Institute and Others*<sup>107</sup>, Weatherup J. analysed these provisions and considered that they were in conformity with the right to freedom of religion in Article 9 ECHR and other ECHR rights such as freedom of expression. However, as the government had failed to adhere to procedural requirements in the consultation stage that predated the introduction of the Regulations, the harassment provisions were set aside and have now no legal effect. The equivalent GB regulations, Equality Act (Sexual Orientation) Regulations 2007, did not contain such a prohibition, again because of concerns about its potential impact on freedom of speech.

Therefore, the current situation is that there is no express prohibition of harassment on the grounds of sexual orientation in GB and NI legislation when it comes to goods and services. Given that harassment will nevertheless qualify as discriminatory treatment under this legislation in any case, this has left the law in state of some incoherence.

Nevertheless, the Equality Bill does not extend express statutory protection against harassment on grounds of sexual orientation or religion or belief (or on the grounds of marriage or civil partnership) in the provision of goods, facilities and services, education in schools, the management or disposal of premises, and the exercise of public functions. However, the Bill will standardise for the purposes of GB law the existing statutory definitions of harassment and to extending express statutory protection against harassment to cover harassment on the grounds of disability in the provision of goods, facilities and services, education in schools, the management or disposal of premises, and the exercise of public functions.<sup>108</sup>

### ***Criminal offences of harassment and their relationship to 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.

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.<sup>109</sup> The Racial and Religious Hatred Act 2006 has introduced an offence of inciting religious hatred, which is however subject to some important defences.

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.

<sup>107</sup> [2007 NIQB 66 (11<sup>th</sup> September 2007)]

<sup>108</sup> UK Equalities Office, *The Equality Bill – Government Response to Consultation*, July 2008, paras. 13.1-13.50.

<sup>109</sup> Amended by the Criminal Justice No.2 (NI) Order 2004



The criminal offence is punishable by 6 months imprisonment or a fine or both. The House of Lords in *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, established that the Protection from Harassment Act 1997 can apply to workplace bullying and harassment. Before this decision, it was not clear that the Act, which was introduced to deal with stalkers, covered harassment and bullying at work. This case involved a claim that an employer was vicariously liable for the homophobic bullying the worker had experienced from his manager. The Law Lords ruled that an employer could be held to be vicariously liable and ordered to pay damages for harassment of one worker by another, as long as the bullying was closely linked to performance of the duties of the job.

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. Reg. 6 of the 2006 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.

As noted above, the current situation is that there is no express prohibition of harassment on the grounds of sexual orientation in GB and NI legislation when it comes to goods and services. Given that harassment will nevertheless qualify as discriminatory treatment under this legislation in any case, this has left the law in state of some incoherence. Nevertheless, the Equality Bill does not extend express statutory protection against harassment on grounds of sexual orientation or religion or belief (or on the grounds of marriage or civil partnership) in the provision of goods, facilities and services, education in schools, the management or disposal of premises, and the exercise of public functions.



The Discrimination Law Review consulted on whether the scope of the statutory prohibition on harassment needed to be extended to include third party harassment and other types of harassment not currently covered by the legislation: see 3.1.3 below.<sup>110</sup> In its response to this consultation exercise, the UK government decided to give further consideration to the case for extending liability of employers in GB law for persistent harassment of their employees by third parties in relation to race, disability, sexual orientation, religion or belief and age: however, it also decided not to impose liability on providers for third party harassment outside the employment field, e.g. by customer on customer, and this approach is reflected in the text of the recently introduced Equality Bill. (See 3.1.3 below.)

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 Occupation<sup>111</sup> and other examples are also available in the Disability Code of Practice produced by the Equality Commission for Northern Ireland.<sup>112</sup> The revised CRE Code of Practice for Employment offers extensive guidance on harassment in the context of race and ethnic origin.<sup>113</sup> The guidance published by ACAS<sup>114</sup> 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 religious belief, and political opinion.<sup>115</sup>

## 2.5 Instructions to discriminate (Article 2(4))

*Does national law (including case-law) prohibit instructions to discriminate?*

*If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

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 (only the equality commissions can bring enforcement action). 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. Reg. 5 of the 2006 age regulations also prohibit instructions to discriminate in both GB and NI, but permit individuals to bring enforcement actions: a similar possibility may exist for instructions to discriminate on the grounds of sexual orientation and religion or belief in GB, but it may be necessary in these cases to show that individual detriment has occurred.

<sup>110</sup>See Ch. 14 of the Review.

<sup>111</sup>Available at <http://www.drc-gb.org/thelaw/practice.asp>

<sup>112</sup>Available at <http://www.equalityni.org/uploads/pdf/DisEmploymentCOP05F.pdf>

<sup>113</sup>The code is available at <http://www.cre.gov.uk/gdpract/employmentcode2005.html>

<sup>114</sup>[www.acas.org.uk/publications](http://www.acas.org.uk/publications)

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



The position in NI in relation to “religious belief or political opinion” is covered by FETO. This is a complex area of UK law!

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:-

- 1) Who has authority over another, or
- 2) 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 in employment on grounds of sexual orientation and religion or belief in GB are not explicitly prohibited. The position is different for religious belief or political opinion 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.*”

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 on 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 or express reservation of the power to bring enforcement actions to the ECNI.

To complicate the position, 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. The Equality Act (Sexual Orientation) Regulations (NI) 2006 and the Equality Act (Sexual Orientation) Regulations 2007 similarly prohibit instructions to discriminate on the grounds of grounds of sexual orientation in the provision of goods, facilities and services, education and public functions, but only the ECNI and the EHRC can enforce these provisions.

However, Reg. 5 of the 2006 age discrimination regulations prohibits instructions to discriminate and also permits individuals to enforce this provision in both GB and NI (the ECNI also has the power to bring enforcement action). This may again reflect the absence at present of a commission with the power to bring enforcement actions in the age context: however, the same difficulties about having to show individual detriment may apply to age as in the areas of sexual orientation and religion or belief.

Although there are very few reported cases, the ability of the equality commissions to bring proceedings for instructions to discriminate has operated as a useful deterrent. For some years there was 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 was 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 people with disabilities? 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? Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

The non-anticipatory duty to provide reasonable accommodation is covered in the DDA (s.4A) by a parallel set of [subtly different] duties on public and private sector employers<sup>116</sup> 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.

The Law Lords took the view in *Archibald* that the effect of the arrangements in question upon the disabled person could be compared with their effect upon the non-disabled persons subject to the same arrangements but whom had not been subject to any disadvantage.

This would clarify if a 'substantial disadvantage' had occurred.<sup>117</sup> This approach was adopted by the Court of Appeal in *Smith v Churchill's Stairlifts plc*.<sup>118</sup> In this case, a disabled applicant for a sales job was dismissed from a training course as he was unable to carry a radiator cabinet that the firm wished their salesmen to display as a sample to potential customers. At first instance, an employment tribunal had held that the disabled person had not been placed at a 'substantial disadvantage', as his inability to carry the cabinet would have been shared by the majority of the general population and therefore he could not be said to have suffered any particular disadvantage that the majority of the population would not also suffer.

<sup>116</sup>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.

<sup>117</sup>'Substantial' is described by the Employment Code of Practice as meaning something 'not minor or trivial': see para. 5.11.

<sup>118</sup>[2005] EWCA Civ 1220



However, the Court of Appeal held that the disabled applicant had been placed at a disadvantage by this arrangement, as a comparison should not have been with the general population at large, but rather with the effect of this requirement upon the nine other applicants who were accepted for the training course, unlike the applicant who had obviously therefore suffered a substantial 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.<sup>119</sup>

As discussed above at 0.3, in the recent case of *Archibald v Fife County Council*,<sup>120</sup> 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 employer<sup>121</sup> to have to make a particular adjustment.<sup>122</sup> The factors it lists can be summarised in general as follows:

- effectiveness in preventing the particular disadvantage
- practicability
- 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.<sup>123</sup>

A 'reasonable accommodation' has been defined as one which does not amount to a 'disproportionate burden' for an employer.

<sup>119</sup> Available at <http://www.drc-gb.org/thelaw/practice.asp>

<sup>120</sup> [2004] UKHL 32

<sup>121</sup> or the person responsible in the employment related situations mentioned in the above footnote

<sup>122</sup> DDA s. 18B(1)

<sup>123</sup> Management of Health and Safety at Work Regulations 1999

In *Morse v Wiltshire CC*,<sup>124</sup> 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. In *Smith v Churchill Stairlifts*,<sup>125</sup> the Court of Appeal concluded that an employer’s reason for refusing to make an adjustment, if genuinely held and material and substantial, could be sufficient justification for less favourable treatment of a disabled person, but would not constitute sufficient justification for a failure to make reasonable accommodation if the employer had failed to give real consideration to the possibility of altering the problematic arrangements.

In *O’Hanlon v Commissioners for HM Revenue and Customs*,<sup>126</sup> the Court of Appeal held that it would be rare that an employer would be obliged under the requirement to make reasonable adjustment to continue to pay full sick leave allowance to a person who was sick for a long time period as a result of their disability.

The definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general: the obligation to make reasonable accommodation under the DDA applies in relation to persons who come within the DDA definition of disability (see above) if the duty is triggered in a particular circumstance.

*b) Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

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.

These duties are more anticipatory in nature than the reactive accommodation duty that is applied in the sphere of employment: see below. However, less positively, these duties are also triggered in different circumstances than the employment duty, i.e. when it is ‘impossible or unreasonably difficult’ for a person with a disability to access a service, rather than when a person has suffered a ‘substantial disadvantage’ when compared to others. This means that the duty to make reasonable accommodation is only imposed when a person with a disability finds it impossible or unreasonably difficult to access a service, while it is sufficient in the employment context if a person with a disability is put at a ‘substantial disadvantage’, a less onerous test.

<sup>124</sup> [1998] IRLR 352, EAT

<sup>125</sup> [2005] EWCA Civ 1220

<sup>126</sup> [2007] IRLR 404



In the interests of clarity, the recently introduced Equality Bill will if and when enacted standardise for the purposes of GB law when the accommodation duties will be imposed by making provision for a single threshold (the one currently set out in the employment duty) in all circumstances, i.e. all accommodation duties will be triggered when a person with a disability is put at a ‘substantial disadvantage’, not just when it is ‘impossible or unreasonably difficult’ for a person to access a service.

- c) *Does failure to meet the duty of reasonable accommodation 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 to make reasonable accommodation 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:

- 1) Discrimination for a reason relating to a disabled person’s disability, with justification defence;
- 2) Direct discrimination, without justification defence; and
- 3) 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 and the possibility of a change to the legal position in GB at 2.3(a) above.)

The Equality Bill if enacted will remove the justification defence that currently exists in GB law for a failure to make reasonable accommodation in the context of supplying goods and services and other areas that lie outside the fields of employment and occupation.

- d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

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.<sup>127</sup> 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.<sup>128</sup>

However, the Court of Appeal in the later case of *Price v Leeds*<sup>129</sup> 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*<sup>130</sup> 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. In *Kay v Lambeth; Price v Leeds*,<sup>131</sup> the House of Lords held that while Article 8 would not normally be available as a defence to eviction proceedings against members of the Traveller community illegally occupying land, there might be circumstances where a local government policy or regulation could be challenged under the ECHR before the administrative courts for failing to accommodate the special needs of particular groups.

There has been little if any discussion of whether the *DH v Czech Republic* ECHR decision requires special accommodation for the children of Traveller families or other disadvantaged groups. While educational segregation is an issue in respect of particular ethnic minority and religious groups, this stems from a complex set of social factors which are dissimilar to the issues generated by the educational testing techniques in *DH*. Also, the largely nomadic nature of the UK Traveller population presents different problems than the segregation at issue in *DH*, and some special provision already exists in UK law to accommodate the special educational needs of the nomadic Traveller communities. (This special provision is usually classified as a form of needs-based assistance rather than as a form of positive action or reasonable accommodation: it could however be understood as a particular and specialised form of positive action.) Therefore, it is unclear at present whether the *DH* decision will ultimately require any changes to UK law.

e) *Does the national law clearly provides for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

In establishing whether an employer failed to make reasonable accommodation, a similar approach is taken to matters of proof as in determining whether a person has suffered direct or indirect discrimination across the equality grounds (or less favourable treatment related to a person's disability).

<sup>127</sup>[2004] EWCA Civ 1248. See also *Clarke v Secretary of State for the Environment* [2001] EWHC Admin 800

<sup>128</sup>[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).

<sup>129</sup>[2005] EWCA Civ 289

<sup>130</sup>[2003] UKHL 43

<sup>131</sup>[2006] UKHL 10



In other words, the burden of proof will shift as required by s. 17 (1C) DDA (which was inserted by the DD Regulations 2003) in employment and occupation cases where the complainant establishes the existence of a *prima facie* case of a failure to make reasonable accommodation. (This approach was confirmed by the EAT in *Tarbuck v Sainsbury Supermarkets* [2006] IRLR 664, who stated that the standard approach to shifting the burden of proof in employment cases should be applied in reasonable accommodation claims.)

However, outside of the employment and occupation context, the burden to establish the claim on the balance of probabilities remains on the claimant, but inferences can arise in certain circumstances which an employer will have to rebut. T

The experience of litigation in this context in the UK is that an important issue related to the burden of proof is whether the employer can be liable for a breach of the duty if he/she was unaware of the existence of the disability in question. The House of Lords indicated in *Malcolm* that knowledge would usually be required, and the Equality Bill if enacted will make express provision that an employer must be aware of the existence of a disability before he or she can be found to be liable for disability discrimination. (This is controversial: some disability rights NGOs question this, on the basis that it may allow employers who should have made reasonable accommodation to meet the obvious needs of staff members to claim that they were unaware that the persons in question were disabled and thus unfairly to avoid liability.)

- f) *Does national law require services available to the public, 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 2000/78?*

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 buildings and to how they offer services to the public.

Part III of the Disability Discrimination Act 1995 ('the DDA') requires three types of reasonable adjustment to be made by providers of goods and services:

- i) Reasonable steps to change practices policies and procedures which make it impossible or unreasonably difficult for disabled persons to use a service (s. 21(1) DDA;
- ii) Changes to physical features of premises where these features make it impossible or unreasonably difficult to use a service. These changes can consist of the removal or alteration of the features in question, or providing a reasonable means of avoiding the feature in question; or providing the service by a reasonable alternative method) (s. 21(2) DDA); and
- iii) The provision of an auxiliary aid or service (such as information on tape, or the provision of a sign language interpreter) where this would enable or facilitate the use by persons with disabilities of a service (s. 21(4) DDA).



These duties are all limited to some extent by s. 21(6) DDA, which states that nothing in the section requires a service provider to take any steps which would fundamentally alter the nature of the service in question or the nature of his trade, profession or business.<sup>132</sup> However, these duties are anticipatory in nature, as they are triggered by the presence of obstacles even if no person with a disability has yet requested individual accommodation.

In the recent Discrimination Law Review, the UK government has proposed that the current threshold test used in employment cases for triggering a requirement to make reasonable accommodation, ‘substantial disadvantage’, should be used instead. This reform has been included in the recently introduced Equality Bill, and this will make it easier for persons with disabilities to challenge a failure to accommodate that causes difficulties for them in accessing services.

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 recently introduced Equality Bill requires landlords and managers of premises to make disability-related alterations to the common parts of residential premises, where it is reasonable to do so, and when requested by a disabled tenant or occupier.

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.<sup>133</sup> However, transport infrastructure (such as roads, train stations and airports) is not covered by this exemption, and therefore is subject to the requirements of the access provisions in Part 3 of the DDA.<sup>134</sup> 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.<sup>135</sup> This permits the relevant Minister to ensure that as transport systems are modernised, suitable provision is made for disabled persons.

<sup>132</sup> Paragraph 4.28 of the *Code of Practice (Revised): Rights of Access to Goods, Facilities and Premises* produced by the former Disability Rights Commission gives some examples of when this exception would apply: for example, nightclubs would not have to adjust their interior lighting to accommodate customers who are partially sighted if this would fundamentally change the atmosphere or ambience of the club.

<sup>133</sup> s.19 (5), Employment by transport providers is subject to the provisions of Part II of the DDA.

<sup>134</sup> See the *Code of Practice on Rights of Access*, para. 2.36

<sup>135</sup> 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.

With effect from December 2006, under provisions in the DDA 2005, the Government has brought 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.

- g) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

UK law does not make provision for a general duty to provide accessibility. Instead, specific legislative provisions and statutory provisions have been introduced as outlined above to regulate the provision of accessibility in different contexts.

However, it should be noted that the duty to make reasonable accommodation in the area of goods and service provision established by Part 3 DDA has an anticipatory dimension. This stems from the wording of s.21 DDA, which refers to the duties being owed to ‘disabled persons’, unlike the employment duty, which is owed only to distinct individuals who suffer a ‘substantial disadvantage’. This means that the service provision duties are anticipatory in nature, as they are owed to ‘disabled people’ in general, meaning that if any person with a disability would find it ‘impossible or unreasonably difficult’ to access the service in question, the duty may be triggered. This ensures that that service providers need to ensure that they have considered and taken steps to ensure the accessibility of their services.<sup>136</sup> It also ensures that service providers are prevented from arguing that an adjustment was not required as they had not been informed in advance of the needs of the disabled person in question. The impact of this anticipatory duty will be enhanced with the relaxation of the circumstances in which this duty may be triggered proposed in the text of the recently introduced Equality Bill: see above at 2.6(b).

- h) *Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

Public authorities (including health authorities) are required under s. 21E of the Disability Discrimination Act 1995 (as amended) to take all reasonable steps to change practices, policies or procedures which make it ‘impossible or unreasonably difficult’ for persons with disabilities to receive a benefit. In addition, the positive duty to promote equality of opportunity for persons with disabilities that is imposed on public authorities may require reasonable accommodation to be made as part of fulfilling this duty. Various specific forms of state aid, social assistance and health care are also provided through social welfare legislation for certain categories of persons with disabilities.

<sup>136</sup> See the *Code of Practice(Revised): Rights of Access to Goods, Facilities and Premises*, Chs. 4 and 5.



State funding supports the provision of technical aids and other forms of technological support, including information technology systems. Special state support also exists for leisure activities for persons with disabilities in the sporting and cultural fields.

The Special Educational Needs and Disability Act ('SENDA') 2001 and the Special Educational Needs and Disability (Northern Ireland) Order 2005 (known as 'SENDI') require schools, universities and other educational institutions to take reasonable steps to make sure that disabled pupils are not placed at a 'substantial disadvantage' when compared to non-disabled pupils. SENDA also establishes a general Special Educational Needs (SEN) framework for students with disabilities, which regulates the provision of technical aid and special support.

Under the DDA, positive action in favour of persons with disabilities is not subject to legal restraint: however, the UK has largely abandoned the use of quota schemes to benefit persons with disabilities in favour of an anti-discrimination approach.

## **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 workers with disabilities?*

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 is 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?*

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.<sup>137</sup> 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.<sup>138</sup>

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*<sup>139</sup> 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.

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.<sup>140</sup> 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.<sup>141</sup>

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- deVere Hotels* [1997] ICR 1. In *Burton*, employees of deVere 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 Lords<sup>142</sup> 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. This is very difficult to establish in practice.

<sup>137</sup> 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; NI Age Regs. Reg. 26.

<sup>138</sup> DDA s 58 (5)

<sup>139</sup> *Jones –v- Tower Boot Co Ltd* [1997] IRLR 168

<sup>140</sup> DDA s 57 (3)

<sup>141</sup> DDA s 58.

<sup>142</sup> *Macdonald –v- Advocate General for Scotland and Pearce –v- Governing Body of Mayfield Secondary School* [2003] IRLR 512



Subsequently, the RR Regulations introduced a statutory definition of harassment for which no comparator is required, as did the SO and RB Regulations and the 2006 age regulations. To date there are no reported cases regarding what effect this may have on liability for 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 (i.e. outside the scope of the Directives), where the rejection by the House of Lords of *Burton* still means that employers would not be liable for harassment by third parties.

Legislation in 2008 (the Sex Discrimination Act 1975 (Amendment) Regulations 2008) made employers explicitly liable for harassment by third parties in the sphere of gender discrimination, but not for the other equality grounds.

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. The report of the Discrimination Law Review sought views on whether the scope of the statutory prohibition on harassment needs to be extended to include third party harassment and other types of harassment not currently covered by the legislation.<sup>143</sup> In its response to this consultation exercise, the UK government decided to give further consideration to the case for extending the liability of employers for persistent harassment of their employees by third parties in GB law in relation to race, disability, sexual orientation, religion or belief and age: however, it also decided not to impose liability on providers for third party harassment outside the employment field, e.g. by customer on customer, and this approach is reflected in the recently published Equality Bill.<sup>144</sup>

## 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 may fall short of the Directives in relation to self-employment. UK legislation also applies to partnerships, to contract work, to barristers and to appointed, but not elected, officeholders; the Disability Discrimination Act 2005 prohibits discrimination by a local authority against a disabled elected member of the authority.

<sup>143</sup>See Ch. 14 of the Review.

<sup>144</sup> UK Equality Unit, The Equality Bill, July 2008, paras. 13.48-52.



(A similar provision is contained in the Disability Discrimination (Northern Ireland) Order 2006.) 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 for all the grounds in several ways.

- 1) 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.
- 2) Discrimination is prohibited in offering pupillage or tenancy to a barrister.
- 3) 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 1998 on public authorities in NI has a similar effect across all of the equality grounds. The Equality Bill makes all GB public authorities subject to a single equality duty which would extend across all the equality grounds.



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

*In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.*

*Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.*

UK anti-discrimination legislation fully covers this area for all the grounds. 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.

With regard to occupational pensions, UK anti-discrimination legislation for all the grounds applies to the provision of occupational pensions by employers, which, under the influence of the sex discrimination case-law of the ECJ, are now through judicial interpretation treated as 'benefits' conferred by an employer and therefore come within the various legislative prohibition on the different types of discrimination.

The DDA includes within Part II specific prohibition of discrimination and harassment and requirement for reasonable adjustments in occupational pension schemes (ss 4G – 4K), with the Disability Discrimination Act 1995 (Pensions) Regulations 2003 and the DDA 1995 (Amendment) Regulations (NI) 2004 inserting the relevant provisions into the DDA and making specific regulations in this area. The Employment Equality (Sexual Orientation) (Amendment) Regulations 2003 (SI No 2827) inserted Schedule 1A in the Employment Equality (Sexual Orientation) Regulations 2003, which inserted a non-discrimination rule into all occupational pension schemes in respect of sexual orientation. Provision was also made for cases to be brought against the trustees or managers of pension schemes. In NI, the same occupational pension provisions are found at Schedule 1 to the Employment Equality (Sexual Orientation) Regulations (NI) 2003.

The major area of partial exception in this context is age. The 2006 age regulations do prohibit age discrimination in occupational pension schemes (see Reg. 11 and Schedule 2 of the GB Age Regs., Reg. 12 and Sch. 1 of the NI Regs.), but in a complex series of statutory provisions exempt certain age-related rules or practices in occupational pension schemes from the general prohibition on age discrimination. These exceptions permit occupational pension schemes to:

- have minimum and maximum ages for joining
- specify a normal retirement date
- pay early and late retirement pensions
- pay ill-health early retirement pensions without reduction and/or with enhancement
- pay early retirement pensions on redundancy without reduction and/or with enhancement



- for defined benefit schemes, link benefits to service
- close a scheme to new entrants
- pay differential increases to pensioners of different ages

These carefully framed exceptions in the Age Regulations are more restrictive than those set out in the original draft regulations. This unexpected tightening of the pension provisions was probably driven by concern that the width of the exceptions in the original draft regulations went further than was permitted by Article 6(2), especially those that related to the use of age distinctions in *paying out* benefits, as distinct from their use in fixing who is *entitled* to particular occupational benefits.<sup>145</sup> Some of these exceptions could still be potentially wider in scope than the exception set out in Article 6(2) of the Directive, and any exceptions still in the Regulations that lie outside the scope of Article 6(2) will have to be shown to be objectively justified under Article 6.1. It should also be noted that the use of age distinctions in occupational schemes can still be challenged on the basis of sex discrimination, even if a member state has taken advantage of the exception.

These new provisions inserted at the last moment into the final text of the Regulations have caused a considerable degree of uncertainty and consternation in the pensions industry. There have been differences of opinion between the government and some pension advisers as to the meaning of certain of these provisions, and in particular about whether employees who become entitled to a pension could in fact choose to work on while also collecting their pension.<sup>146</sup> As a consequence, the government delayed implementation of these provisions until 1<sup>st</sup> December 2006 (the absolute final deadline allowed under the Directive) and it revised its initial draft regulations several times in this difficult and complex area.

### **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))**

*Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning course?*

UK anti-discrimination law covers access provided by employers to training for all the grounds. 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).

<sup>145</sup>The text of Article 6(2) referred to fixing conditions for ‘admission or entitlement’, not to differentiation in how benefits are paid out after an entitlement has arisen.

<sup>146</sup> See BBC News, ‘Age Rules on Pensions Postponed’, 8<sup>th</sup> September 2006, available at <http://news.bbc.co.uk/1/hi/business/5326848.stm>





The RRA and RRO have always applied to *all* stages of education, including further and higher education, including university education and adult life-long learning, and FETO also applies to all further and higher education and adult life-long learning,. 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 any further and higher education with a vocational element generally in the GB SO and RB Regulations, the NI SO Regulations, the DDA and the 2006 GB and NI age regulations. The Equality Act 2006 now prohibits religious discrimination in all education, while the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Equality Act (Sexual Orientation) Regulations 2007 in general make it unlawful to discriminate on grounds of sexual orientation in the provision of goods, facilities and services, education and public functions. This would appear to include adult life-long learning, Note however that age discrimination in education outside of the scope of Directive 2000/78/EC is not prohibited, as yet. However, the Equality Bill prohibits age discrimination in GB in the provision of goods and services and in the performance of public functions, subject to a wide-ranging power conferred upon Ministers to modify this general prohibition by regulation: this is likely to result in the prohibition of particular forms of age discrimination in education.

### **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 for all the grounds 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)**

*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?*

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 RRO<sup>147</sup> to extend protection 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 came into force in December 2006 (and October 2007 in NI).

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. 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 allows the UK government to use this power to prohibit discrimination on the grounds of sexual orientation in the performance of public functions, again extending the scope of coverage to social protection, including healthcare and social security. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Equality Act (Sexual Orientation) Regulations 2007 have given effect to this power.

However, the Equality Bill prohibits age discrimination in GB in the provision of goods and services and in the performance of public functions, subject to a wide-ranging power conferred upon Ministers to modify this general prohibition by regulation: this is likely to result in the prohibition of particular forms of age discrimination in some areas of social protection.

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.

*The exception in Article 3(3), Directive 2000/78?*

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<sup>147</sup>Article 20A RRO



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 has a similar impact, as does the extension of protection against discrimination on the basis of sexual orientation in the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Equality Act (Sexual Orientation) Regulations 2007. The UK government has taken similar steps to extend protection against age discrimination beyond employment and occupation in the recently published Equality Bill.

### **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 has a similar impact, as does the extension of protection against discrimination on the basis of sexual orientation in the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the forthcoming GB regulations.

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.

However, the Equality Bill prohibits age discrimination in GB in the provision of goods and services and in the performance of public functions, subject to a wide-ranging power conferred upon Ministers to modify this general prohibition by regulation: this is likely to result in the prohibition of particular forms of age discrimination in some areas 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 and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

*Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated “special” education is favoured and supported.*

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 reflect wider issues of divided communities and social segregation.<sup>148</sup> State schools in particular parts of England, in particular the East End of London and in some of the northern cities such as Bradford, often contain high numbers of black and Asian pupils, with some schools also being overwhelmingly Muslim in student composition. For example, around a quarter of England’s minority ethnic pupils are in schools in Outer London and just under a fifth are in schools in Inner London: see Department of Education: *Ethnicity and Education* (2006), p. 27, which results in certain schools having a very large BME population (black and minority ethnic).

This is partially due to population settlement patterns, partially due to ethnic groups tending to ‘cluster’ in particular areas, and partially due to other complex factors, including a times a tendency for white families to avoid schools which are seen as heavily ‘ethnic’.

<sup>148</sup>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>



While various initiatives exist at local level which attempt to deal with this problem, this is producing at times a pattern of segregation: however, studies have shown that the national situation is complex and it is difficult to make generalisations in this area (Department of Education: *Ethnicity and Education* (2006), p. 28-9). There is also a degree of segregation in third level education, with some institutions of higher education having more than 40% BME (black and minority ethnic) intake while others have less than 5% (Higher Education Statistics Agency, 2003-04). Again, some initiatives are in place to attempt to address this ‘clustering’ of BME students, but there is not a clear or systemic nation-wide anti-segregation strategy yet in place.

Concerns also exist as to the lack of facilities for Traveller children.<sup>149</sup> Useful positive action practices exist in the field of education. For example, all Local Education Authorities (LEAs) have a statutory duty to ensure that education is available for all children of compulsory school age (five to 16 year-olds) in their area. These duties apply to all children residing in the LEA’s area, whether permanently or temporarily and, therefore, Traveller and Roma children residing with their families on temporary or unauthorised sites are included within this general duty. Most LEAs also provide specialist Traveller Education Support Services who help Travelling pupils and parents to access education and provide practical advice and support to schools taking in Travelling pupils. Special provision is made in legislation to protect Traveller parents against criminal convictions for the non-attendance of their children at school. However, despite these useful positive action policies which have been developed over time, many Traveller children still face disruption to their education, often caused by the absence of adequate housing facilities and the risk of eviction (see below). Therefore, the lack of temporary accommodation for Traveller families can have a very negative impact on the education of their children. Concern also exists about the ‘clustering’ of Traveller children in certain poorly-performing schools, especially in Northern Ireland.

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. None have as yet given rise to legal issues involving segregation.

Segregation of Catholic and Protestant pupils in Northern Ireland has been a constant problem there for many decades, with large proportions of the different groups going to faith schools.

Sections 81 and 82 of the Act also permit 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 Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Equality Act (Sexual Orientation) Regulations 2007 make provision for this, subject to certain narrow exceptions.

<sup>149</sup> 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](http://www.cre.gov.uk/policy/gypsies_and_travellers.html)





However, the Equality Bill prohibits age discrimination in GB in the provision of goods and services and in the performance of public functions, subject to a wide-ranging power conferred upon Ministers to modify this general prohibition by regulation: as noted above, this is likely to result in the prohibition of particular forms of age discrimination in some areas of education.

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.<sup>150</sup> 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 reasonable accommodation duties imposed on schools under Part Four of the DDA, as well as a variety of policy initiatives and legislative provisions, are intended to encourage integrated education within the educational mainstream for persons with disabilities, which has been since the Education Act 1981 a policy priority within the UK state educational structure. For example, the Education (Disability Strategies and Pupils' Records) (Scotland) Act 2002 places a requirement on education bodies to develop plans to improve access to the curriculum, the physical environment and communication of school information for disabled pupils. SENDA also requires accommodation of disabled pupils within mainstream educational structures (with appropriate support) where possible.

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)**

- (3) *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.*

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.

<sup>150</sup>See original Part IV DDA 1995, ss. 29 and 30.



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.

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 Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Equality Act (Sexual Orientation) Regulations 2007 make provision for this.

The Equality Bill prohibits age discrimination in GB in the provision of goods and services and in the performance of public functions, subject to a wide-ranging power conferred upon Ministers to modify this general prohibition by regulation: this is likely to result in the prohibition of particular forms of age discrimination in the provision of goods and services.

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 Equality Bill prohibits clubs with 25 or more members discriminating on the grounds of gender, religion or belief, sexual orientation or age in regard to members or guests, as well as clarifying and extending protection against disability discrimination by such clubs. However, single-sex clubs or clubs formed to benefit a single group will not be subject to these requirements.

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.



- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

The forthcoming Equality Bill will prohibit age discrimination in GB in the provision of goods and services and in the performance of public functions, subject to a wide-ranging power conferred upon Ministers to modify this general prohibition by regulation: this is likely to result in the prohibition of particular forms of age discrimination in the provision of financial services. The UK government has indicated that the use of reasonable actuarial factors in the provision of financial services will be exempt from this prohibition, and other specific exemptions may be introduced when the regulations are finally implemented.

In addition, as discussed below in detail at 4.7.1(c), the Age Regulations 2006 exempt the use of certain types of age distinctions in the provision of occupational services from the scope of the prohibition of age discrimination in employment (taking advantage of Article 6(2) of Directive 2000/78/EC): however, other forms of age distinction in this context are covered by the Age Regulations 2006. These very technical and precise provisions govern the use of age distinctions in the provision of occupational pensions: as many UK occupational pension schemes are administered by financial service providers, these provisions therefore regulate the use of age distinctions in this particular area of financial services.

As the DDA prohibits less favourable treatment related to an individual's disability in the provision of goods and services, and also requires service providers to make reasonable accommodation in certain circumstances (see above), disability discrimination in the provision of financial services is potential covered by the DDA. However, the ability to justify less favourable treatment (or detriment on the basis of a disability, which will be prohibited in place of 'less favourable treatment' by the Equality Bill) may in practice limit the impact of the DDA in the field of financial services, in particular where financial services are denied on the basis of actuarial or statistical data particular to an individual's specific disability.

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

*To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.*

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. These specific exceptions will be removed in GB by the recently introduced forthcoming Equality Bill if and when it finally becomes law.

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, with exceptions for small dwellings. 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 2006 Act also permits the UK government to introduce similar regulations in GB and NI prohibiting discrimination on the grounds of sexual orientation in housing. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Equality Act (Sexual Orientation) Regulations 2007 make provision for this.

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. These duties may influence how other statutory duties are performed by public authorities, such as their duties to provide housing for local populations: this may have an impact on the provision of accommodation for Traveller groups, which continues to be a source of controversy.

The ECHR decision in *Connors v UK* (2002) 35 EHRR 691 held that the UK had been in breach of Art. 8 of the Convention when a local authority failed to take account of the special needs of a Traveller community when carrying out a summary eviction of that family from local authority property. For 'normal' eviction procedures, in *Kay v Lambeth*; *Price v Leeds*,<sup>151</sup> the House of Lords held that while Article 8 would not normally be available as a defence to eviction proceedings against members of the Traveller community illegally occupying land, there might be circumstances where a local government policy or regulation could be challenged under the ECHR before the administrative courts for failing to take Article 8 into account. It remains to be seen how this will impact on the treatment of Travellers by local authorities, which remains a serious area of concern in the UK.

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<sup>151</sup> [2006] UKHL 10



Before the enactment of the Criminal Justice and Public Order Act 1994 (CJPOA), local authorities had a statutory duty to provide caravan sites for Gypsies and Travellers under the Caravan Sites Act 1968. However, the CJPOA removed that duty and gave local authorities and the police broad powers to evict Gypsies and Travellers from unauthorised sites. For a considerable period of time, Circular 1/94, *Gypsy Sites and Planning (Circular 1/94)*, issued by central government, guided local authorities in providing accommodation for Travellers. This Circular provided that local authorities should take special action to encourage Travellers to purchase land for halting sites themselves and to apply to legitimise their own sites through the planning system. However, Travellers face considerable difficulties in obtaining planning permission for private halting sites. Circular 1/94 also required local planning authorities to assess the need for caravan sites for Travellers in their administrative areas and identify locations where the land use requirements of Travellers can be met. However, this positive duty has often meet with a degree of resistance and inertia on the part of local authorities, many of whom have not identified suitable locations for such sites, or rely on unrealistic criteria. This has caused considerable difficulties for many Travellers, who are therefore often forced to camp illegally.

Recently, the House of Commons' Select Committee on the Housing Bill 2004 recommended to the government that only the re-introduction of the statutory duty on local authorities to provide authorised camping sites would remedy the situation. Also, the House of Lords in the cases of *South Buckhamshire v Porter*, *Wrexham CBC v Berry*, and *Chichester DC v Keet and Searle*<sup>152</sup> held that the vulnerable position of Travellers as a minority group deserved more sympathetic attention and special consideration of their needs than had previously been the case in the planning and site allocation process. However, this decision has not resulted in major changes to the existing situation.

Under the Housing Act 1996, local authorities had a duty to provide accommodation to people who are judged to be 'homeless' and have a 'priority need' for accommodation. This can entitle Travellers to accommodation, which may include positive provision in the form of temporary accommodation on caravan sites, as many Traveller groups desire to maintain their nomadic lifestyle. However, this is dependant on the availability of this type of accommodation. The Housing Act (2004), in conjunction with Circular ODPM 1/06, requires councils to assess the needs of Gypsies and Travellers via an Accommodation Needs Assessment process, and to have a strategy in place which sets out how any identified needs will be met as part of their wider housing strategies. This positive duty came into force on 2 January 2007, and it is yet too early to determine what overall effect this is having. However, by imposing a clearer duty upon local authorities to accommodate the needs of Travellers, this new legislation has some potential to improve the situation. Practical guidance on how to carry out assessments of the accommodation needs of Gypsies and Travellers has also been produced. Also, a Task Group on Site Provision and Enforcement has been established to provide further guidance on issues of eviction, site quality and design.

In Northern Ireland, the Housing Executive (NIHE) has carried out a comprehensive assessment of the accommodation needs of all Travellers in Northern Ireland and has drawn up a programme of positive action schemes to cater for the special needs of Travellers. In Wales, additional funding for the accommodation of Travellers has recently been announced.

<sup>152</sup> 2003] UKHL 26





However, in *Basildon District Council v McCarthy & Ors*,<sup>153</sup> the appellant local authority appealed against a High Court judgment which had overturned the authority's decision under planning control legislation to enforce compliance with enforcement notices requiring Irish Traveller and Gypsy families resident on unauthorised sites in the Council's district to leave these sites. The Court of Appeal held that the Council had not erred in failing to give adequate consideration to the lack of camping sites or other forms of suitable accommodation for the Gypsy and Traveller population. The Court took the view that the local authority had discharged its statutory obligations by considering the impact of eviction on each individual family and their duties under the UK's homelessness legislation: no wider consideration of housing matters was required.

Another problem relates to the absence of security of tenure. Travellers living on local authority halting sites have no security of tenure. The Caravan Sites Act 1968 simply provides that, possession can be obtained by a local authority if it gives a resident four weeks notice to quit and then obtains a possession order from a court. However, the ECHR decision in *Connors v UK* and subsequent UK court decisions has established that the Article 8 right to home life needs to be taken into account in eviction processes: alternative accommodation may have to be provided. Again, recent legislation has slightly improved the legal position. In 2004 the Office of the Deputy Prime Minister (DCLG) and the Home Office jointly launched the "Guidance on Managing Unauthorised Encampments". It provides guidance to local authorities, the police and others on managing unauthorised encampments. However, a lack of accommodation remains a persistent problem for Travellers, and the planning system as a whole could be said to place Travellers in a highly disadvantageous position.

In previous decades, BME (black and minority ethnic) groups suffered discrimination in housing, both as a result of discrimination by private landlords and segregation and discrimination in the allocation of public housing. Certain towns and cities in the north of England still remain very segregated, even if discrimination in the sphere of housing appears to be less common than was the case in the past. Segregation is also a problem in NI, where Catholic and Protestant communities often live in segregated communities as a result of the communal violence of the last thirty years.

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<sup>153</sup> [2009] EWCA Civ 13



## 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. However, in the interests of clarity and harmonisation, the new Equality Bill if enacted will make provision for a genuine occupational requirement defence similar to that which currently exists for the other equality grounds to be applied across all the grounds, including disability, in GB law.

#### *GB and NI – Race*

The RRA (s.5(2)) and RRO (art. 8(2)) had listed four types of jobs<sup>154</sup> 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.

<sup>154</sup> 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.



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 continue to apply for grounds of colour and nationality. However, the Equality Bill if enacted will remove these specific exceptions and provide that a single genuine occupational requirement test be introduced for all the equality grounds (except for disability) in GB law.

### *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.

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 – Religious 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 2006 GB and NI age regulations state 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 i) genuine and determining occupational requirement, it is ii) proportionate for the employer to apply the requirement in the particular case, and iii) the employer did consider, and it was reasonable for the employer to so 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 (Art. 4(2) Directive 2000/78)

- 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 made 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). A similar provision exists for Scottish Catholic schools in s. 21(2A) of the Education Act (Scotland) 1980.



This permits a wide scope for discrimination in selection and dismissal, as the school is not required 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. 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.

This appears to have been done in *Glasgow City Council v McNab*,<sup>155</sup> where the EAT gave a narrow interpretation to the permitted 'ethos' exceptions to the prohibition on discrimination based on religion or belief. In this case, an atheist who applied for a temporary position as acting head of a Catholic state school was not successful on the basis that he was not Catholic.

The EAT held that this constituted a violation of the RB Regulations 2003, as the school could not establish that being a Catholic was a genuine occupational requirement for that particular post and it was not necessary for an acting principal to be Catholic to maintain the religious nature of the school.

However, there is some concern that the discrimination permitted under the School Standards and Framework Act 1998 may still be used to exclude or dismiss LGB teachers or others whose conduct is deemed not to reflect the school's religious ethos, as has occurred in previous cases.

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? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)*

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

- 1) *the employment is for purposes of an organised religion; [and]*
- 2) *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(3) 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.

<sup>155</sup> [2007] IRLR 476



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 in the *Amicus* case to have the regulation annulled. (see above under Case Law )<sup>156</sup> The Court accepted the government's argument that reg. 7(3) was intended to have a narrow scope and was therefore not outside Art. 4(1) of the Directive.

In *Glasgow City Council v McNab*,<sup>157</sup> an atheist who applied for a temporary position as acting head of a Catholic state school was not successful on the basis that he was not Catholic. The EAT held that this constituted a violation of the RB Regulations 2003, as the school could not establish that being a Catholic was a genuine occupational requirement for that particular post and it was not necessary for an acting principal to be Catholic to maintain the religious nature of the school. This shows that the employment tribunals may give a narrow interpretation to the permitted 'ethos' exceptions to the prohibition of discrimination based on religion or belief.

However, 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. 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).

However, at present, the controversial cases in the UK have arisen where individuals allege that they have been subject to religious discrimination when they are required to refrain from wearing particular symbols linked to their religious beliefs (see the *Azmi* and *Eweida* cases in Case-law above) or else have been disciplined for refusing to perform functions relating to same-sex partnership and family rights (see *Ladele* in case-law above).

<sup>156</sup> *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](http://www.bailii.org/ew/cases/EWHC/Admin/2004/860.html)

<sup>157</sup> [2007] IRLR 476



#### 4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

- 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)?*

The 2006 GB and NI age regulations do not extend 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.

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

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.

- c) *Are there cases where religious institutions can select people (on the basis of their religion) to hire or to dismiss from a job - when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

As discussed above, the RB Regulations are made subject to ss 58 – 60 of the School Standards and Framework Act 1998 (reg. 39), which permits a voluntary aided school (a publicly funded state 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). A similar provision exists for Scottish Catholic schools in s. 21(2A) of the Education Act (Scotland) 1980. (Only national legislation is involved.)

This permits a wide scope for discrimination in selection and dismissal, as the school is not required 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. By taking this Act into account, the RB Regulations may fail to comply with Article 4(2).

However, for an example of judicial interpretation of the Regulations which ensured that direct effect was given to Article 4(2), see *Glasgow City Council v McNab*, discussed above at 4.2(a). Despite this decision, there is some concern that the discrimination permitted under the School Standards and Framework Act 1998 and the Scotland (Education) Act 1980 may still be used to exclude or dismiss LGB teachers or others whose conduct is deemed not to reflect the school's religious ethos, as has occurred in previous cases.

The Discrimination Law Review proposed that the exceptions to the RB Regulations that permit state-maintained religious schools to discriminate, as well as the exceptions for the armed forces, should be retained in the Equality Bill.<sup>158</sup> This recommendation is reflected in the text of the recently published Bill.

#### 4.4 Nationality discrimination (Art. 3(2))

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

- a) *How does national law treat nationality discrimination? Does this include stateless status?*  
*What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?*  
*Is there overlap in case law between discrimination on grounds of nationality and ethnicity (ie where nationality discrimination may constitute ethnic discrimination as well?)*

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 in the same manner as was race discrimination before the 2000 Race Directive was implemented. 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.

Nationality discrimination can constitute indirect race discrimination, but for the most part, discrimination on the basis of nationality is directly litigated as such.

<sup>158</sup> See Appendix One, *A Framework for Fairness*.



However, as the legislative prohibition on nationality discrimination now lacks the enhanced protection given against race discrimination by the 2000 Racial Equality Directive and the 2003 RRO (which includes a more expansive definition of indirect discrimination, a more onerous objective justification test and a tighter set of exceptions), protection against national discrimination is currently less developed than protection against discrimination on the basis of race, ethnicity or national origin.

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.

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

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. This was not re-assessed by the Discrimination Law Review.
- 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.



The Discrimination Law Review has proposed removing exceptions in the RRA that permit nationality discrimination in small partnerships and private households, and the Equality Bill if enacted is likely to give effect to this recommendation.

#### 4.5 Work-related family benefits (Recital 22 Directive 2000/78)

*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 (e.g. Case C-267/06 Maruko) 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?*

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).<sup>159</sup>

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.<sup>160</sup>

<sup>159</sup> *R (on application of Amicus & others) –v- Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin)

<sup>160</sup> 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.





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

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.<sup>161</sup> 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.<sup>162</sup> This has been the case since 1 December 2003, when the Regulations came into force.

#### **4.6 Health and safety (Art. 7(2) Directive 2000/78)**

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

*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)?*

Employers have a duty<sup>163</sup> 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.

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.

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.

<sup>161</sup> Schedule 17, s.7(3)

<sup>162</sup> ACAS Website, *available at*, [www.acas.org.uk](http://www.acas.org.uk); ACAS, ‘Sexual Orientation in the Workplace: A Guide for Employers and Employees’, *supra* note 7, p.30.

<sup>163</sup> Management of Health and Safety at Work Regulations 1999

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,<sup>164</sup> 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,<sup>165</sup>.

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 (Art. 6 Directive 2000/78)**

##### **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 deferred to October 2006 the duty to implement the Employment Framework Directive in relation to discrimination on grounds of age. However, the Employment Equality (Age) Regulations 2006 and the Employment Equality (Age) Regulations (Northern Ireland) 2006 now prohibit direct or indirect age discrimination in employment and occupation from October 2006. However, an employer will be permitted to avail of a general objective justification defence and can show that discriminatory treatment on the grounds of age is a proportionate means of achieving a legitimate aim: the *Mangold* judgment will obviously guide the UK courts and tribunals in applying this test.

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. This is controversial, and may be difficult to justify given the ECJ decision in *Mangold*.

A less controversial specific exemption exists for the payment of life assurance benefits to retired workers. 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: see below. A specific and narrow exception is also made for positive action in training and encouraging workers from particular age groups: see below. Another specific exemption allows older workers to receive higher levels of redundancy payment: the UK government considers that this exemption is objectively justified under the Directive, given that older workers have less future earning potential than younger workers. However, this remains controversial.

<sup>164</sup> *Panesar –v- Nestle’ Co. Ltd.* [1980] IRLR 64; *Blakerd –v- Elizabeth Shaw Ltd.* [1980] IRLR 64

<sup>165</sup> *Singh –v- British Rail Engineering Ltd.* [1986] ICR 22



Crucially, the 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 age equality 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 has placed 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 have removed the current age limit of 65 on bringing unfair dismissal claims and the age cap of 65 for receiving redundancy payments. Nevertheless, in *R v Secretary of State for Trade and Industry, ex p. Heyday*, an age equality campaigning group challenged this provision allowing employers to maintain a mandatory retirement age for employees after they reach 65, on the basis that this was contrary to the requirements of Article 6 of the Framework Equality Directive. With the consent of the government lawyers, the matter was referred by the English High Court to the ECJ for resolution. The ECJ has subsequently in its *Heyday* decision set out the required approach to assessing whether such retirement age provisions can be objectively justified.<sup>166</sup> This approach will now be applied by the UK courts when the *Heyday* case is decided at domestic level.

Benefits that are linked to the length of an employee's length of service with a particular employer are also exempted from the legislation in certain circumstances. The use of length of service by an employer to award or increase benefits to employees during the first five years of their service is deemed by the Regulations to be clearly justified, and a complete and automatic exemption will apply: the UK government considers that this is objectively justified as it allows employers to encourage recently-joined employees to remain with their new employers for at least some time.

In contrast, discriminating between employees on the basis of length of service requirements which are longer than five years may still be justified, but will not be automatically so: Reg. 32 of the GB Age Regs. (Reg. 34 of the NI Age Regs.) sets out conditions to be fulfilled for this general exemption to apply:

- 1) awarding or increasing the benefit is meant to reflect the higher level of experience of the employee, or to reward loyalty, or to increase or maintain motivation of the employee; and
- 2) the employer has concluded that there will be a business benefit resulting from the achievement of these aims; and
- 3) the employer applies the length of service criterion similarly to staff in similar situations.

These conditions appear to be easier to satisfy than the full objective justification test. The employer does not have to show the existence of objective justification, but just to show that the use of the length of service criterion was done for a legitimate aim, applied consistently and was deemed necessary to achieve a 'business benefit'.

<sup>166</sup> Case C-388/07, Judgment of 5 March 2009.



These criteria still require the employer to justify the aim and effect of the benefit, but this exception may be wider than permitted under the Directive, even though the UK government believes it to be objectively justified. Concern has also been expressed that the five year exemption of any length of service requirement may provide employers with too much leeway: five years is a considerable period of time in the contemporary workplace, and this time limit seems to be potentially disproportionate. It should also be noted that length of service requirements may fall foul of the prohibition on indirect sex and race discrimination in certain circumstances.<sup>167</sup>

In *Rolls Royce Plc v Unite the Union*,<sup>168</sup> the High Court held that an employer's use of length of service as part of a scheme used to select employees for redundancy was lawful under Reg. 32. However, the High Court also stated that the use of redundancy selection schemes that was based solely on the principle of 'last in first out' ('LIFO') would be less likely to satisfy the objective justification test. (See Case-Law, above.)

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

Aside from the exemptions discussed above, age distinctions within the scope of the Directive appear to have been removed by the implementing Regulations. Lower and upper age limits for receiving statutory sick pay, statutory maternity pay, statutory paternity pay and statutory adoption pay have been removed by the Regulations, which also removed the previous statutory provisions that removed the right to protection from unfair dismissal upon reaching 65, or the normal retirement age for the post in question. The Regulations also remove the lower age limit of 18 and the upper limit of 65 for entitlement to statutory redundancy payments.

c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?*

As discussed above, the GB and NI Regulations make it unlawful for trustees or managers of an occupational pension scheme, when carrying out their functions, to discriminate on grounds of age. However, certain age-related rules or practices in occupational pension schemes are exempted, and these are defined in a complex set of provisions in Schedule 2, parts 2 and 3 of the GB Regulations (Sch. 1 of the NI Regs.). These exceptions permit occupational pension schemes to:

- have minimum and maximum ages for joining
- specify a normal retirement date
- pay early and late retirement pensions
- pay ill-health early retirement pensions without reduction and/or with enhancement
- pay early retirement pensions on redundancy without reduction and/or with enhancement
- for defined benefit schemes, link benefits to service

<sup>167</sup> See e.g. Case C-184/89, *Nimz v. Freie und Hansestadt Hamburg* [1991] ECR I-297.

<sup>168</sup> [2008] EWHC 2420 (QB) (17 October 2008).



- close a scheme to new entrants
- pay differential increases to pensioners of different ages

The provisions in the Age Regulations are more restrictive than those set out in the original draft regulations. This unexpected tightening of the pension provisions was probably driven by concern that the width of the exceptions in the original draft regulations went further than was permitted by Article 6(2), especially those that related to the use of age distinctions in *paying out* benefits, as distinct from their use in fixing who is *entitled* to particular occupational benefits.<sup>169</sup> Any exceptions still in the Regulations that lie outside the scope of Article 6(2) will have to be shown to be objectively justified under Article 6.1.

These new provisions inserted at the last moment into the final text of the Regulations have caused a considerable degree of uncertainty and consternation in the pensions industry. There have been differences of opinion between the government and some pension advisers as to the meaning of certain of these provisions, and in particular about whether employees who become entitled to a pension could in fact choose to work on while also collecting their pension.<sup>170</sup> As a consequence, the government delayed implementation of these provisions until 1<sup>st</sup> December 2006 (the absolute final deadline allowed under the Directive) and it revised its initial draft regulations several times in this difficult and complex area, with the GB and NI Age Amendment (No. 2) Regulations 2006 making substantial amendments to the occupational pension provisions and coming into force on 1 December 2006.

It should also be noted that the use of age distinctions in occupational schemes can still be challenged on the basis of sex discrimination, even if a member state has taken advantage of the exception.

#### **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 1 October 2006 were - ages 16-17 £3.30 per hour (3.88 euros); 18-21 £4.45 per hour (5.25 euros) and workers 22 and over £5.35 per hour (6.30 euros). The age regulations as discussed above 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. The UK government argues that this exception is objectively justified as necessary to promote the integration of younger workers into the workforce.

<sup>169</sup> The text of Article 6(2) referred to fixing conditions for 'admission or entitlement', not to differentiation in how benefits are paid out after an entitlement has arisen.

<sup>170</sup> See BBC News, 'Age Rules on Pensions Postponed', 8<sup>th</sup> September 2006, available at <http://news.bbc.co.uk/1/hi/business/5326848.stm>





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 Act, 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?*

As discussed above, the 2006 GB and NI age regulations provide for positive action 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 (along with specific NI legislation) 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 under the age regulations. 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.<sup>171</sup>

#### 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).*

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

<sup>171</sup> Price –v- Civil Service Commission [1977] IRLR 291

- 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 (and eventually increased to 68 by 2046). 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 have been abolished in April 2006. Occupational pensions will be paid when the scheme rules determine, though from 1 December 2006 those rules must be compliant with the Employment Equality (Age) Regulations 2006 and the NI Regulations: see above.

- 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 (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

The 2006 GB and NI regulations allow employers to impose a mandatory retirement age and terminate the contracts of employment of employees after they reach the age of 65. This is controversial, as age equality 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 places 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 remove the current age limit of 65 on bringing unfair dismissal claims and the age cap of 65 for receiving redundancy payments. Nevertheless, in *R v Secretary of State for Trade and Industry, ex p. Heyday*, an age equality campaigning group challenged this provision allowing employers to maintain a mandatory retirement age for employees after they reach 65, on the basis that this was contrary to the requirements of Article 6 of the Framework Equality Directive.

As noted above, this matter has been referred to the ECJ, which subsequently in its *Heyday* decision has set out the required approach to assessing whether such retirement age provisions can be objectively justified.<sup>172</sup> This approach will now be applied by the UK courts when the *Heyday* case is decided at domestic level.

- 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)?*

The age regulations as discussed above provide for a national default retirement age of 65, pending final determination of the *Heyday* challenge. 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. Lower and upper age limits for receiving statutory maternity paternity and sick pay have been removed by the Regulations, which also removed the previous statutory provisions that removed the right to protection from unfair dismissal upon reaching 65, or the normal retirement age for the post in question. 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.

#### 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 can be objectively justified under the age regulations. (See the discussion of *Rolls Royce Plc v Unite*,<sup>173</sup> above.)

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

Prior to the coming into force of the 2006 GB and NI age regulations, the statutory scheme for compensation for unfair dismissal and redundancy in the Employment Rights Act 1996 (and the Employment Rights (NI) Order 1996) was based on the age of the worker as well as his/her period of employment. No compensation was available if the worker was age 65 or older.

<sup>172</sup> Case C-388/07, Judgment of 5 March 2009.

<sup>173</sup> [2008] EWHC 2420 (QB) (17 October 2008).



In a recent case these provisions were challenged, unsuccessfully, as being indirectly discriminatory on grounds of sex.<sup>174</sup> However, in the 2006 age regulations, this upper age limit was removed, but a specific exemption continues to allow older workers to receive higher levels of redundancy payment: the UK government considers that this exemption is objectively justified under the Directive, given that older workers have less future earning potential than younger workers.

It is not expected that the Equality Bill when finally enacted will modify the existing GB law on age discrimination in employment.

#### **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), the NISO Regulations (reg. 26), Equality Act (Sexual Orientation) Regulations (NI) 2006 and the NI Age Regs (Reg. 29) 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, NI Age Regs., Equality Act (Sexual Orientation) Regulations (NI) 2006 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, the new Equality Act, and the 2006 GB 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.

The Discrimination Law Review has proposed that these exceptions should be retained, and it is expected that the Equality Bill when finally enacted will implement this recommendation.

<sup>174</sup> 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](http://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.



#### 4.9 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, the new provisions of the Equality Act 2006, the GB and NI Age Regulations and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Equality Act (Sexual Orientation) Regulations 2007 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*

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 currently permitted as follows:

### *Age*

In Reg. 29 of the 2006 GB and Reg. 32 of the NI 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 –*

- 1) The adoption of practices encouraging such participation; and*
- 2) 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 were to expire on the third anniversary of their coming into force unless specifically renewed by an order made by the Secretary of State, who was expected to take account of progress that has been made in securing a more representative police force. So far, the measures have been maintained in effect by the Secretary of State.

### ***Race - GB and NI***

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

- 1) 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)
- 2) 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
- 3) 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 –*

- 1) *affording persons of a particular sexual orientation access to facilities for training which would help fit them for particular work; or*
- 2) *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.*

The Equality Act (Sexual Orientation) Regulations 2007 and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 contain no specific exceptions for positive action in the provision of goods and services.

### ***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.

### ***Reform Proposals***

The report of the Discrimination Law Review sought views on whether to extend the available scope for positive action in GB law, and in particular on the following questions:



- whether to adopt provisions to allow for wider balancing measures to allow more rapid progress to be made towards redressing underrepresentation and disadvantage;
- whether to allow all protected groups to benefit from measures to meet particular needs in relation to education, training and welfare or other benefits;
- to give the EHRC a role in issuing clear practical guidance and Codes of Practice, but not in approving positive action programmes; and
- to continue if necessary, and broaden the scope of, permitted voluntary positive action in the selection of candidates by political parties, with particular reference to the possibility of using preferential treatment for ethnic minority candidates (at present, preferential treatment in candidate selection is only permitted for women).

In its response to this consultation exercise, the UK government indicated that the Equality Bill would widen the scope of positive action measures in GB law for all the grounds protected by discrimination law, allowing disadvantaged groups to benefit from measures to meet their special needs. It will also enable employers, where they feel it is appropriate, and where there is a choice between two or more equally qualified candidates, to take underrepresentation into account when making recruitment or promotion decisions, provided there is not an automatic rule favouring those with any particular protected characteristic. (In other words, employers will be allowed to avail of some of the possibilities for positive action measures permitted under EU law.) Positive action measures will remain strictly voluntary and the principle of selection on merit will be retained. These proposals are reflected in the text of the recently published Equality Bill.<sup>175</sup>

The UK Government also has included in the Equality Bill new specific positive action provisions applying to political parties, which can be used across all protected grounds. These are intended to enable parties in GB to take a wider range of positive action measures in relation to matters regarding their constitution, organisation and administration, including the following:

- carrying out an audit of political party membership to identify the proportion of members from under-represented groups and identify where gaps are present;
- setting targets for recruitment drives;
- carrying out general and specific or targeted recruitment drives;
- running mentoring and leadership programmes;
- setting targets for increasing the proportion of politicians and staff from under-represented groups;
- establishing and supporting in-house forums for under-represented groups;
- reaching out to community and faith organisations;
- supporting local young Mayors and youth parliament;
- supporting non-partisan voter registration initiatives and democracy week.<sup>176</sup>

However, the UK Government has decided not to permit political parties to adopt wide-ranging positive action measures to ensure the selection of ethnic minority candidates for parliamentary seats, such as introducing all-minority shortlists for candidate selection in certain constituencies, as has been permitted in the gender context.

<sup>175</sup> UK Equalities Unit, *The Equality Bill – Government Response to Consultation*, July 2008, 5.19-21.

<sup>176</sup> *Ibid.*, para. 5.36.



The UK government has also suggested that the Equality and Human Rights Commission (EHRC) could provide comprehensive and authoritative guidance on when positive action could be used, through its power to prepare codes of practice.

In addition, the UK government has expressed doubt about imposing positive equality duties on private employers and service providers in GB, expressing a preference for ‘light touch’ encouragement rather than intensive regulation. In its response to the consultation that followed the report of the Discrimination Law Review, it announced that employers in GB would be encouraged to adopt measures to ensure greater transparency in pay frameworks and public authorities would be encouraged to use public procurement to promote the use of positive action and equality of opportunity measures on the part of private employers. However, the recently published Equality Bill does impose a single positive equality duty which would apply across all the equality grounds upon public authorities in GB. It also confers a power upon Ministers to require public and private sector companies in GB with over 250 employees to publish statistics on gender differences in pay: however, this power can only be exercised after 2013, and private sector companies have been given five years in which to improve their performance before Ministers may choose to impose publication requirements.

- b) *Do measures of positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted., classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. 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 people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.*

It would be impossible in the space and time available to give anything like a comprehensive account of the range and diversity of positive action measures in the UK, especially as many such measures are adopted by public and private employers on an *ad hoc* and small-scale basis, and are subject to constant review and adjustment. (For example, University College London, where the author of this report lectures, is currently implementing up to twenty different forms of positive action measures directed towards ethnic minorities alone.) However, the following analysis attempts to give a picture of current UK developments.

It should be noted that many of the following positive action strategies are often limited in scope and effect as the scope for preferential treatment is limited in UK law. As such, there is little use of quotas or preferential treatment outside of NI, but more intensive use of broad social policy measures. Positive action in the UK tends to be directed towards ethnic minorities, persons with disabilities, particular age groups (in particular older persons) and certain religious communities.

### ***Broad Social Policy***

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.<sup>177</sup> 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 came 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. As previously noted, the recently introduced Equality Bill will if enacted impose a single positive equality duty which would apply across all the equality grounds upon public authorities in GB.

Various public policy initiatives have been introduced to combat poverty and disadvantage in the Muslim communities in Britain. In general, special measures to assist the UK's various ethnic minority groups are commonplace, including the provision of information on how to access social services in a variety of languages (including Urdu, Chinese, Hindi and Swahili), arrangements for special educational and health care support, and special 'outreach' schemes designed to encourage ethnic minorities to enter professions, universities and other parts of society which remain predominantly 'white'.

The Discrimination Law Review has proposed that the UK government should encourage a greater focus on equality concerns in public procurement and provide better guidance and encouragement for private bodies to adopt their own positive action policies.

### ***Special Measures***

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. A special exemption also permits Sikhs to refrain from wearing motorcycle helmets. In general, the wearing of the *hijab*, turban and other forms of religious symbols is not prohibited in schools, courts and other public places: it is not exceptional, for example, for lawyers to wear the *hijab* if they are Muslim women.

<sup>177</sup> 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.



Various special measures also exist to assist older and younger persons, such as employment and welfare support measures.

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 (as discussed above in some detail at 3.2.8), and some positive provision is made for Traveller families in housing (see also above at 3.2.10).

### *Quotas*

See above for information on the temporary quota 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)). This 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.

Quotas for employing persons with disabilities are sometimes used in the voluntary sector and in some public organisations. However, in general, there are no disability quotas in operation in the UK, the previous quota scheme having been deemed a failure and abolished by the DDA.



## 6. REMEDIES AND ENFORCEMENT

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

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

*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)?*

*Are there available statistics on the number of cases related to discrimination brought to justice ? If so, please provide recent data.*

*a) What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

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) (Part 5 of the 2006 GB Age regulations) (Part 6 of the NI Age Regs.) includes provisions 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)

Under the Disability Rights Commission Act 1999 (s.10) the DRC (now the EHRC) was given the power to 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) (Reg. 41 of the 2006 GB Age Regulations and Reg. 46 of the NI age regulations).

The Discrimination Law Review sought views on how to improve the effectiveness of the dispute resolution system for discrimination cases outside of the employment and occupation context, where a review of the employment tribunal system in general is ongoing. In particular, the Review sought opinions on how to enhance the expertise of county and sheriff courts in dealing with discrimination cases, and also is seeking ways of enhancing the role of the UK ombudsman system and of alternative dispute resolution in this area. Following this process, the Equality Bill when enacted will expand the power of employment tribunals in GB to make more wide-ranging recommendations in discrimination cases: this will allow tribunals to indicate steps that employers should take to prevent discriminating against employees and the steps that they should take to prevent other discrimination cases arising. However, these recommendations will not be legally binding, which may limit their impact.

The UK government has also indicated that it intends to encourage greater use of alternative dispute resolution and ombudsman mechanisms, and to provide special training and expert assistance for judges and tribunal members dealing with discrimination cases.

There is no difference between the public and private spheres in the context of employment in the context of remedies and enforcement under discrimination law.

However, 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.<sup>178</sup>

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

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.

<sup>178</sup> 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.



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 procedures<sup>179</sup> 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 days 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%.<sup>180</sup> The equality commissions have over the last few years assisted 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 for the new EHRC in GB.

<sup>179</sup> Employment Act 2002, Employment Act 2002 (Dispute Resolution) Regulations 2004 and Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2004; for NI, see the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations 2004 (SR No 521) and the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005..

<sup>180</sup> Figures taken from research for the year 2001 published in Labour Research, April 2002.



The following are the statistics showing the discrimination claims which were **accepted** by the employment tribunals from 1<sup>st</sup> April 2006 to 31<sup>st</sup> March 2008:<sup>181</sup> no later data is yet available, nor is there data on the amount of goods and services cases brought before the county courts.

Year	2004-2005	2005-2006	2006-2007	2007-8
Age discrimination	n/a	n/a	972 <sup>182</sup>	2949
Sex discrimination	11,726	14,250	28,153	26907
Religion and belief discrimination	307	486	648	709
Sexual orientation discrimination	349	395	470	582
Race discrimination	3,317	4,103	3780	4130
Disability discrimination	4,942	4,585	5533	5833

The following tables indicates the outcome of cases **disposed of** by the employment tribunals in the years April 2005 to March 2008 (note that the numbers of cases disposed of do not correspond to the numbers accepted by the tribunals, as the tribunals do not process all the cases they accept within the year in question):

**A. Which Cases Proceeded to the Tribunal Stage? (The first column indicates the number of cases heard by the tribunals, the second the number of cases that are initiated but withdrawn before a tribunal hearing, the third column indicates the number of cases that are conciliated before a hearing, and the fourth column indicates the number of cases struck out as disclosing no cause of action.)**

NATURE OF CLAIM	DISPOSED (determined by a tribunal)	WITHDRAWN (before a determination)	CONCILIATED (before a determination)	STRUCK OUT (no cause of action)
Age	1778	35%	45%	4%
Sex	16,184	42%	19%	30%
Religion and belief	608	33%	38%	6%
Sexual orientation	516	31%	45%	5%
Race	3535	31%	37%	8%
Disability	5133	34%	44%	6%

**B. The Outcome of Tribunal Cases (i.e. cases which after acceptance are determined by a tribunal and not withdrawn, settled or struck out before the tribunal begins to dispose of the matter)**

NATURE OF CLAIM	DISMISSED AT TRIBUNAL (after an initial hearing)	DISMISSED AFTER HEARING	SUCCESSFUL IN TRIBUNAL	DEFAULT JUDGMENT (non-contested)
Age	5%	8%	3%	1%
Sex	1%	4%	3%	0%
Religion/belief	7%	14%	2%	0%
Sexual orientation	3%	10%	6%	0%
Race	6%	15%	3%	0%
Disability	3%	9%	3%	0%

Note the low number of successful claims and the very high number of settled claims: UK employers often settle rather than face a hearing on a discrimination claim. Cases of obvious discrimination in particular often result in a settlement. This partially explains why the number of successful litigated cases is low (factually or legally uncertain claims tend to proceed to the tribunal). However, the low number of successful claims is still an area of concern.

<sup>181</sup> See Appendix A, *The Employment Tribunal Service: Annual Report 2006-07* (London: 2007).

<sup>182</sup> Most of the age cases relate to mandatory retirement, and have been suspended pending the decision of the ECJ in the *Heyday* reference.



*b) Are these binding or non-binding?*

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). As noted above, the Equality Bill if enacted will expand the power of employment tribunals in GB to make more wide-ranging recommendations in discrimination cases.

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

Yes. In *Relaxion Group v Rhys-Harper plc*,<sup>183</sup> 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, Regulation 21 of the Employment Equality (Religion or Belief) Regulations 2003, Reg. 7(7) and 24 of the Employment Equality (Age) Regulations 2006. The NI regulations make similar provision.

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

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

*a) in support of a complainant*

In the UK there is no scheme for the registration of NGOs.

The various rules of civil procedure and common law precedent which regulate proceedings in UK courts and employment tribunals limit the circumstances in which associations may intervene in an ongoing case as independent parties in support of a claimant. In general, only claimants who allege that they have been the victims of discrimination may bring a case before a court or tribunal.

<sup>183</sup> [2003] UKHL 33



However, associations with sufficient interest (*locus standi*) in a matter may bring judicial review actions under administrative law against public authorities, even if they have not themselves been the victims of a wrongful act. This requirement of sufficient interest has been given a generous interpretation in recent years by the UK courts and trade unions, NGOs and the equality commissions have brought important actions against public authorities through judicial review proceedings, such as the *R (on the application of Amicus and others) – v- Secretary of State for Trade and Industry* and *R(Age Concern) v Secretary of State for Business, Enterprise and Regulatory Reform* cases described in 0.3 above. In addition, courts and tribunals may at their discretion permit associations with relevant expertise to make a ‘third-party intervention’ in any case, whereby associations may present legal arguments on a point of law that is at issue in the proceedings (as distinct from presenting arguments directly in favour of the claimant). Such ‘third party interventions’ are often permitted in complex discrimination law cases.

Also, there are no restrictions under the normal rules of civil procedure on any organisation offering support to complainants in discrimination cases, in the sense of providing complainants with advice, legal assistance in case preparation or financial assistance to secure external lawyers’ services. Some trade unions, the equality commissions and some specialised NGOs directly employ qualified lawyers and therefore can offer full support to complainants. In many discrimination cases, the legal arguments put forward by the complainant have been prepared by the legal teams of the Equality and Human Rights Commission, trade unions or NGOs, who also argue the case before the court or tribunal as the complainant’s chosen legal representatives.

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 commissions, trade unions, race equality councils, citizens advice bureaux or other voluntary sector advice agencies, complainant aid organisations.

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

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 may not be fully compliant with the Directives (arts. 7(2)/9(2)). However, section 24 of the Equality Act 2006 permits the new EHRC to seek injunctive relief to prevent a person from committing an unlawful act.

The Discrimination Law Review considered that no alteration was required in UK law in this area.



However, as noted above, the UK government is currently consulting on whether representative actions should be permitted in discrimination cases as part of a wider review of legal standing rules. However, at present, no proposals to allow organisations to engage in proceedings on behalf of victims have been included in the Equality Bill.<sup>184</sup>

### 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 Directives<sup>185</sup>. (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, Regs. 37 and 40 Employment Equality (Age) Regulations 2006 and Regs. 42 and 45 in the NI age regulations.)

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

*“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 –*

- (1) has committed such [as specified in subsection (1)] an act of discrimination or harassment against the complainant, or*
- (2) 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.”*

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.

However, note that in *Oyarce v Cheshire County Council*,<sup>186</sup> the EAT held that the shift in the burden of proof could not be applied in cases of victimisation linked to race discrimination claims.

<sup>184</sup> See UK Equalities Office, *The Equality Bill – Government Response to the Consultation*, July 2008, Ch. 6, 79-82.

<sup>185</sup> 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.

<sup>186</sup> [2007] UKEAT 0557/06

This startling conclusion was based on the EAT's finding that Article 9 of the 2000 Race Equality Directive did not require a shift in the burden of proof in victimisation cases. This controversial decision has been recently upheld by the Court of Appeal: see above. However, the recently published text of the Equality Bill makes provision for a shift in the burden of proof in victimisation cases in GB law.

Also, in *Abbey National Plc v Chagger*,<sup>187</sup> an employer appealed a finding of race discrimination by the Employment Tribunal on the basis that the shift in the burden of proof as required by GB race discrimination legislation and the the Race Equality Directive 2000 should not have been applied in this case, as the 2000 Directive did not cover discrimination based on skin colour (the type of prejudice at issue in this case), but only applied to discrimination based on ethnic or racial origin. However, the EAT held that it was inconceivable that the Directive was not intended to apply to discrimination on colour grounds, and that the same shift of burden of proof rule should apply to discrimination based on skin colour, as well as in cases involving discrimination based on ethnic origin and the grounds covered by the 2000 Directive.

#### 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.

<sup>187</sup> UKEAT/0041/08





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. 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.

Also, 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.<sup>188</sup> 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. As a result, and to standardise discrimination law with GB employment law (where no comparator in victimisation claims is required), the forthcoming Equality Bill will abolish of the comparator requirement in victimisation cases.

As noted above, in *Oyarce v Cheshire County Council*,<sup>189</sup> the Court of Appeal held that the shift in the burden of proof could not be applied in cases of victimisation linked to race discrimination claims. This startling conclusion was based on the EAT’s finding that Article 9 of the 2000 Race Equality Directive did not require a shift in the burden of proof in victimisation cases. However, the recently published text of the Equality Bill makes provision for a shift in the burden of proof in victimisation cases in GB law.

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

- a) *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.*

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.

<sup>188</sup> See, for example, *Aziz –v- Trinity Taxis* [1989] QB 463 and *Chief Constable of the West Yorkshire Police –v- Khan* [2001] IRLR 830.

<sup>189</sup> [2007] UKEAT 0557/06



b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

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 (9,430 – 1,800 euros), with some awards of only a few hundred pounds and exceptional awards well in excess of £100,000 (118,000 euros).

In 2002, the Court of Appeal<sup>190</sup> fixed a wide range for injury to feelings compensation -- from £500 to £25,000 (590-30,000 euros) -- 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.

c) *Is there any information available concerning:*

- *the average amount of compensation available to victims*
- *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?*

Compensation awards vary across the grounds, and from context to context. As yet, it is a little early 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 (approx. 34,000 euros); for race discrimination, £13,720 (16,183 euros); and for sex discrimination (included here as a comparator) £11,898 (14,030 euros). Average compensation across all three grounds increased by 44% from 2003. Trends since then have remained reasonably static.

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 authors are 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.

<sup>190</sup> *Vento –v- Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102



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 equality commissions 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 to prevent discrimination 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. The Discrimination Law Review gave some consideration to this issue, without arriving at any firm conclusion that a change in the existing legal position was necessary. However, the Equality Bill if enacted will expand the power of employment tribunals in GB to make more wide-ranging recommendations in discrimination cases (as noted above).



## 7. SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

*When answering this question if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, 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.*

- a) *Does a ‘specialised body’ or ‘bodies’ exist for the promotion of equal treatment irrespective of racial or ethnic origin?(Body/bodies that corresponds to the requirements of article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so)*

### The Equality and Human Rights Commission

The Equality Act 2006 established a new single equalities and human rights body for GB, the Commission for Equality and Human Rights (CEHR), which came into formal existence in October 2007 and now calls itself the Equality and Human Rights Commission (EHRC). The EHRC has taken over the powers and functions of the three previous GB equality commissions – the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission and has new functions in relation to sexual orientation, religion or belief and age, as well as in relation to human rights in general. It therefore has responsibility for promoting equal treatment on the grounds of race/ethnicity in GB, and is now the designated body for GB in relation to Article 13 of Directive 43/2000/EC (succeeding the CRE).

### The Equality Commission for Northern Ireland (ECNI)

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 EHRC in relation to race, religious belief and political opinion, sex and disability and, now, since the NI SO Regulations (regs.30 – 32), and Part 5 of the NI Age Regs., many of the same powers and duties in relation to sexual orientation and age. It therefore has responsibility for promoting equal treatment on the grounds of race/ethnicity in GB, and is the designated body for NI in relation to Article 13 of Directive 43/2000/EC.

- b) *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.*

### EHRC

Like the bodies it has replaced, members of the EHRC are appointed by a Secretary of State to serve for a fixed term. The appointment process is not fully transparent, in that little information is available on the criteria applied by the Secretary of State in selecting members of the Commission.



However, the Secretary of State is often subject to pressure from civil society to select well-qualified candidates with a good record on equality issues, which ensures that appointments to some degree reflect the expectations of civil society and disadvantaged groups.

Funding is determined by the designated Secretary of State out of their departmental budget, and the EHRC is therefore accountable to the Secretary of State, to whom it reports annually. These reports are laid before Parliament, to ensure that the Commission has some link to parliamentary processes. (Members of Parliament can choose to stage a debate on the contents of the report, but this rarely if ever happens.) In addition, the Joint Committee on Human Rights of the UK Parliament has the ability to inquire into the work of the EHRC and its relationship to the Secretary of State.

### **ECNI**

Members of the ECNI are appointed by the Secretary of State for Northern Ireland to serve for a fixed term. As with the EHRC, the appointment process is not fully transparent, in that little information is available on the criteria applied by the Secretary of State in selecting members of the Commission. However, the Secretary of State is often subject to pressure from civil society to select well-qualified candidates with a good record on equality issues, which ensures that appointments to some degree reflect the expectations of civil society and disadvantaged groups. In addition, substantial political pressures exist in NI for the two major communities to be well represented on the Commission.

Funding is determined by the designated Secretary of State out of their departmental budget, and the ECNI reports annually to him/her. These reports are laid before Parliament, to ensure that the Commission has some link to parliamentary processes. (Again, as with the EHRC, this rarely generates active parliamentary debate.) In addition, committees of the UK Parliament have the ability to inquire into the work of the ECNI and its relationship with the Secretary of State, although so far this has not taken place to any significant degree.

- c) *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.*

### **EHRC**

The EHRC's remit extends across all the anti-discrimination grounds, and also includes the promotion of equality of opportunity and 'understanding of the importance of equality and diversity'. It also is extended in s. 10 to include the promotion of good relations and prevention of hostilities between different communities and 'groups' in British society. The EHRC is similarly given a wide-ranging remit to promote compliance with, and understanding of, human rights. This includes rights contained in international instruments which have not been formally incorporated into UK law, although the Commission is to pay 'particular regard' to the ECHR rights.<sup>191</sup>

<sup>191</sup> Clause 8(4) of the original Bill provided that the Commission 'may not take action in relation to non-Convention rights unless satisfied that it has taken or is taking all appropriate action in relation to the Convention rights.' This would have substantially reduced the freedom of action of the Commission to promote compliance with other rights instruments, including involvement with UN and Council of Europe monitoring systems. Following criticism, this clause was amended during the Bill's passage through Parliament.





The EHRC can also monitor and advise on the effectiveness of equality and human rights instruments, and is obliged to monitor and produce periodic reports on progress towards the social goals set out in s. 3 of the Act.

However, the EHRC is precluded from taking ‘human rights action’ in relation to devolved matters in respect of which the Scottish Parliament has conferred competence on the newly established Scottish Human Rights Commission. The EHRC however has full responsibility for equality and anti-discrimination issues in Scotland. Both Commissions will have to work closely to prevent unnecessary overlaps and confusion between ‘human rights’ and ‘equality’ issues: the existence of a separate ‘Scottish Committee’ within the EHRC structure will help with this.

### **ECNI**

The remit of the ECNI extends across all of the discrimination grounds, and also extends to discrimination on the grounds of political belief. It however does not have responsibility for wider human rights issues, which come within the remit of the Northern Irish Human Rights Commission.

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

### **EHRC**

S. 3 of the Act places the EHRC under a ‘general duty’ to use its powers and functions to work towards the development of a society where equality and rights principles have become rooted, which is defined as follows:

- 1) People’s ability to achieve their potential is not limited by prejudice or discrimination,
- 2) There is respect for and protection of each individual’s human rights (including respect for the dignity and worth of each individual),
- 3) Each person has an equal opportunity to participate in society, and
- 4) There is mutual respect between communities based on understanding and valuing of diversity and on shared respect for equality and human rights.’

The 2006 Act confers the powers of the existing equality commissions on the EHRC, and extends them across the six equality grounds. The EHRC can choose to support individual alleging discrimination before courts and tribunals, or to provide alternative forms of legal support and advice: it is not required to do so, and the expectation is that the EHRC will aim to select strategic cases rather than support a wide number of individual cases. The former equality commissions had at one stage provided assistance to a wide range of complainants, which however was reduced over the last few years, due to a preference for supporting strategic cases rather than a large amount of costly individual cases. Given the lack of support for individual discrimination cases in the UK system, the current lack of support for most individual cases is concerning, and may raise an issue under Article 13(2) of the Race Directive.



In contrast to these extended enforcement powers in the context of anti-discrimination law, the EHRC's powers in respect of human rights are more circumscribed. It cannot support individual cases brought under the HRA or based upon any other cause of action apart from the anti-discrimination legislation.<sup>192</sup> The EHRC can however be able to support cases that combine both anti-discrimination and human rights claims.

The EHRC can also issue codes of practice, undertake research, surveys or educational activities, provide general advice, campaign for reform, and provide financial assistance to organisations concerned with the promotion of equality of opportunity and good relations. These powers are applicable in both the discrimination and human rights spheres.

### *The Equality Commission for Northern Ireland (ECNI)*

The ECNI has similar powers and functions as the EHRC, including the power of supporting individual cases. As with the EHRC, the continuing debate within the ECNI concerns the relative priority to be given to strategic 'promotional' work and to law enforcement, including assistance to individual complainants: the ECNI at present supports more individual cases than does the EHRC.

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

The EHRC 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 EHRC can use statutory powers to require production of documents and information and can issue notices requiring discriminators to change their behaviour, which can be enforced in the courts. The EHRC also has powers to bring proceedings in relation to discriminatory advertisements and instructions or inducement to discriminate. Also, the EHRC has the power to take enforcement action against public authorities who fail to comply with their duty to promote race equality.

The 2006 Act has clarified and enhanced the scope of some of these powers. S. 30 places the ability of the EHRC to apply for judicial review and to intervene in court proceedings that relate to discrimination issues on firmer ground, by making explicit statutory provision for these powers.<sup>193</sup> The Commission's general inquiry and formal investigation powers have also been clarified and extended. The Commission has also been given extended powers to assess the compliance of public authorities with the general positive equality duties, and to issue a 'compliance notice' when it concludes following such an assessment that a public authority is not complying with the requirements of a general duty.<sup>194</sup>

<sup>192</sup> The Scottish Human Rights Commission is similarly barred from supporting individual human rights actions.

<sup>193</sup> The absence of such an explicit power to intervene in court proceedings in the legislation establishing the Northern Irish Human Rights Commission required a decision by the House of Lords to confirm that the Commission did have this power: see *In re the Northern Ireland Human Rights Commission* [2002] UKHL 25.

<sup>194</sup> Ss. 31-32 of the Equality Act.



The EHRC is also given a new power to enter into (and to enforce via legal action if necessary) binding agreements with other bodies who undertake to avoid discriminatory acts: this power was held by the DRC, but not by the other two commissions. The Commission is also now able to seek an injunction to prevent someone committing an unlawful discriminatory act, another new power.<sup>195</sup>

Approximately 75 per cent of the cases investigated by the ECHR have involved allegations relating to race, disability or gender, reflecting the existence of positive duties in these areas. For example, of the 337 cases pursued by the Commission, around 175 relate to the public sector duties, requiring public sector organisations to take steps not just to eliminate unlawful discrimination and harassment, but also to actively promote equality. (Work on approximately 90 of these cases is ongoing, while the other 85 have now successfully concluded.)

As noted above, the EHRC's powers in respect of human rights are more circumscribed. The EHRC can carry out general inquiries into matters concerning compliance with human rights instruments. It also has the important power under s. 30(3) of the Act to bring judicial review proceedings under the HRA against public authorities, and it can intervene in court proceedings that relate to human rights issues. (The EHRC has made important interventions in a series of key recent cases, including *Malcolm*, *Basildon* and *Ladele*, discussed above.) However, the Commission cannot initiate 'named investigations' into whether particular authorities are complying with the HRA.

The ECNI has similar powers and functions as the EHRC, except that it has no power to commence formal investigations into questions relating to wider human rights issues, or to bring judicial review proceedings against public authorities for violating human rights. However, it can bring judicial review proceedings to prevent public authorities breaching the provisions of anti-discrimination legislation, intervene in court proceedings, launch formal investigations and assess compliance with the N public and private sector equality duties.

*f) Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions)*

Neither the EHRC or the ECNI are quasi-judicial institutions. Their role is to promote equality and enforce discrimination law, not to act as adjudicatory bodies.

However, both commissions can as noted above carry out formal investigations as to whether bodies are complying with discrimination law (including the positive equality duties). If following such an investigation, the EHRC or the ECNI consider that a individual or an organisation is violating the law, they may issue an enforcement or compliance notice stating the necessary action required to ensure conformity with the discrimination legislation (the terminology varies according to the investigatory power being used).

<sup>195</sup> See s. 24 of the 2006 Act. The EOC had previously only the power to seek an injunction against bodies with a previous 'track-record' of illegal discrimination, and even then this power was limited: see the almost indecipherable provisions of s. 73 of the Sex Discrimination Act 1975.



This is not legally binding: if the individual or organisation concerned refuses to comply with the notice, the EHRC or the ECNI need to go to the courts to seek an order requiring compliance (or in the case of the ECNI when investigating compliance with the FETO fair treatment duty, the Secretary of State, who can prohibit non-compliant companies from obtaining government contracts.) These powers are mainly used at present to ensure conformity with the positive equality duties: in that context, notices issued by the commissions are usually complied with without the need for a court order.

*g) Is the work undertaken independently?*

### ***EHRC***

In general, the EHRC is widely perceived as being largely independent of government interference, despite the lack of direct accountability to Parliament which many commentators have argued would be preferable to the current relationship with the relevant Secretary of State.

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-

- (1) Its activities,
- (2) Its timetables, and
- (3) Its priorities."

During the consultations on its establishment, there were strong representations that the ECHR should report directly to Parliament or a committee of Parliament instead of to the executive. However, these suggestions were not adopted.

The EHRC has suffered a degree of internal turmoil and conflict about policy priorities in recent months: however, this has resulted not so much from governmental interference as from differences in views as to the Commission's policies and strategies. Central to these disputes have been disagreements about the extent to which the Commission should push for the imposition of extended duties upon private sector employers in the context of equal pay, and whether the Commission should be more aggressive in using its enforcement powers against public and private sector bodies.

### ***ECNI***

The ECNI is widely seen as acting independently of government interference: historically, it has been perceived to be the most independent of the UK equality commissions, although it must move carefully in the complex world of NI politics.



- h) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

### ***EHRC***

The Equality and Human Rights Commission has made support for Travellers and Roma a central part of its new legal strategy. It has also identified their concerns about housing and discrimination as a significant part of its policy agenda over the next years. The new Commission intends to support appropriate cases using both anti-discrimination law and the ECHR and to continue to campaign in the media and in the elected parliaments for Traveller and Roma rights. It has recently published several authoritative research publications on the treatment of Traveller families in the UK, which can be accessed via the Commission's website.<sup>196</sup>

### ***ECNI***

The ECNI has also identified Roma and Traveller issues as a priority issue and has in particular launched a consultation on strategy for promoting equality for Travellers in education in April 2006, as well as emphasising Traveller issues in much of its case-work and legal reform campaigning.

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<sup>196</sup> See <http://www.equalityhumanrights.com/en/publicationsandresources/pages/publications.aspx> (last accessed 18th April 2009).





## 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". Following the publication of the draft age regulations in 2005, an extensive consultation resulted in some significant alterations in the final text of the 2006 GB and NI age regulations. The Discrimination Law Review has also involved a very extensive consultation process.

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. However, the age regulations have received extensive publicity.

The government made available £625,000 (736,865 euros) in 2003-4 and £1.45 million (1,709,973 euros) 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 (2,948,245 euros) 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 have been undertaken for the 2006 Age Regulations and the 2006 and 2007 Equality Act (Sexual Orientation) Regulations in both GB and NI.



To a considerable extent the governments in GB and NI rely on the equality commissions to increase public awareness of existing anti-discrimination laws and the Directives. The previous GB commissions and the ECNI have published a great deal of information about current protection against discrimination; all generated an extensive range of publications, information and guidance, much of which is available in hard copy from the new EHRC and the ECNI, and which is also on the EHRC and ECNI websites: see [www.ehrc.org](http://www.ehrc.org) and [www.equalityni.org](http://www.equalityni.org). However, some criticism has been directed at the EHRC for initially failing to duplicate much of the material made available by its predecessor commissions on its website, and the transition to the new commission structure has resulted in material becoming less accessible.

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 ever-increasing complexity of UK discrimination law makes providing simple guidance virtually impossible, and, regretfully, the government has done little in this regard. The Discrimination Law Review proposed a simplification and codification of the law in a single equality act: the Equality Act is intended to give effect to this codification in GB.

*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) and*

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 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.

An extensive consultation with NGOs and stakeholders was carried out after the publication of the Discrimination Law Review in 2007, which has informed the UK government's preparation of the Equality Bill in GB.

- 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 document<sup>197</sup>, 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 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 appears 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.

- d) *to specifically address Roma and Travellers*

Formal consultation with Traveller groups is increasingly common, both at central government level and also within the devolved administrations. The Gypsy and Traveller Unit within the Department for Communities and Local Government acts as a point of contact with Traveller communities within central government. The Housing Act 2004 requires local authorities to include Travellers in the Accommodation Needs Assessment process established by that legislation.

<sup>197</sup> TUC, Implementing the Employment and Race Directives, March 2002 (paragraphs 3.1 – 3.5)



However, once again, considerable variations exist as regards consultation at local level, where considerable hostility towards Traveller groups exists, and consultation mechanisms with respect to the UK's small but growing Roma population are not well developed.

## 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? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

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); Schedule 5 of the Employment Equality (Age) Regulations 2006 and Sch. 4 of the NI age regulations.

- 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 have been repealed or, retained, where they can be objectively justified under the provisions of the Directive. However, concern exists about the retention of mandatory retirement age and other aspects of the age legislation.

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, and the GB and NI age regulations. 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).



It is not anticipated that the Equality Bill when and if enacted will alter the legal position in GB, although the ECHR has recently called for anti-discrimination and equality principles to be given superior status in UK law.<sup>198</sup>

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<sup>198</sup> See the ECHR's response to the government consultation paper, *A Framework for Fairness* (the report of the Discrimination Law Review), available at [http://www.equalityhumanrights.com/Documents/DLRresponses/Fairness\\_Final.pdf](http://www.equalityhumanrights.com/Documents/DLRresponses/Fairness_Final.pdf) (last accessed 18th April 2009).





## 9. CO-ORDINATION AT NATIONAL LEVEL

*Which government department/ other authority is/ are responsible for dealing with or co-ordinating 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, and there has been a constant process of shifting responsibility around between different departments to reflect the differing interests of different ministers. Equality is seen as a very important issue in current government priorities, but has not found a definite, fixed home in the governmental structure. Consultation on proposals for transposition of the Directives has initially led by the Department of Trade and Industry, which has since been disbanded. Much of its functions have been taken over by the new Department for Business, Enterprise and Regulatory Reform. The Home Office retains responsibility for issues relating to race and religion, and the Department for Work and Pensions has lead responsibility for disability and age issues. (However, certain age issues are shared with the Department for Business, Enterprise and Regulatory Reform.) Equality considerations are supposed to be mainstreamed into the work of all government departments, which are also subject to the positive equality duties.

In May 2006, a new Department for Communities and Local Government assumed responsibility for the EHRC. The Women and Equality Unit within this Department took a co-ordination role for issues relating to gender, sexual orientation, race, religion and other parts of the equalities agenda. This Unit was in October 2007 converted into a separate and independent government department, headed by a leading Cabinet Minister, Harriet Harman MP, which is now called the Government Equalities Office. It has lead responsibility for gender and sexual orientation equality, is now the sponsoring department for the EHRC and co-ordinates work on other equality issues, which however remain the responsibility of the different departments as outlined above. The Equalities Office is also leading on work related to the Discrimination Law Review. The separate Office for Disability Issues plays a co-ordinating and ‘champion’ role across government on disability issues.

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). Since the restoration of devolved government in Northern Ireland, responsibility for equality 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



## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: United Kingdom

Date: December 2008

<b>Title of Legislation (including amending legislation)</b>	<b>In force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative / Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
This table concerns only key national legislation; please list the main 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 (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Race Relations Act 1976 <a href="http://www.homeoffice.gov.uk/docs/racereel1.html">www.homeoffice.gov.uk/docs/racereel1.html</a>	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 Act).	All sectors of employment and employment related activities, access to goods facilities and services (thereby covering most areas of social advantages and social protection), disposal and management of premises, education. Applies to GB.	Prohibition of direct, indirect discrimination and victimisation, harassment and instructions to discriminate, rights of individual to seek legal redress, creation of Commission for Racial Equality as specialised body (now replaced by the EHRC).
Race Relations (Amendment) Act 2000 <a href="http://www.legislation.hmsso.gov.uk/acts/acts2000/20000034.htm">www.legislation.hmsso.gov.uk/acts/acts2000/20000034.htm</a>	April 2001	Racial grounds	Civil law	Extends scope of 1976 Act to include all functions of public authorities. Applies to	Wider protection against discrimination. Imposes statutory



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
				GB.	duty on public authorities to promote race equality
Race Relations Act 1976 (Amendment) Regulations 2003 <a href="http://www.legislation.hmso.gov.uk/si/si2003/20031626.htm">www.legislation.hmso.gov.uk/si/si2003/20031626.htm</a>	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
Race Relations Act 1976 (Amendment) Regulations 2008 <a href="http://www.opsi.gov.uk/si/si2008/uksi_20083008_en_1">http://www.opsi.gov.uk/si/si2008/uksi_20083008_en_1</a>	December 2008	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	Amends RRA to ensure that the prohibition on indirect discrimination can apply to practice, criteria or provisions which 'would put' persons of a particular group at a disadvantage, thereby

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
				protection, social advantage. Applies to GB.	ensuring that indirect discrimination claims may be brought even where a victim has not yet been actively discriminated against.
Disability Discrimination Act 1995 <a href="http://194.128.65.3/acts/acts1995/Ukpga_19950050_en_1.htm">http://194.128.65.3/acts/acts1995/Ukpga_19950050_en_1.htm</a>	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, instructions to discrimination, right to seek legal redress
Disability Rights Commission Act 1999 <a href="http://www.opsi.gov.uk/acts/acts1999/19990017.htm">http://www.opsi.gov.uk/acts/acts1999/19990017.htm</a>	August 1999	Disability	Civil	Applies to GB.	Creates Disability Rights Commission for GB (specialised body) – now replaced by the EHRC.
Disability Discrimination Act 1995 (Amendment) Regulations 2003 <a href="http://194.128.65.3/si/si2003/20031673.htm">http://194.128.65.3/si/si2003/20031673.htm</a>	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





<b>Title of Legislation (including amending legislation)</b>	<b>In force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative / Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
					reasonable adjustment in employment, and requires shift of burden of proof
Disability Discrimination Act 1995 (Pensions) Regulations 2003  <a href="http://www.opsi.gov.uk/si/si2003/20032770.htm">www.opsi.gov.uk/si/si2003/20032770.htm</a>	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
Employment Equality (Religion or Belief) Regulations 2003  <a href="http://www.legislation.hmso.gov.uk/si/si2003/20031660.htm">http://www.legislation.hmso.gov.uk/si/si2003/20031660.htm</a>	Dec. 2003	Religion or belief	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
Employment Equality (Sexual Orientation) Regulations 2003  <a href="http://www.legislation.hmso.gov.uk/si/si2003/20031661.htm">http://www.legislation.hmso.gov.uk/si/si2003/20031661.htm</a>	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

<b>Title of Legislation (including amending legislation)</b>	<b>In force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative / Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
Race Relations (NI) Order 1997 <a href="http://194.128.65.3/si/si1997/1970869.htm">http://194.128.65.3/si/si1997/1970869.htm</a>	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 to NI.	Prohibits direct and indirect discrimination, victimisation, right to seek legal redress, creates CRE for NI, specialised body.
Northern Ireland Act 1998 <a href="http://www.opsi.gov.uk/acts/acts1998/19980047.htm">http://www.opsi.gov.uk/acts/acts1998/19980047.htm</a>	1 <sup>st</sup> 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)
Race Relations Order (Amendment) Regulations (NI) 2003 <a href="http://www.northernireland-legislation.hmsi.gov.uk/sr/sr2003/20030341.htm">www.northernireland-legislation.hmsi.gov.uk/sr/sr2003/20030341.htm</a>	July 2003	Race and ethnic origins and national origins (includes origins within Irish Traveller community)	civil law	All sectors of employment and employment related activities, access to goods facilities and services, education, disposal and management of premises, social	Amends RRO extending scope to meet that of the Race Directive, new definition of indirect discrimination, harassment, shift of the burden of proof.



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
				security, healthcare, other social protection, social advantage. Applies to NI.	
Employment Equality (Sexual Orientation) Regulations (NI) 2003  <a href="http://www.northernireland-legislation.hmsso.gov.uk/sr/sr2003/20030497.htm">www.northernireland-legislation.hmsso.gov.uk/sr/sr2003/20030497.htm</a>	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  <a href="http://www.northernireland-legislation.hmsso.gov.uk/sr/sr2004/20040055.htm">www.northernireland-legislation.hmsso.gov.uk/sr/sr2004/20040055.htm</a>	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  <a href="http://www.opsi.gov.uk/si/si2000/20001110.htm">www.opsi.gov.uk/si/si2000/20001110.htm</a>	April 2000			Applies to NI.	Gives ECNI powers and duties in relation to disability discrimination equivalent to those of

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
					the DRC
Disability Discrimination Act 2005 <a href="http://www.opsi.gov.uk/acts/acts/2005/20050013.htm">http://www.opsi.gov.uk/acts/acts/2005/20050013.htm</a>	5 Dec 2005, with the positive duty coming into force in Dec. 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 <a href="http://www.opsi.gov.uk/si/si2006/20060312.htm">http://www.opsi.gov.uk/si/si2006/20060312.htm</a>	31 <sup>st</sup> October 2007 - the duty on public authorities was operative from 1 Jan 07	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 <a href="http://www.opsi.gov.uk/acts/acts/2006/20060003.htm">http://www.opsi.gov.uk/acts/acts/2006/20060003.htm</a>	Most of the provisions of the Act relating to the establishment of the new Commission for Equality and Human Rights came	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	Extends protection against discrimination on grounds religion/belief and sexual orientation to provision goods and services, housing, education, public functions. Also establishes new

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
	into force on 18 <sup>th</sup> 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 functions on gender grounds came into force on 6 <sup>th</sup> April 2007. The provisions prohibiting			discrimination on the grounds of sexual orientation in the provision of goods and services, which apply to GB and NI.	Commission for Equality and Human Rights.



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
	religious discrimination in the provision of goods and services coming into effect in April 2007.				
Employment Equality (Age) Regulations 2006 <a href="http://www.dti.gov.uk/er/equality/age.htm">http://www.dti.gov.uk/er/equality/age.htm</a>	1st October 2006 (with the occupational pensions provisions coming into force on 1 <sup>st</sup> December 2006)	Age	Civil	Employment and Vocational Training. Applies to GB	Transposes age provisions of the Directive
<u>Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006</u> <a href="http://www.opsi.gov.uk/sr/sr2006/20060439.htm">http://www.opsi.gov.uk/sr/sr2006/20060439.htm</a>	1 <sup>st</sup> January 2007	Sexual orientation	Civil	Access to goods and services; education; housing; performance of public functions.	Extends protection against discrimination on the ground of sexual orientation to provision goods and services, housing, education, public functions in NI: involves a use of the regulation-making

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
					power given to the UK government by the Equality Act 2006.
<u>Employment Equality (Age) (Amendment No.2) Regulations 2006 - SI 2006/2931</u>  <a href="http://www.opsi.gov.uk/si/si2006/20062931.htm">http://www.opsi.gov.uk/si/si2006/20062931.htm</a>	1 <sup>st</sup> December 2006	Age	Civil	Occupational pensions	Transposes age provisions of the Directive.
<u>Equality Act (Sexual Orientation) Regulations 2007</u>  <a href="http://www.opsi.gov.uk/si/si2007/uksi_20071263_en_1">http://www.opsi.gov.uk/si/si2007/uksi_20071263_en_1</a>	30 <sup>th</sup> April 2007	Sexual orientation	Civil	Access to goods and services; education; housing; performance of public functions	Extends protection against discrimination on the ground of sexual orientation to provision goods and services, housing, education, public functions in GB: involves a use of the regulation-making power given to the UK government by the Equality Act 2006.

**ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**

Name of country: United Kingdom

Date: December 2008

<b>Instrument</b>	<b>Signed (yes/no)</b>	<b>Ratified (yes/no)</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
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	None	No	No
Revised European Social Charter	Yes	No	N/A	Ratified collective complaints protocol? No.	No
International Covenant on Civil and Political Rights	Yes	Yes	None	No	No
Framework Convention for the Protection of National Minorities	Yes	Yes	None	No	No
International Convention on	Yes	Yes	None	No	No

<b>Instrument</b>	<b>Signed (yes/no)</b>	<b>Ratified (yes/no)</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Economic, Social and Cultural Rights					
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	None	No	No
Convention on the Elimination of Discrimination Against Women	Yes	Yes	None	Proposed but not yet approved – but inquiry procedure has been acceded to 17 December 2004.	No
ILO Convention No. 111 on Discrimination	Yes	Yes	None	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	No	No

<b>Instrument</b>	<b>Signed (yes/no)</b>	<b>Ratified (yes/no)</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
			accommodated separately from adults.”		
Convention on the Rights of Persons with Disabilities	Yes	Not yet – but the UK government has indicated that it will ratify the Convention soon.			





### 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
EHRC	Equality and Human Rights Commission
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