

## What we need from a Single Equality Bill: Issues for Consideration

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On 18 January 2008, I gave the keynote speech at the TUC Discrimination Law Conference in which I outlined the key principles necessary for reforming the current tangle of equality law in order to create a comprehensive, coherent and user-friendly law suitable for the challenges of the 21<sup>st</sup> century. This note provides a brief outline of those principles<sup>1</sup>.

### Key principles

The three main underlying principles are:

- The Bill must contain clear, consistent standards, consolidating existing law so that it is more user-friendly and accessible.
- It must create an effective, efficient and equitable regulatory framework, aimed at encouraging voluntary and *easy* steps to promote equality.
- Victims should have accessible remedies. Individuals should be free to seek redress for the harm they have suffered as a result of unlawful discrimination, through procedures which are fair, inexpensive and expeditious, and the remedies should be effective in achieving widespread change.

### Purpose

A Single Equality Bill should include a clause describing the purpose of the new legislation. In broad terms this should be:

- The protection of the dignity, autonomy and worth of every individual;
- The promotion of equality and the elimination of discrimination so that no person should be denied opportunities or benefits for reasons related to one of the prohibited grounds;
- The application of the principle of equality in a way which does not require a reduction in the level of protection already afforded to any person;
- The identification and removal of barriers against persons in designated groups;
- The encouragement of positive policies and practices and such reasonable adjustments as will ensure that persons in designated groups achieve fair participation in employment, fair access to education, training, goods facilities and services and a fair distribution of benefits;
- The promotion of good relations between persons of different racial or religious groups or belief, age, marital status or sexual orientation, between men and women generally, and between persons with a disability and persons without.

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<sup>1</sup> The groundwork for a Single Equality Bill has already been done in the wide-ranging and ground-breaking report of the Independent Review and the Enforcement of UK Anti-Discrimination Legislation, *Equality: A New Framework*, published in 2000 (“the Hepple Report”) which led to Lord Lester’s Private Member’s Single Equality Bill which was passed by the Lords in 2003. The principles outlined here are taken from this report and Bill.

## Interpretation Clause

The Bill should provide interpretative guidance in its introductory clauses. These are:

- No levelling down;
- Accommodation of difference: Promoting equality may require more than treating different individuals in the same way as each other and may also require the accommodation of difference in some contexts;
- Special Measures: The need to correct disadvantages that arise from discrimination may require the taking of nuanced measures which are necessary to remedy past discrimination and promote equality of opportunity. Such measures must be proportionate to their legitimate aim and enhance rather than diminish the principle of equal opportunities based on individual merit.

## Measures to target particular behaviour or arrangements

- The intersection of discrimination based on more than one strand must be recognized.
- The Bill should identify clearly that unlawful conduct involves discrimination, harassment or victimization based on the prohibited grounds.
- Definitions of discrimination and indirect discrimination (especially the objective justification test) must be clarified, standardised across all the strands and harmonised in line with the definitions imposed by European law.

## Scope

- In addition to the existing grounds of sex, race and disability, the Bill should cover discrimination on the grounds of sexual orientation, age, gender reassignment and religion or belief. Family status, marital status and pregnancy should be specified as grounds in their own right, in addition to sex.
- The definition of indirect discrimination should apply to disability discrimination.
- The prohibition against discrimination ought to apply to employment, education, the provision of goods, facilities and services, the performance of public functions and the disposal of premises. In particular, the prohibition against age discrimination should extend to goods, facilities and services.
- Prohibition against harassment should not extend to religion because of the free speech implications.

## Exceptions

- Currently the law acknowledges genuine occupational requirements. This exception should relate also to genuine service requirements. This should be carefully worded so as to allow positive action measures but not to allow wide justification of direct discrimination in the provision of goods, facilities and services.
- In relation to insurance, there is a tension as to whether or not insurance providers can treat groups of people differently by imposing different premiums based on one's membership of a particular group. The EU Directive on gender equality allows

insurance companies to impose differentiated premiums based on reliable actuarial evidence. This exception should be narrowly tailored.

- Exceptions relating to age should be removed as age is not a reasonable or justifiable basis for discrimination.

### **Equality duty**

- Bodies exercising functions of a public nature must have due regard to the need to eliminate discrimination and to promote equality of opportunity.
- Auditing bodies should have a specific duty to consider compliance with the Bill.
- The equality duty should extend to all strands but each strand should be addressed in a way that best suits its needs.
- It should not be left to public bodies to prioritise one area of equality as this would be inconsistent with the general principle that there should be no hierarchy of rights.

### **Equality duty in the private sector**

- It is important to ensure that employees in the private sector do not receive less protection than those in the public sector.
- Regulation in the private sector should not be intrusive and should operate primarily on voluntary incentive.
- Large employers should be required to carry out periodic reviews of the composition of their workforce and their employment policies and practices. If a review indicates that there may be failings in terms of equality opportunities or equal pay, employers should be required to draw up proposals with a view to bringing about change.

### **Equal pay**

- Mandatory pay equity plans should place a positive duty on employers to provide pay equity, designed in a way which would remove the gender pay gap over a period of time. Employers with more than ten full-time employees should be obliged to conduct a periodic pay audit (once every three years), covering both full- and part-time employees, and to publish this in the company's report.
- If, following an audit, the employer finds a significant disparity between predominantly female and predominantly male job classes, it should be obliged to draw up a pay equity plan in negotiation with recognised trade unions with a view to reaching a collective agreement (or if no trade union is recognised to negotiate in respect of pay, the company should consult with employees or their representative to reach a workforce agreement). When bargaining on pay, the employer and recognised union should have due regard to the need to promote equal pay for work of equal value for men and women. If no agreement can be reached there should be a mechanism to go to arbitration and the arbitrator should have the power to award a pay equity plan. Individual employees should be able to bring proceedings in an employment tribunal for breach of a collective agreement, workforce agreement or arbitration award.

- It is extremely important that this applies in both the public and private sectors. A distinction between the private and public sectors in this area would effectively discriminate against private sector employees, who would not have equal pay protection under a Single Equality Bill.
- It is necessary to extend the basis of comparison to include the use of a hypothetical comparator in the case of equal pay. It makes no sense to have a different standard for women than that which applies to race.
- It is necessary to improve the methods of assessing the relative value of jobs.
- There should be no distinction between contractual and non-contractual equal pay claims.
- New and improved tribunal procedures are necessary for the enforcement of individual equal pay claims, with mechanisms that extend decisions in individual cases to all people falling within the vulnerable group.

### **Positive action and reasonable adjustment**

- Employers, service providers and providers of education ought to have positive duties to make reasonable adjustments to remove barriers created as a result of historical discrimination.
- It is necessary to extend the scope of permissible positive action to better tackle disadvantage linked to discrimination or to meet special needs.

### **Public procurement**

- There should be a specific duty to ensure that public authorities are not able to contract out of their equality duties. This is an essential element of incentive-based regulation but under the current system it is weak and poorly enforced.

### **Enforcement and remedies**

- There must be no levelling down of existing protection.
- Under current law, the focus is on eliminating discrimination by means of investigative and legal processes. New legislation should tackle discrimination more proactively and in a less adversarial way, without imposing unnecessary bureaucratic burdens.
- The focus should be on encouraging and incentivising voluntary compliance, with effectively deterrent sanctions when compliance is breached.
- Representative claims should be allowed. Where tribunals find cases of unlawful discrimination that apply more broadly than the individual claimant, its decision should have collective effect and provision should be made for collective implications.

### **Tribunals**

- In order to make efficient use of resources, ensure appropriate expertise in discrimination cases and reduce procedural and cost barriers to bringing claims, employment-related discrimination cases should be commenced in employment

tribunals, with the possibility for chairmen to transfer matters to other courts if necessary. Employment matters which have particularly complex issues of discrimination may be referred to the High Court or an Employment Appeal Tribunal.

- Matters that do not concern employment, such as education or the provision of goods, facilities and services, should be referred to a special “equality tribunal” or body appointed under specific arrangements to hear such matters.
- Employment Tribunals should be able to recommend strategic changes to organisational policy following a finding of unlawful discrimination in order to maximise the impact of the individual discrimination cases and enable organisations to avoid future claims.
- Tribunals should be empowered to tackle persistent offenders through the imposition of increasingly severe sanctions, linked to the self-interest of organisations.