Overview

The DCLG published a Green Paper “A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain” for consultation, in June. The proposals are the outcome of the Discrimination Law Review and take forward the Government’s manifesto commitment to introduce a single equality bill in this Parliament. Responses must be submitted by 4 September 2007, a short consultation period for such a complex subject. This briefing outlines the main questions and makes some comments on the proposals.

The Green Paper covers the need to harmonise, simplify and modernise the law, and to make it more effective. The complexities and inconsistencies of the current law make it difficult for individuals to know their rights and make it equally difficult for employers and providers of services to understand their legal responsibilities. The Green Paper:

- sets out detailed proposals for a single equality bill that would simplify some provisions
- seeks views as to whether a single equality bill should provide equivalent protection against discrimination and harassment on grounds of race, sex, disability, sexual orientation, religion or belief and age or whether some aspects of different treatment should be maintained or added.
- makes proposals for revising the statutory duties that currently require public bodies to promote equality on grounds of race, disability and gender. The consultation document contains proposals for a new single equality duty seeks views on extending this duty to cover sexual orientation, religion or belief, and age.

This is an important consultation and local authorities are urged to consider a response based on their experience. The consultation document, an easy-read version a summary and the response form, as well as regulatory and equality impact assessments can be downloaded from the accompanying link.

This briefing has been prepared for LGIU by Barbara Cohen, an independent expert on discrimination law.

Briefing in full

Background

Equality legislation currently is contained in numerous statutes, orders, regulations and European directives providing different degrees of protection against discrimination on grounds
of race, sex, disability, sexual orientation, religion or belief and age. The government recognised the need for a more coherent legislative framework to underpin the work of the Commission for Equality and Human Rights, which takes over responsibility for all grounds of discrimination on 1 October 2007.

The Green Paper sets out detailed proposals for a single equality bill, which would replace the existing complex array of primary and secondary legislation. It draws to some extent on the findings of the Equalities Review chaired by Trevor Phillips that reported in February 2007.

The consultation document is organised in three parts. The current position is summarised and government’s proposals are discussed in some detail, and views are sought on these proposals; where the government has not reached a final decision the document asks for further evidence or seeks views on alternative approaches to particular issues.

**Part 1: Harmonising and simplifying the law**

Part 1 asks for views on proposals to

- simplify and standardise definitions and to simplify and harmonise exceptions
- harmonise the approach to discrimination by bodies carrying out ‘public functions’
- bring equal pay within a single equality bill.

The following proposals or questions are put forward:

**A single definition**

A single definition of disability discrimination would replace the present different definitions for employment, education, provision of goods and services.

**Single lower threshold for disability responsibilities**

A lower threshold in relation to access to goods and services on grounds of disability: the duty to make reasonable adjustments for disabled people would be triggered at a single point, so that employers and providers of goods and services would have a duty to make reasonable adjustment when a provision, criterion or practice or a physical feature of premises places a disabled person at a substantial disadvantage.

**Indirect discrimination to cover all areas**

The definition of indirect discrimination would be harmonised to cover all areas, so that, (as is now the case in employment situations), indirect discrimination would occur when an apparently neutral provision, criterion or practice puts persons of a particular group at a particular disadvantage and which cannot be justified as a proportionate means of achieving a legitimate aim.

**Revision of the “genuine occupational requirement” test**

A “genuine occupational requirement” test would be adopted as the sole basis for discrimination in employment, removing the lists of permitted exceptions in the Race Relations Act 1976 (RRA) and the Sex Discrimination Act 1975 (SDA). In order to restrict a post to persons of a particular racial or ethnic origin, gender, sexual orientation, religion or belief or age, a employer would need to show that the nature of the post or the context in which it is being carried out requires the postholder to be of a particular race, gender, sexual orientation etc. and that it is proportionate to apply that requirement in the particular case. Views are sought as to whether any of the exceptions currently in the RRA or the SDA should be retained.

**How should the exceptions in education, housing and other functions be revised?**

Views are sought on how the law should deal with exceptions to the prohibition of discrimination
in education, housing, provision of goods, facilities and services and functions of public bodies: would a genuine service requirement test, applying to all grounds, be possible? Would it permit discrimination that is currently unlawful? In Annex A the government lists the specific exceptions they propose to retain and those they propose to remove. Exceptions proposed to be retained include those relating to faith schools, single sex schools, acts done under statutory authority, religious discrimination in exercise by local authorities of well-being power, care within a family.

**Should rights, duties and exceptions to apply to all grounds?**
Harmonise the protection against discrimination in access to and provision of goods, facilities and services and functions of public authorities, so that the same rights, duties and exceptions would apply on all grounds.

**Equal pay reviews**
There are no proposals for equal pay reviews; however, in order to comply with their specific gender equality duties public authorities will normally need to carry out such reviews.

**Part 2. More effective law**

Part 2 seeks views on proposals:

- for a wider range of lawful positive action, referred to as “balancing measures”
- for a new approach to public sector equality duties, and
- considers how public authorities can take account of equality in carrying out procurement
- and proposes improved county court procedures for discrimination cases.

There are no proposals creating positive obligations for the private sector.

**Positive action – ‘balancing measures’**
The government is proposing to widen the scope for employers and providers of services to take voluntary measures to prevent or compensate for disadvantage or to meet special needs linked to membership of a protected group. For employers, this could include fast-tracking under-represented groups through initial training where all had met the initial entry criteria, in order to speed up the achievement of a more representative workforce. For providers of services, it could include special measures to enable disadvantaged or under-represented groups to enjoy the benefits of the service on equal terms.

**A significant change in the public sector equality duties**
Of particular relevance to local authorities are the proposals for a new approach to public sector equality duties.

**Current duties**
Public bodies, including local authorities, and many others such as police authorities, governing bodies of maintained schools and colleges, primary care trusts, NHS trusts, central government departments, are subject to equality duties under the Race Relations Act 1976 (RRA), the Disability Discrimination Act 1995 (DDA) and the Sex Discrimination Act 1975 (SDA).

This framework includes compliance with a general duty requiring public bodies, in carrying out their functions, to have due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity on each of the three grounds, with additional elements of the general duty under the DDA. Regulations impose specific duties for race, disability and gender, which includes a duty to prepare and publish an equality scheme and to carry out certain measures within stated time limits. The CRE, DRC and EOC have powers to enforce
non-compliance with the specific duties and failure to meet the general duty can be challenged by way of judicial review.

The proposals

The consultation paper proposes that there should be a single equality duty for race, disability and gender with the following purposes:

- addressing disadvantage
- promoting respect for the equal worth of different groups and fostering good relations within and between groups
- meeting different needs while promoting shared values
- promoting equal participation.

Identifying priorities

Authorities would be required to “identify priority equality objectives and take proportionate action towards their achievement”. It would be possible to choose priority areas within which to adopt equality objectives, rather than, as currently, being subject to a duty to mainstream race, disability and gender equality across all functions.

Authorities would be expected to take into account local and national priorities; the latter could be set through Public Service Agreements and departmental strategic objectives and/or priorities identified by the CEHR; national strategic equality outcomes could be set by central government.

The government wants authorities to have autonomy and flexibility in determining what they need to do to achieve their priority objectives. Rather than introduce specific duties requiring certain steps to be taken, authorities would be expected to apply the following principles proportionately:

- consultation and involvement – addressing employees, service users, other stakeholders
- use of evidence – to establish priorities and monitor progress
- transparency – employees and service users should have information about how the authority is responding to its equality duty
- capability - staff should be appropriately trained.

Should the public sector duties be extended to cover all grounds of discrimination?

Views are sought as to whether the equality duty should be extended to the other protected grounds: sexual orientation, religion or belief and age. The government is not committed to this approach, and makes it clear that the priorities adopted would depend on the circumstances of the authority and extending responsibilities to cover all protected grounds would not guarantee equal outcomes for all groups. The document acknowledges that without protection against age discrimination outside employment (as explained below) such a duty would be very limited.

The Green Paper also:

- Discusses the role of inspectorates in securing compliance with the public sector equality duty.
- Acknowledges that some public authorities are unclear about the extent to which equality objectives can be pursued through public procurement, but does not see the need for legislation to confirm or clarify what authorities can and should do. The document proposes instead that practical guidance should be agreed between the CEHR and the government.
Responsibilities in the private sector

The government is not intending to introduce any new legal obligations on the private sector, but proposes:

- “the development of a light touch ‘equality check tool’ for employers”, and
- seeks views on a voluntary equality standard for businesses that could be an accredited independently assessed standard like the local government equality standard.

Part 3. Modernising the law

Part 3 seeks views on the following proposals:

- A slightly simpler definition of disability, but not extending the definition to cover genetic predisposition.
- A legal duty on landlords to carry out reasonable disability-related alterations to common parts of rented residential premises if the disabled person who needs such alterations meets the costs.

Consideration of other possibilities

- **Age discrimination**
  The lack of protection against age discrimination by public and private sector bodies outside the workplace is discussed without commitment to legislate. The government is calling for more evidence on this subject, but is satisfied that age-related treatment of under-18s is generally appropriate and should not be subject to anti-discrimination legislation. The Green Paper does refer to some age-related benefits, and makes clear that any protection against age discrimination in education, housing, goods and service and functions of public authorities should enable both direct and indirect discrimination to be justified.

- **Being clearer about protection against harassment**
  The consultation document discusses different forms of protection against harassment on different grounds and in different circumstances and seeks both evidence and views on legislation that would be more consistent across all grounds.

- **Pregnancy and gender-reassignment**
  The consultation document also sets out the government’s proposals for implementation of the EC goods and services gender directive (which also applies to pregnancy and gender-reassignment) that will require amendment of the SDA by 21 December 2007. As the gender directive does not apply to education, the government is not proposing to extend to schools protection against discrimination on grounds of pregnancy or gender-reassignment.

- There are no proposals for protection against discrimination on grounds of being a carer.

Commentary

The setting up of the Discrimination Law Review was widely welcomed, as there is a broad consensus that our anti-discrimination legislation is in need of reform. The complex matrix of statutes and regulations makes it difficult for all concerned to be clear about their rights and obligations.

However, it is already clear that the proposals for a single equality bill set out in the consultation Green Paper are not so widely welcomed. The proposals have been criticised as failing to create the “clearer and more streamlined equality legislation framework” that the Discrimination
Law Review was set up to achieve, and are seen as unlikely to “produce better outcomes for those who experience disadvantage” which was the second half of the Discrimination Law Review’s general purpose.

The consultation document proposes maintaining some different definitions and different scope for different grounds as well as different specific exceptions. It fails to deal with enforcement and remedies for discrimination or sanctions that would be effectively dissuasive. The proposals wholly avoid any equality or equal pay obligations on private sector employers and fail to recognise the need for clearer protection where discrimination occurs on multiple interrelated grounds.

The new legal framework proposed for the public sector equality duties is a major concern for those in local government. The Green Paper recognises the important role of public bodies -- as providers of services, as regulators and as employers -- in overcoming disadvantage and securing greater equality, and states that the government’s aims are to ensure that authorities do take appropriate action to secure effective equality outcomes without imposing unnecessary bureaucratic burdens. However, it is difficult to see how the actual proposals will achieve these aims.

The implementation of the existing duties has posed a significant challenge for authorities, but there must be concerns that watering down current obligations will result in less action and fewer real equality outcomes.

The proposals in the consultation document move away from plainly stated general duties that apply to all of an authority’s functions and would instead introduce a ‘strategic equality duty’, requiring an authority to take proportionate action towards the achievement of priority objectives. There is no reference to the elimination of unlawful discrimination. The new framework would leave to each authority to fix its own priority objectives.

There is no obligation to conduct impact assessments, despite evidence from both Northern Ireland and Great Britain that such assessments have aided authorities to identify and avoid adverse impacts in developing and implementing their policies. By replacing obligations to take certain specific actions (including publishing an equality scheme), with principles that are to shape action, the proposals would remove a base-line standard against which an authority could measure itself and inspectorates and the CEHR and members of the public could assess compliance.

In response to the race, disability and gender duties equality matters are beginning to be mainstreamed in many local authorities. There must be a real concern that the introduction of a legal duty that lacks clarity and relies on each public authority to interpret statements of purpose and principles will result in a loss of momentum and reduced commitment.

If there is to be a single equality duty on public authorities, it would be fairer if it applied to all grounds currently protected under equality legislation. It would then be for each authority, rather than the government, to determine how it should respond to equality issues on each of these grounds.

On public sector procurement, there is an absence of central government commitment to ensure real change. The experience in the US and Northern Ireland has demonstrated the huge potential for securing good equality practice in the private sector through public procurement, and private sector businesses generally endorse this view. The uncertainty over what authorities should be doing to promote equality in procurement persists, despite guidance by the CRE, DRC EOC and others: this will not change without much clearer statutory requirements.
Responding to the consultation

The LGIU encourages affiliates to respond to the consultation, within the time available taking up in particular any issues that arise from their own practice and experience. The government requires responses by 4 September 2007: details of how to respond are given above.

Additional Information

Covers

- Equalities, Social inclusion, Community cohesion

Question

Send Feedback for this briefing

Related links

- A Framework for Fairness

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