



**EXECUTIVE SUMMARY OF RESPONSES TO THE PUBLIC
CONSULTATION ON THE EQUALITY BILL**

THE ODYSSEUS TRUST

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Background

On 30 July 2002 the draft Equality Bill was launched for public consultation at a meeting in the House of Lords, attended by leading practitioners, members of NGOs, the Equality Commissions, academics and politicians.

The public consultation process lasted until 30 September 2002. The Odysseus Trust received over 45 responses.

In addition, during this period, the Government published its draft regulations to implement the EC Race Directive (2000/43/EC) and the Framework Employment Directive (2000/78/EC).

The Odysseus Trust engaged in analysis of the responses and the draft regulations. We were encouraged that the consultation process demonstrated overwhelming support for the principle of a Single Equality Act.

We then considered all the suggestions made by respondents and where these suggestions were consistent with the aims of the Bill we sought to implement them. In addition, we conducted a further review of both the existing anti-discrimination legislation and the draft regulations and ensured that in every area the Equality Bill offers at least the same protection. In most areas the Equality Bill goes much further than the existing protection.

The Equality Bill as introduced by Lord Lester of Herne Hill QC on 14th January 2003 is in many ways a very different Bill from that launched in July 2003. The Odysseus Trust would like to thank all the Respondents for their time and expertise and looks forward to their continuing support during the passage of the Bill.

Outlined below are some of the main issues raised by the consultation process and an indication of how we dealt with them. This is not a comprehensive account of all the changes and we would also encourage readers to consult both the Equality Bill and the redrafted Explanatory Notes for more detailed information. All references to 'the Bill' in this summary refer to the Bill as published on 15th January 2003.

Grounds of Discrimination

A number of respondents suggested that the list should be widened to be as broad as both Protocol 12 of the European Convention on Human Rights and Article 21 of the EU Charter on Fundamental Rights. Other specific suggestions included ex-prisoners, trade union members and employees on fixed term contracts.

As a result of a number of respondents' suggestions and in particular to a request made by the Equal Opportunities Commission we have decided to reflect the difficulties faced in viewing pregnancy discrimination as a species of sex discrimination by adding pregnancy as a separate ground. With that exception, the list as currently drafted broadly reflects the Government's obligations under the EU Framework Directive and we have decided not to add any further grounds at this stage.

Certain respondents also suggested that the list should be open-ended. It is our view that it would not be appropriate, for reasons of legal certainty, to leave the list open-ended. Primary legislation will still be required for the list to be amended in future.

In response to a number of comments we looked at how the Bill could better address the problem of multiple discrimination. The wording now adopted in section 1 (1) of the Bill is 'reasons related to *one or more* of the following grounds'.

Hierarchy of Rights

Many respondents expressed concern both at the launch meeting and in their written submissions that the draft Bill contained a 'hierarchy of rights'. In particular the positive duties on public authorities only applied to race, sex and disability.

The original exclusion of religion or belief, sexual orientation and age from the positive duties of public authorities stemmed from a concern about how this duty would be monitored with due regard to the privacy of the individuals concerned. However, we understood the concerns about this 'hierarchy' and the new clause 26 of the Bill extends the equality duties of public bodies across all grounds. Our original concerns about monitoring of this duty is dealt with through clause 27 which allows the Secretary of State to make different orders in relation to the assessment of compliance for each ground.

However, it was agreed not to extend the positive duties of designated employers across all grounds. For the purposes of clause 30, 'employment equity groups' comprise groups identified by reference to a particular disability they have or have had, persons identified by reference to their colour, race, nationality or ethnic or

national origins and men and women generally. This section is designed to ensure fair participation in employment in respect of the prescribed groups and we maintain that such methods are not appropriate in respect of religion or belief, sexual orientation and age.

Provisions Relating to Disability

The Disability Rights Commission (the 'DRC') and a number of leading disability NGOs responded to the public consultation. There was widespread concern that the Bill had failed to deal with the distinctive nature of disability discrimination and that the Bill offered less protection to disabled persons than the Disability Discrimination Act 1995 ('the DDA').

In response to these concerns disability became the first issue on our list of key priorities for redrafting. We were assisted to a large extent by Caroline Gooding and Catherine Casserley at the Disability Rights Commission who discussed with us the exact ways in which the Bill could be improved.

As well as ensuring that the Bill now meets the standard of existing legislation we have also implemented many of the Task Force recommendations in the areas covered by the Bill.

The principal concern expressed by respondents was that there was no freestanding individually enforceable duty to make reasonable adjustments in the draft Equality Bill. Further, there was no duty to make reasonable adjustment in relation to the provision of goods and services. Instead, the Bill relied on a uniform concept of indirect discrimination across all grounds. One area of particular concern to NGOs such as the RNIB was that there was no specific reference to a duty to provide auxiliary goods or services such as the provision of information on audio tape or sign language interpreters.

In the light of these comments, the Bill now mirrors the reasonable adjustment provisions in the DDA. As in the DDA, this duty is anticipatory in the provision of goods and services but not in relation to employment. There is now a specific reference to auxiliary goods and services. All the duties to facilitate access for disabled persons are contained in an identifiable section of the Bill at clauses 34 to 37. This section is supplemented by schedule 3 that provides more detail as to the nature of the duty and the individuals and bodies who are under a duty to enforce it. In some respects we have gone further than the DDA in relation to who is covered by the duty. For instance we have implemented the Task Force recommendations that local councils should be placed under a duty to make reasonable adjustment in the appointment of councillors with disabilities and that the exclusion for voluntary organisations should be removed.

Respondents also expressed concern that the draft Bill does not contain adequate provision for people with disabilities in the education field. We considered this in greater depth and have now mirrored the central provisions of the Special Educational Needs and Disability Act 2001 (SENDA) (see clause 35 of the Bill). We have also preserved the right to appeal to the Special Educational Needs and Disability Tribunal as the tribunal with specific expertise in this area (clause 50 of the Bill).

A number of respondents also raised concerns about the definition of disability in the draft Bill. The three main areas of concern were perception of disability, association with disability and past disability. The DRC and the RNIB also expressed some concern about who should be deemed to be disabled under the Bill.

As explained in the explanatory notes, we consider that perception and association are covered by the phrase 'grounds related to disability'. This reflects the case law in other areas of discrimination such as race. However, we have amended the Bill to ensure that references to disabled people also include people who have had disabilities.

We have also implemented a number of Task Force Recommendations concerning the definition of disability such as a provision deeming people who are registered blind or partially sighted as disabled.

The Single Equality Commission

The enforcement provisions in the Bill rely on the existence of a single Equality Commission. We maintain that a single Commission is a central element of the comprehensive and uniform equality legislation.

However, the consultation process demonstrated some reluctance amongst the disability lobby to agree to a single Commission. The DRC expressed concern that its special expertise in this area and the strong representation of disabled people would be lost in a single Commission.

The Bill recognises these concerns and allows for a transitional period for the DRC to join. The DRC would not be forced to join the Single Commission for at least 3 years after the Bill comes in to force. We have also introduced transitional arrangements such as information sharing to facilitate the transfer.

It should also be noted that many lobby groups recognise that if a single Commission is to become a political reality in any event, it is better for it to be established on the basis of a strong single Equality Act, rather than by piecemeal legislation and regulation.

The second area of debate surrounding the Commission is the role human rights should play within a single Equality Commission. The draft Bill allowed the Commission to provide assistance to claimants where there was a breach of Article 14 of the European Convention on Human Rights, but did not go any further. We recognise that not all aspects of human rights fit easily into an Equality Commission and we are keen to ensure that the Government considers the need for a separate Human Rights Commission. However, in response to the comments of several specialist human rights NGOs and practitioners we have extended the role of human rights within the Commission. Clause 39 (4) states specifically that the Commission should discharge its duty by reference to the international human rights obligations of the United Kingdom and provides a list of those obligations.

Exclusions from the Protected Areas of Activity

The draft Bill contained a significant number of exceptions to the general duty not to discriminate. These largely reflected the existing exclusions contained in existing sex and race legislation. In some areas these were amended or added to in order to reflect the inclusion of religion, sexual orientation and age in the draft Bill. All these exclusions are now contained in Schedule 2 of the Bill.

A number of respondents expressed a general concern that the exclusions were not sufficiently restrictive. For example, a common concern was that an exclusion to provide for single sex clubs would permit discrimination on grounds other than sex. This concern has been addressed through the addition of a subsection under each exclusion which prohibits discrimination for any reason other than the prohibited ground in question. In addition, all exclusions are now subject to the limiting provision of clause 2 (2) of the Bill which states that all exclusions should not be given a wider effect than is strictly necessary in all the circumstances.

One exclusion of particular concern to respondents was clause 26 of the draft Bill (now Schedule 2, para. 14). In response to concerns expressed by respondents we have deleted clause 26 (2). It will no longer be permissible for a charitable body to discriminate on the grounds of sex or sexual orientation where it is necessary to comply with the religion or avoid offending the susceptibilities of a significant number of its followers. Discrimination such as this in the field of employment on any ground will now be subject to the stricter test for genuine occupational qualifications (now contained at Schedule 2, para. 13). The only remaining exclusion for charitable bodies with a religious ethos is that such a body can choose to employ a person of a particular religion or belief where such a belief is a genuine and determining requirement and that requirement is proportionate (see Schedule 2, para. 14 (1)).

The other exclusion where we noted a significant amount of concern was clause 28, which dealt with justifiable age based discrimination (now Schedule 2, para. 16). Of particular concern were clauses 28 (c) and (d) dealing with requirements relating to pay or other terms of employment 'which are based on seniority or professional experience' and requirements which consist of setting a maximum age for recruitment 'based on the training requirements for the post in question or the need for a reasonable period of employment'. In the light of such comments we re-examined the whole test as to when age discrimination can be justified. We have now deleted both the subclauses above. We accept the assertion of Help the Aged that there is no necessary correlation between age and the length of time someone stays in the job. Any such requirements will no longer be treated as automatically fulfilling the test and will be subject a test to show that the requirement is objectively justified by a legitimate objective and that the requirement is proportionate to a legitimate objective.

Dr Matthew Weait and Kay Taylor

Parliamentary Legal Officers to Lord Lester of Herne Hill QC

The Odysseus Trust

13th January 2003

List of Respondents

Ian Andrews
Forum Against Islamophobia and Racism
Committee on the Administration of Justice
Frances Butler, Joint Parliamentary Committee on Human Rights
Martin Clay
Colm O’Cinneide, University College London
Alan Crisp
MIND
Discrimination Law Association
RNIB
Equality Commission for Northern Ireland
Professor Sandra Fredman, Exeter College, Oxford
Tess Gill, Old Square Chambers
Disability Rights Commission
Help the Aged
NATFHE
Equality Challenge Unit
Terrence Higgins Trust
Dorris Littlejohn
LIBERTY
Lesbian and Gay Christian Movement
Runnymede
Stonewall
Professor Aileen McColgan, School of Law, King’s College
Professor Christopher McCrudden, Lincoln College, Oxford
Employers Forum on Age
Karon Monaghan, Matrix Chambers
Scott Moncrieff
Trades Union Congress
JUSTICE
British Medical Association
Rabbi Julia Neuberger MA, King’s Fund
Commission for Racial Equality
The Inter Faith Network
National Secular Society
UNISON
Police Federation of England and Wales
Equal Opportunities Commission Scotland
Sally-Anne Sangra
The Law Society
British Humanist Association
The Association of Muslim Lawyers

Baroness Turner of Camden
Professor Paul Weller, University of Derby
Baroness Whitaker
Children's Rights Alliance for England
Lesbian and Gay Employment Rights