

**Industrial Law Society**  
**London 4 October 2007.**

## **THE PROPOSED SINGLE EQUALITY BILL: A CRITICAL REVIEW**

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### **OUTLINE**

#### **1. Better Late than Never? –**

- 1997 – *Improving Equality Law; the Options* by B.Hepple, Lord Lester, Evelyn Ellis, Dinah Rose, Rabinder Singh (Justice)
- 2000 – *Equality: a New Framework -Independent Review of Enforcement of UK Equality Legislation* by B.Hepple, M.Coussey and T.Choudhury (Hart Publishing) [Cambridge Review]
- 2001-2003 – **Govt** introduces new strands on religion or belief, sexual orientation, amends race, disability and gender to comply with EU directives; age discrimination from Oct 2006. Secondary legislation ..
- 2003 – Lester Bill ('outstanding' 'will not die the death' – Ld McIntosh) passes all stages in Lords; over 200 MPs sign EDM calling on govt. to introduce Bill .
- May 2004 – White Paper (FFA) – single Commission for Equality and Human Rights (CEHR) BUT 'body of existing law will remain as before'. First task of CEHR will be to review existing legislation.
- 2006 - Equality Act - established CEHR (in operation 1 Oct.2007) taking over from EOC, DRC and CRE; makes unlawful discrimination on grounds of religion or belief re provision of services, goods and education; provision for regulations to do same for sexual orientation; creates duty on public authorities to promote equality of opportunity re gender (from April 2007), as was done for disability in 2005 (from Dec.2006) .
- 2005-2007 series of Government reviews - Turner Commission on Pensions; Women and Work Commission;; Equalities Review (ER) final report *Fairness and Freedom* (Feb. 2007) calls for Single Equality Act that 'focuses on a simpler more coherent framework, and facilitates actions to help groups as well as individuals.'
- 2005 - 2007 Discrimination Law Review ( DTI now Dept for Communities and Local Government) 'to create a simpler fairer framework' Consultation Paper *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* [DLR], June 2007,, consultation closed 4 Sept.2007.
- Assuming political will, Single Equality Bill may be introduced in 2007-8, in force 2009 ?

## 2. Two aspects of DLR

- Underlying theory of type of equality which Government is pursuing – ‘individual freedom of choice and fairness’ (see my lecture *In Search of Equality under Law*, UCL Current Legal Problems series, 11 October 2007 , 6pm, at UCL)
- Underlying theory of regulation – ‘reflexive regulation’ – (see C.McCruden, ‘Equality Legislation and Reflexive Regulation: a Response to the Discrimination Law Review’ (2007) 36 ILJ 255-66, and this lecture)

## 3. Three criteria by which to judge the DLR –

- **Does it propose effective harmonisation and simplification in place of current fragmented, inconsistent and incoherent approach to different strands of inequality?**
- **Does it provide effective incentives and sanctions to encourage organisations to take a proactive approach to achieving equality ?**
- **Will it lead to more effective legal procedures and remedies?**

## 4. Harmonisation and simplification of legislation and institutions

- **Too much law** – people have come to think that eliminating discrimination and promoting equality is a matter of detailed rules imposed by external agencies rather than the responsibility of organisations and individuals to change themselves..
- **Complexity - e.g.**
  - Indirect discrimination: (lamentable state of complexity and obfuscation' (Mummery LJ in *Rutherford* ) see confusing speeches in *Rutherford (No.2) v Sec of State for Trade and Industry* [2006] UKHL 19, [2006] IRLR 551, HL; and comment by Elias P. ,ELA Annual Lecture 2006). The DLR proposes a harmonised definition, but note the wording differs from EU directives (‘proportionate’ not ‘appropriate and necessary’ ; and the UK wording only allows a challenge by a victim who has suffered a disadvantage and not for policies and practices to be challenged at an early stage before they have had an impact –ie anticipatory actions [‘would put’ in Directive]).
- **Failure to implement EC law correctly - e.g. *Equal Opportunities Commission v Sec of State for Trade and Industry* [2007] EWHC 483 (Admin). ( harassment; discrimination against pregnant women; entitlement of women on maternity leave to discretionary bonus; limits on claims during additional maternity leave period)**
- **Inconsistencies and new hierarchies of inequality**  
The overriding general principle which should be applied in order to achieve the stated aims of harmonisation and simplification, effectiveness and

modernisation is that there should be **no hierarchy of equality. The same rules should be applied to all strands unless there is convincing justification for an exception.** This principle has not been consistently followed in the Consultation Paper, with the result that in some respects law may become more complex, confusing and ineffective than at present

EXAMPLES

Association with victims. The proposal (p.36) is that we should largely keep the existing approaches in relation to discrimination on the basis of perception and association except for an extension to protect against discrimination on the grounds of association with transsexual people (p.36). This breaches the principle (above) that there should be no hierarchy of equality. The Cambridge Review (para.2.68) recommended that legislation should be framed so as to prohibit discrimination on the specified grounds, without the need to show that the victim belongs to the protected group. This was reflected in the wording of cl.1(1) of the Lester Bill ('for reasons related to one or more of the following grounds'). There is currently a pending case in the ECJ (*Coleman v Attridge*) on this issue- potentially UK law is in breach of EC law.

Coverage of indirect discrimination. Proposal to extend indirect discrimination to cover gender reassignment but not to explicitly introduce it to disability discrimination law (p.38). This fragmented approach to indirect discrimination breaches the principle that there should be no hierarchy of equality. We argued in our Report (paras. 2.28 -2.33) that the concept of indirect discrimination should be applied to all prohibited grounds of discrimination, including disability, and this was reflected in the Lester Bill, cl.11

Treating equal pay for women differently. Proposal that distinction between contractual and non-contractual approaches should be retained (p.57) breaches the principle (above) that there should be no hierarchy of equality. The law would be simplified and harmonised across all prohibited grounds by making the right to equal pay for women and men part of the general scheme of direct and indirect discrimination. The exclusion of pay from the SDA has led to many anomalies and complexities (e.g. contractual bonuses are covered by the EqPA, but non-contractual bonuses are not; see too, *Hoyland v Asda Stores Ltd* [2006] CSIH 21; [2006] IRLR 468 ).

## 5. **Incentives and sanctions to encourage positive action to achieve equality of opportunity**

- **Retrospective fault-finding not business plans**

Redressing complaints by individuals is important but this does not change organisations. One of the most important findings of Cambridge Review's targeted case studies is that the pressure of individual complaints has been the starting point for changes in organisations but (to quote one manager) 'litigation has short-lived effect'.

- **Individualised procedures have failed to deliver equality**  
*Equalities Review(2007)*: to remove employment penalty (measure of disadvantage that individuals or groups face) at present rate of progress 75 years to achieve equal pay for women; disabled people possibly never; Pakistani and Bangladeshi women definitely never.(p.25).
- **Reflexive/responsive regulation.**  
The Cambridge Review, chap.3, rejected the ‘kitchen-sink’ or ‘smorgasbjord’ approach to regulation in which every conceivable legal sanction is used in the mistaken belief that coercion is always necessary and that resources are unlimited; and also pointed out that voluntarism could only work if complemented by other methods such as *enforced self-regulation*, which is aimed at organisations which do not comply voluntarily. McCrudden (2007) 36 ILJ 255 argues that the underlying theory is the DLR is *reflexive regulation*. The Cambridge Review advocated this, calling it *responsive regulation*. This has two essential pre-conditions: first regulation must be responsive to the different behaviour of organisations subject to regulation. Secondly, the quality of regulation will be improved by bringing into the regulatory process the experience and views of those directly affected, such as trade unions, community organisations, public interest groups that act as watchdogs, educate and inform others and help individuals to enforce their rights.

McCrudden (above) finds many examples of reflexive/responsive regulation in the DLR e.g

- Emphasis on business case for equality (ie builds on self-interest)(p.8)
- Mechanisms for consultation and engagement with stakeholders (p.20), and discussion of consensus and partnership (p.16)
- Spreading good practice as distinct from ‘legal compliance’(pp.32,54,109,111,113)
- Alternative methods of dispute resolution(pp.115, 117)
- Use of government procurement (p.109) and an ‘equality standard’ for which employers would be accredited leading to easier access to government contracts (p.112)

## **6. How to make reflexive/responsive regulation more effective**

- **Simplify positive obligations in public sector**  
The *Equalities Review* (2007) found that the race equality duty and rules on positive action placed too much emphasis on process, too little outcomes (p.102), were inflexible and rigid, (p.104), did not give enough clear guidance and support (p.106), and that enforcement was too blunt and inflexible. The proposal for a single duty on public authorities (DLR. p.85) across the strands of race, gender and disability, and more scope for positive action (pp.72-75), is an attempt to meet these criticisms. However, an ambiguous statement of the purpose of the public sector duty risks interpretative confusion and gives scope for obfuscation by those who seek to play on differences in meaning between different parts of the Single Act. The Lester Bill cl. 1 sets out a very

clear statement of purpose of the whole Act, and in cl. 2 a series of interpretative principles which would be of great value to public authorities, courts and others implementing the legislation.

- **Extend the public sector duty to (a) age; (b) sexual orientation; and (c) religion or belief** In principle there is no reason why there should be a hierarchy of equality in respect of the public sector duty. The special features of the public sector duty in respect of these new strands can be the subject of guidance from the CEHR.
- **Provide for positive obligations in private sector**  
The Government's approach to the private sector as set out in Chapter 6 of the DLR is profoundly mistaken. It is a further example of a hierarchy of equality, with different standards applying in the public and private sectors. It is essential to have (a) mandatory procedures which enable other interest groups to participate, and (b) a gradual escalation of incentives and penalties, with sufficiently strong sanctions at the top of the 'enforcement pyramid' to ensure compliance by even the most persistent offender (Cambridge Review, paras.3.1 -3.7). There is a significant risk that by applying a strengthened positive duty on the public sector and maintaining a purely voluntary approach in the private sector, the Single Act will encourage outsourcing of public services in order to avoid their statutory duties: see Cambridge Review's proposal for mandatory employment equity and pay equity reviews (Report, paras.3.37 to 3.39).
- **Improve equal pay legislation**  
The equal pay legislation cannot be simplified or made to work more easily in practice unless the fundamental weaknesses in that legislation are overcome. The Cambridge Review (paras.3.41-3.60) canvassed three main strategies for doing this:
  - (1) *mandatory pay equity plans* placing 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:
  - (2) *recognition of the collective nature of pay discrimination*. Instances of unequal pay rarely exist in isolation from the pay system as a whole.:see EAT (31 July 2007 in *GMB v Allen* (EOR No.168, September 2007, and unions still face 3,000 High Court negligence claims ,EOR 168,p.4). The Cambridge Review recommended that if after a pay audit an 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 consultation with employee representatives, and that when bargaining on pay the employer and union should have due regard to the need to promote equal pay. The CAC should have power to award a pay equity plan where there is no agreement. In order to provide an incentive to employers to negotiate for equal pay we suggested that it should be possible to contract-out of the individual's right to equal pay by collective agreement or workforce agreement in respect of a defined and reasonable period so far as it is appropriate and necessary to allow the employer time to absorb the costs of implementation of an agreed pay equity plan.

*(3) extending the basis of comparison and improving the methods of assessing the relative value of jobs.(paras.3.51 to 3.65).*

## **7.Improving individual remedies**

Limit comments to two proposals in DLR-

- **Using Alternative Dispute Resolution more effectively or widely to resolve discrimination disputes**

There are three main obstacles to the use of ADR in this field: (1) the justifiable wish of some litigants to obtain a statement of principle from an independent tribunal recognising the wrong to them and promoting change in the respondent's organisation; (b) the inequality of arms in cases where the claimant is not legally represented and the respondent is a large organisation with such representation; and (c) in employment cases, each party normally bears its own costs, and there is no procedure for payments into court by way of offers of settlement. The CEHR should, in providing conciliation services also provide assistance with mediation where appropriate. Consideration should be given to introducing a payment into court procedure in the case of large claims and in such cases the CEHR should provide expert advice to unrepresented parties as to whether they should accept.

- **Concentrate expertise in the employment tribunals not county/sheriff courts.**

The DLR (para.7.23) rejects the arguments we made in the Cambridge Review (paras. 4.13 to 4.17) for all discrimination cases to be commenced in employment tribunals (renamed equality tribunals in non-employment cases), but with power to transfer the matter to a county or sheriff court. It would be an inefficient use of resources to have special training for county court judges, and it would lead to centralisation rather than local justice (which employment tribunals can offer). It is a far better use of resources to concentrate the expertise in the employment/equality tribunal

## **8.Conclusion**

The proposed Single Equality Act provides an enormous opportunity to raise the status of the principle of equality within a wider culture of human rights. The new Commission and the new Act are less likely to be seen as representing only sectional interests particularly since issues affecting white men – such as age and sexual orientation – will be included. The CEHR can speak with a strong voice on the basis of an overarching principle, and the Act can encourage effective self-regulation. But if it is to achieve this the Act which emerges from the parliamentary process will need to-

- Have clear consistent and intelligible standards
- Be concise and user-friendly
- Implement all EU and international obligations fully

- Encourage inclusive proactive approach e.g. positive duties on public authorities and also the private sector; employment equity and pay equity plans, duties to facilitate access by disabled persons
- Place primary responsibility on organisations to ensure effective self-regulation
- Encourage participation by stakeholders
- Ensure that CEHR has plays an effective back-up role of assistance, investigation, and ultimately judicial enforcement where voluntary means fail
- Make effective use of public procurement (see C.McCruden,*Buying Social Justice: Equality. Government procurement and Legal Change* ,OUP, 2007)

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