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DISCRIMINATION LAW ASSOCIATION

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BRIEFING No 152 FAMILY FRIENDLY CHANGES IN THE EMPLOYMENT RELATIONS ACT 1999

This briefing is divided into five sections:

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- ordinary maternity leave (OML)
- additional maternity leave (AML)
- Notice of intention to return during a maternity leave period (OML & AML)
- The right to return
- Redundancy during maternity leave

B. PARENTAL LEAVE (PL)

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- Entitlement to 13 weeks' leave for each child
- When parental leave may be taken
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D. TIME OFF FOR DEPENDANTS

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E. PART TIME WORKING

A. New Maternity Rights

Maternity rights, often called complex beyond the 'worst excesses of a taxing statute' have been simplified by the Employment Relations Act 1999. Many, though not all, important rights have been extended, and ambiguous rights clarified. This article summarises the main changes to maternity rights as well as the new provisions on parental and dependants' leave.

A.1. Ordinary maternity leave (OML)

a) OML will be 18 weeks (increased from 14); it will be extended if the compulsory maternity leave period has not expired or there is a statutory provision preventing the woman from working;

b) The notice provisions have been simplified: at least 21 days before the start of her maternity leave (or if not reasonably practicable, as soon as is reasonably practicable) the woman must notify her employer of:

- her pregnancy;
- expected week of childbirth (EWC), and
- the date on which she intends to start her maternity leave (provided it is not early than the beginning of the 11th week before EWC); this must be in writing if requested by her employer.
- In addition, if requested by the employer, she must show the employer a medical certificate stating the EWC.

Where the woman is absent wholly or partly because of pregnancy (including childbirth) from the 6th week before the EWC, her maternity leave will begin immediately. She must inform her employer that her absence is pregnancy related or that she has given birth. The employer may ask for this notice to be in writing.

c) During ordinary maternity leave a woman is entitled to the benefit of her terms and conditions of employment, except remuneration, now defined as wages or salary.

A.2. Additional maternity leave (AML) - the 29 weeks

Entitlement depends on satisfying the conditions for OML and one year's employment at 11th week before EWC (not 2 years as previously).

A.3. Notice of intention to return during a maternity leave period (OML & AML)

The assumption is that ordinary maternity leave will last 18 weeks and additional maternity leave, the 29-week period. If a woman wants to return earlier (in relation to either), she must give a minimum of 21 days' notice. If she fails to give the notice, the employer can postpone her return until the end of her leave or so that he has 21 days' notice and is under no obligation to pay her.

Previously, only 7 days notice of an early return from ordinary maternity leave had to be given and a woman had to give 21 days' notice of return from additional maternity leave. Neither employer nor employee has a right to postpone the employee's return.

An employer may (not earlier than 21 days before the end of her OML period) ask a woman to notify it in writing of: a) the date of childbirth; and b) whether she intends to return to work at the end of her AML period. This must be in writing & accompanied by a statement explaining how the employee determines the end of AML and warning of the consequences of failure to comply. She must reply within 21 days and failure to do so will deprive her of protection from being subjected to a detriment or dismissal as a result of taking AML.

A.4. The right to return
This is similar to the previous situation. A woman returning from OML is entitled to return to the same job.

A woman returning after AML is entitled to return to the same job. However, if this is not reasonably practicable, she is entitled to return to another job that is both suitable for her and appropriate for her to do in the circumstances.

A.5. Redundancy during maternity leave
If a woman is made redundant during ordinary or additional maternity leave, where there is a suitable available vacancy, she is entitled to be offered it (with her employer or his successor or an associated employer), under a new contract which is such that:

- the work is suitable in relation to her and appropriate for her in the circumstances;
- its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable.

B. Parental leave (PL)

B.1. Who is entitled to parental leave?
- An employee who has been continuously employed for one year with the same employer who
- has, or expects to have, responsibility for a child, i.e.
    i. mother
    ii. person who has parental responsibility under the Children Act or has acquired it;
    iii. father who is registered as the child's father on birth certificate;
    iv. adopted parent.
- Where the child was born or adopted after 15th December 1999.

B.2. Entitlement to 13 weeks' leave for each child
Where an employee works the same hours each week, a week's leave will be the equivalent to these hours. Thus, if an employee works 16 hours per week, a week's parental leave will be 16 hours.

Where an employee's hours vary each week, or /she works some weeks but not others, these hours will be calculated by averaging them out over 52 weeks.

Where an employee takes leave of less than a week - calculated as above - s/he completes a weeks' leave when s/he has taken the period which is equivalent to a week's leave (calculated as above). Thus, if a full time employee takes 2 days one week and 3 days the next, this will be the equivalent of a week's leave. If she works 2 ½ days, a week's leave will be one day and 1½ days

B.3. When parental leave may be taken

- up to the date of the child's 5th birthday;
- where the child is entitled to a disability living allowance, up to the child's 18th birthday;
- where a child has been adopted, up to the 5th anniversary of the placement or the child's 18th birthday, whichever is earlier;
- where the employer has postponed the parental leave, after the end of the period to which the leave was postponed (see below).

B.4. Default provisions in schedule 2

These cover evidence and notice requirements, length of leave taken at any one time and postponement and apply where either: (a) there are no parental leave provisions in the employee's contract of employment, or (b) the contract does not incorporate or operate by reference to a collective agreement or workforce agreement dealing with parental leave.

NB: where there are such provisions in the employee's contract, these may be either more or less favourable than the default provisions.

B.5 Conditions of entitlement

a) the employee must, if required, provide evidence of entitlement, i.e.

- of the employee's responsibility or expected responsibility
- child's date of birth or placement date if adopted
- child's date of birth or placement date if adopted
- child's entitlement to disability living allowance

b) the employee must give notice:

- 21 days notice of the beginning and end date of leave; or
- in relation to the father, where the leave is to begin on the day of the birth, 21 days notice of the EWC and duration of leave;
- where the child is adopted and the leave is to be begin on the date of the placement, 21 days notice of the date of placement must be given (or if not reasonably practicable, as soon as is reasonably practicable).

B.6 Amount of leave that can be taken at any one time

Only a week's leave (or multiple of a week) can be taken at any one time. This is calculated as in (2) above. This does not apply to a child in receipt of disability living allowance.

An employee may not take more than 4 weeks' leave in respect of any individual child during a particular year.

B.7 Postponement of leave
An employer may postpone parental leave where the employer considers the operation of his business would be unduly disrupted if the employee took leave during the period identified in his notice. It cannot be postponed where the leave is to be taken at the time of birth or adoption.

The employer must then allow the employee to take a period of leave of the same duration beginning on a date determined by the employer, after consulting the employee, which is no later than 6 months after the commencement of that period.

Not less than 7 days after the employee's notice to the employer, the employer must give the employee notice in writing of the postponement, stating the reason and specifying the dates of parental leave the employer has agreed can be taken.

C. Provisions applicable in relation to more than one kind of absence

C.1. Rights during AML and parental leave
a. The employee is entitled to the implied obligation of trust and confidence and any terms and conditions relating to:

- notice of termination;
- compensation in the event of redundancy;
- disciplinary or grievance procedures.

b. The employee is bound by her/his implied obligation to the employer of good faith and any terms and conditions of her employment relating to:

- notice of termination by her;
- disclosure of confidential information;
- acceptance of gifts or other benefits;
- the employee's participation in any other business.

C.2. Right to return after additional maternity leave or parental leave
These apply, apart from a redundancy situation (see above for provisions relating to redundancy during OML or AML) to rights to return to work.

a. an employee who takes parental leave of 4 weeks or less (other than immediately after taking AML), is entitled to return to the job in which she was employed before her absence;
b. An employee who takes AML or parental leave for more than 4 weeks, or takes parental leave of less than 4 weeks, but it is immediately after AML, is entitled to return from leave to the job in which she was employed before her absence, or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.

The right to return, under (a) or (b) is:

- on not less favourable terms and conditions as to remuneration (compared to those at the commencement of either OML or PL);
- with her seniority, pension rights and similar rights as they would have been if the periods prior to AMP or PL were continuous with

her employment following her return to work (subject to the requirements of equal treatment in relation to pensions under the Social Security Act 1989;
- otherwise on terms and conditions not less favourable had she not been absent from work after the end of OML or during PL.

C.3. Protection from detriment

An employee is entitled not to be subjected to any detriment by any act, or any deliberate failure to act (not being a dismissal which is dealt with elsewhere), by her employer for the following reasons:

- She is pregnant
- She has given birth (where the act or omission took place during OML or AML)
- Any health and safety requirement under s66(2) of 1996 Act
- She took or sought to take OML or the benefits during OML
- She took or sought to take: i. AMP, ii. PL, iii. Time off under s57A
- She declined to sign a workforce agreement
- As a representative of the workforce or candidate in an election she performed any functions as a representative or candidate.

C.4. Unfair dismissal

An employee can claim automatically unfair dismissal where the reason or principal reason for dismissal is one of the following:

(1) The reasons connected with:

- the pregnancy of the employee;
- the fact that the employee has given birth to a child, where the dismissal ends the employee's OML or AML;
- the application of a requirement or recommendation under the health and safety provisions of s66(2);
- the fact that she took, sought to take or availed herself of the benefits of OML;
- the fact that she took or sought to take:
    i. AML
    ii. PL
    iii. Time off under 57A of the 1996 Act
- the fact that she declined to sign a workforce agreement
- the fact that she performed any functions or activities as a representative of members of the workforce or was a candidate for election.

(2) The employee is redundant and has not been offered suitable alternative employment (see above) where the dismissal ends the employee's ordinary or additional maternity leave period

This protection (in (1) and (2)) above do not apply if either:

- immediately before the end of her AML the number of employees did not exceed 5 and it was not practicable for the employer to permit her to return to a job which is suitable and appropriate for her to do in the circumstances and

- it is not reasonably practicable for a reason other than redundancy for the employer to permit her to return to a job which is both suitable for her and appropriate and an associated employer offers her a job and she accepts or unreasonably refuses that offer, or

  a. it is not reasonably practicable for a reason other than redundancy for the employer to permit her to return to a suitable, appropriate job,
  b. an associated employer offers her a job of that kind, and
  c. she accepts or unreasonably refuses that offer

It will be an ordinary unfair dismissal if the employee is made redundant and other employees in positions similarly to the employee have not been made redundant and the reason for the redundancy is one of those set out above, (1).

C.5. Contractual rights to maternity or parental leave
Where an employee is entitled statutory rights to OML, AML or PL, as well as contractual rights, she cannot exercise the statutory and contractual rights separately. She may, in taking the leave for which the two rights provide, take advantage of whichever right is, in any particular aspect, the most favourable.

The 1996 Act and the Regulations relating to the statutory right apply subject to any modifications necessary to give effect to any more favourable contractual terms, to the exercise of the composite rights as they apply to the exercise of the statutory right.

D. Time off for dependants

D.1. What events are covered? s57A(1)

a. to provide assistance where a dependant is ill (physically or mentally), gives birth, is injured or assaulted;
b. to make arrangements for the provision of care for a dependant who
   is ill or injured;
c. to take action in the case of the death of a dependant;
d. because of the unexpected disruption or termination of arrangements
   for the care of a dependant, or
e. to deal with an incident which involves a child of the employee and which occurs unexpectedly at school. This only covers a child or adopted child

D.2. What is a dependant? s57A(3)-(6)
In all cases a dependant is a spouse, a child, a parent, a person living in the same household as the employee, otherwise than his employee, tenant, lodger or boarder.

In addition, for the purposes of 1(a) or (b) dependant also includes 'any person who reasonably relies on the employee': (i). for assistance when the person falls ill, is injured or assaulted; (ii). to make arrangements for the provision of care in the event of illness or injury.

For the purposes of 1(d) dependent includes a person who reasonably relies on the employee to make arrangements for the provision of care.

D.3. Amount of time off allowed
It is a 'reasonable amount of time during the employee's working hours in order to take action which is necessary. Account may be taken of

- who else is available to help
- amount of time off required
- closeness of relationship
- anything else relevant

D.4. Notification duties
The employee must tell his employer the reason for his absence as soon as reasonably practicable and tell the employer for how long he expects to be absent.

D.5. Complaint and remedies
Complaint must be made within 3 months from the date when the refusal occurred, or if not practicable to do so, within such further period as is reasonable.

The tribunal can:

- make a declaration that the complaint is well-founded
- award compensation which is 'just and equitable' having regard to the employer's default in refusing to allow time off; and any loss sustained by the employee.

E. Part-time work provisions of The Employment Relations Act 1999

Employment Relations Act 1999 s20 provides that codes of practice may be issued:

- eliminating discrimination in the field of employment against part-time workers;
- facilitating the development of opportunities for part-time work;
- facilitating the flexible organisation of working time taking into account the needs of workers and employers;
- any matter dealt with in the framework agreement on part-time work.

ERA s19 provides that regulations may be made to secure that part-time workers are treated no less favourably than persons in full-time employment. The Code of Practice and Regulations are due out mid December 1999, with implementation by April.

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DISCRIMINATION LAW ASSOCIATION

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BRIEFING No 153 RELIGIOUS DISCRIMINATION: The Current State of the Law - a summary - and Proposals for Reform

INTRODUCTION: THE NEED FOR REFORM

There is currently no substantive law against discrimination of grounds of religion or religious belief on mainland UK. Northern Ireland has had legislation since 1976 and The Human Rights Act 1998 (HRA) will enshrine in British law a general right to "freedom of thought, conscience and religion" from October 2000. However, the effectiveness of the HRA will be limited, and almost certainly will be of limited use when it comes to discrimination in the workplace.

Some religious groups/religions (notably Sikhs and Jews) have, through case law developments under the Race Relations Act 1976 (RRA), achieved a degree of protection from discrimination where religion and ethnic origin/ethnicity have been found to be co-terminous. Also the indirect discrimination provisions of the RRA have been used imaginatively to challenge religious discrimination against Muslims, where members of a particular racial or national group (e.g. Bangladeshis) have been disproportionately adversely affected by detriments of a religious kind. But such discrimination does not attract compensation unless it was intentional and, in any event, the act of discrimination is still defined as "racial", and not on grounds of religion.

In other areas of law (which this paper will not address, but is important to refer to) only Christianity (or in most cases specifically the Church of England) has legal protection. In the constitution the Church of England is the established Church, there is legal protection from "Blasphemy", and in education it is assumed that any "collective act of worship" or "religious education" will be from a Christian perspective, with parents of other religions having the "right" to opt-out. These special privileges amount, in effect, to less favourable treatment of other religions compared to that of Christianity/Church of England.

The current state of the law in respect of religious discrimination is therefore a mixture of confusion, irrationality, and special privileges for Christianity. In today's multi-faith society this situation is totally unsatisfactory and, understandably, draws forth criticism and, indeed anger, from those religions who are not protected by law. There is a need for urgent reform, eloquently outlined in a speech to the House of Lords by Lord Lester of Herne Hill in October of this year:

> "I personally find it strange that I should have a remedy if I am discriminated against on racial grounds but, for example, the noble Lord, Lord Haskel, should not have a remedy if he is discriminated against on religious grounds. When, as an officer in the Army, I experienced discrimination, I could never tell whether the anti-Semitism was on racial or religious grounds. Other noble Lords have referred to the complications, as did the Right Reverend Prelate the Bishop of Oxford in his important speech.
>
> " There surely has to be an effective legal remedy for the wrong of religious discrimination as well as the wrong of racial discrimination. When I hear technical objections being raised I wonder whether we ever look at the laws of other countries. Almost every other Commonwealth and continental European Country, as well as Ireland, have in their written constitution guarantees of equal protection of the law without discrimination on any grounds, including religion. It is only because we do not have such constitutional guarantees that we have the incoherent patchwork of laws that act in their place. Surely it is absurd that my rights as a British citizen should depend on whether I happen to live in Great Britain or Northern Ireland. How can it make sense that religious discrimination is forbidden in Northern Ireland and not in Great Britain? I know of no other country like that."

In order to argue effectively for reform it is, however, important to understand the current state of the law - to have an overall appreciation of where there currently is, or is not, legal protection from discrimination on religious grounds. The rest of this paper will attempt to outline the current situation, however irrational and confusing it may be.

NORTHERN IRELAND

The Northern Ireland Constitution Act of 1973 contained a broad prohibition on political and religious discrimination by public bodies. However, this limited protection remained unused. The Fair Employment (Northern Ireland) Acts of 1976 and 1989 established protection for individuals against religious and political discrimination in ***employment***. Under the Fair Employment and Treatment Order of 1999, protection was extended to discrimination in the provision of ***goods, facilities and services*** (but, note, ***not*** in education). The Fair Employment Commission (FEC) had (until this year) the statutory responsibility for enforcement of the legislation. During 1999 the FEC merged with the EOC (NI) and the CRE (NI) into a single **Equality Commission for Northern Ireland**. From next year the new Equalities Commission will also have responsibility for disability discrimination in Northern Ireland.

RELIGIOUS GROUP = RACIAL/ETHNIC GROUP?

The definition of "racial grounds" in the Race Relations Act 1976 covers "colour, race, nationality, ethnic or national origins". In defining "ethnic group" the House of Lords in *Mandla - v - Lee [1983] IRLR 209 HL* found that **Sikhs** were an ethnic group as well as a religion, because they were a distinct community by virtue of certain characteristics, two of which were essential:

- a long shared history, of which the group was conscious in distinguishing it from other groups; and,
- a cultural tradition of its own, including family and social customs and manners - often but not necessarily, associated with religious observance

In addition the House of Lords said the following characteristics could be relevant: a common geographical origin or decent from a small number of common ancestors; a common language, which did not necessarily have to be peculiar to the group; a common literature peculiar to the group; a common religion different from that of neighbouring groups; the characteristic of being a minority or being an oppressed or dominant group within a larger community.

In *Seide - v - Gillette Industries Ltd [1980] IRLR 427 EAT* it was found that being "Jewish" can mean being a member of a race or a particular ethnic group for the purposes of the RRA, as well as being a member of a particular religious faith. The EAT said in its conclusion "… what happened in the present case was not because the appellant was of the Jewish faith but because he was a member of the Jewish race or of Jewish ethnic origin", thus distinguishing between the applicants religion and his racial origins.

However, in *Tariq - v - Young and others [24773/88],* an industrial tribunal held that **Muslims** were ***not*** an ethnic group, but simply a religious group. It is likely that **Hindus** would also not be a racial group on the same reasoning. In *Dawkins - v - Department of Environment/Crown Suppliers PSA [1993] IRLR 284 CA* it was also found that **Rastafarians** were not a racial group, but a religious group.

RELIGIOUS DISCRIMINATION = INDIRECT RACIAL DISCRIMINATION?

The Race Relations Act defines "indirect discrimination" as:

> "A person discriminates against another in any circumstance relevant for the purpose of any provision if….(b) he applies to that other a requirement or condition which he applies equally or would apply equally to persons not of the same racial group as that other but:
>
> (i) 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
> (ii) 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
> (iii) which is to the detriment of that other because he cannot comply with it" **[Section 1(1)(b)]**

Over the years a number of tribunals have found conditions or requirement which adversely effect a particular religious group (and that religious group is also made up of a particular racial group) constitutes ***unlawful indirect discrimination***. However, as is well known, proving a case of indirect

discrimination in such circumstances can be a tortuous and difficult process. In addition, even if the case is successful, there is ***at present*** (this may change in the near future) no compensation awarded, unless the condition or requirement was intentionally imposed with the knowledge that it would have a discriminatory effect.

In *J.H. Walker - v - Hussain and others [1996] IRLR 12 EAT* a clothing company forbade all its employees to take holidays during May-June. This requirement was found to be indirect racial discrimination, in that it precluded a substantial minority of Asian employees (who were also Muslim) from celebrating Eid, compared with non-Asians (who were not Muslim). The requirement was found to be not justifiable, when balancing the discriminatory effect with the reasonable business needs of the company - especially since the Muslim workers were prepared to work additional hours to make up any backlog. The tribunal also awarded compensation since, as the employees had protested, the company knew that its decision on holidays would have discriminatory consequences. In persisting with its policy it demonstrated that it wanted to bring about those consequences.

It should be noted, however, that if these **Muslim** employees, had been of mixed ethnic or national origins (e.g. White/British, European, Asian, and African) they would probably not have been able to invoke the indirect discrimination provisions of the RRA! The **religious discrimination** would, therefore not have been unlawful.

Other examples of where the indirect discrimination provisions of the RRA have been used include:

- *Farhath Malik - v - British Home Stores [1980],* where the Manchester Industrial Tribunal found that the stores policy was unlawful when Miss Malik was required to wear a skirt, despite her Muslim faith and Pakistani origins
- *CRE - v - Precision Manufacturing Services Ltd [1992],* where an employer asked Rotherham Job centre not to send him Muslims. This was found to be indirect racial discrimination against Asians
- *M. Yassin - v - Northwest Homecare [1993],* where Mr. Yassin was told not to attend prayers at lunchtime, even though his working day lasted up to 13 hours and he proposed to take only one hour over the visit. The tribunal found the company's position "wholly unacceptable"
- *Bi - v - J & G Mantle t/a Elderthorpe Residential Home [1998],* where the applicant was told that the wearing of a hijaab scarf was not part of a uniform requirement. The tribunal found this was indirect racial discrimination because "a lower proportion of the company's Asian workers could comply with (the condition) compared to non-Asian workers". The company were also aware of the effects of the requirement and were ordered to pay compensation of £1253 in respect of injury to feelings

THE HUMAN RIGHTS ACT 1998 (HRA)

From October 2000 the European Convention on Human Rights (ECHR) will be incorporated into British law. Article 9 provides for the Right to Freedom of Thought, Conscience and Religion. This includes the right to change one's

religion or beliefs. There is an absolute right to "hold" any thoughts, or positions of conscience and religion. This can cover a wide range of beliefs, such as pacifism. The problem comes, however, when there is the out-ward manifestation of such thoughts or beliefs. The manifestation of beliefs can be limited under Article 9(2) of the ECHR and the term "practice" does not cover all acts which are motivated or influenced by religion or belief.

There might also be circumstances in which rights protected under Article 9 conflict or overlap with rights protected under other articles of the Convention. Without going into the technicalities and legal minefield of ECHR jurisprudence, it may be simpler to say the ECHR framework is as complex and any other area of law, subject to qualifications and the balancing of rights which makes the outcome of any case difficult to predict.

Of more importance is the limitation in bringing cases only against public bodies or emanations of the state. There is little protection under the ECHR framework against the activities of private individuals or that of private employers. The effectiveness of the HRA in the employment area is likely to be limited, but these limits, through imaginative litigation, may be lessened over time

The HRA is more likely to have an impact in extending protection from religious discrimination in the arenas of local authority and central government services or statutory enforcement and the judicial system.

It should also be remembered that there is a general "anti-discrimination" provision (Article 14). This includes discrimination on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or status. However, the use of Article 14 is limited to where discrimination occurs alongside or within the ambit of another Convention right.

SUMMARY

- The following religions have also been defined as racial groups under the RRA: Sikhs and Jews. They thus have full protection from discrimination - both direct and indirect
- It some cases the indirect discrimination provisions of both the RRA and SDA may be helpful in tackling religious discrimination. However, this is often very difficult to prove and in many situations (under the RRA) will provide no compensation to the victim, unless the discrimination was intentional
- Most major religions (Islam, Christianity, Buddhism, Hinduism) are not protected against discrimination
- the only UK legislation specifically against religious discrimination applies only to Northern Ireland
- The Human Rights Act 1998 may provide additional protection against religious discrimination, but this is likely to be limited to the actions of public bodies in the exercise of their functions and will have limited impact in the area of employment rights.
- The current law against religious discrimination is therefore inconsistent, contradictory, illogical and partial

CONCLUSION - THE WAY FORWARD?

Given the situation described above, there are a number of reform proposals being discussed at this time. In general there is wide agreement on the general outcome desired - full legal protection against religious discrimination in the whole of the UK. Where disagreements exist, or alternative models are suggested, the differences are essentially tactical, rather than substantive. The following represent some of these options:

- **Extend of the law on religious and political discrimination from Northern Ireland to the whole of the UK**. This has the advantage of simplicity, in that the law has already been operating in a part of the UK for sometime. It also has the advantage of ensuring consistency over the whole of the UK. The disadvantages are that the opportunity may be lost to get better and stronger legislative protection than that which exist in Northern Ireland and there are also likely to be few parliamentary opportunities to "make it happen"
- **Add "religious discrimination" to the provisions of the Race Relations Act.** This has the advantage of simplicity, but has the disadvantage that the Commission for Racial Equality would have to widen its brief, with almost certainly only the same resources. The proposed reforms to the Race Relations Act, announced recently in the Queen's speech, may, provide opportunities to lobby/campaign to widen protection against religious discrimination earlier than other proposals.
- **A new Religious Discrimination Act**, with the possibility of a separate commission to deal with religious discrimination. This presents the same problem as extending the Northern Ireland legislation (in terms of opportunity to make it happen), but has the advantage of being clear and to the point in its purpose.

Whatever happens eventually, it is clear that nothing will happen without considerable campaigning over the short to long term. It is therefore important that we "keep our eyes on the prize" (i.e. effective protection against religious discrimination) with the maximum unity amongst all those who are prepared to work for such an aim.

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SOURCES:

The Future of Equalities Legislation - an Agenda for Reform. DLA AGM & Conference 1999 (especially the paper by Dianna Luping (Liberty) on "Religious and Political Discrimination")

Religious Discrimination - Your Rights. Commission for Racial Equality leaflet [1997]

Religious discrimination & the Law. Ahmed Thomson, Deputy-Chairman, The Association of Muslim Lawyers [1999]

Legislation to Deter Religious Discrimination. Society of Labour Lawyers Human Rights & Discrimination Group letter to Home Secretary [1999]

Discrimination - A Guide to the Relevant Case Law on Race and Sex Discrimination and Equal Pay by Michael Rubenstein. Published by IRLR and EOR [1999]

Discrimination at work by Camilla Palmer and Gay Moon. Legal Action Group [1997]

Anti-Discrimination Law in Britain by Colin Bourn and John Whitmore. Sweet & Maxwell [1996

DISCRIMINATION LAW ASSOCIATION

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BRIEFING No 154 DDA UPDATE – JANUARY 2000

The following cases are a selection of recent key DDA decisions which go some way to show the approach being taken by Employment Tribunals and Employment Appeal Tribunals when enforcing the Act. The cases of *Greenwood v British Airways, Kapadia v London Borough of Lambeth* and *Vicary v British Telecommunications plc* provide further examples of how the definition of who is a disabled person is being decided. *MHC Consulting Services Ltd v Tansell* , although rather complex on the facts, is an interesting case about a disabled person providing work through a chain of contracts. The issue in question was which organisation in the chain was the 'principal'. The EAT made a very helpful statement in it's judgement which was that Tribunals deciding DDA cases must construe the Act purposively to offer, rather than limit, statutory protection. However this case is going to the Court of Appeal.

GREENWOOD V BRITISH AIRWAYS

Mr Greenwood the applicant [A] had been employed by British Airways the respondent [R] since 1989. He had nervous tension which caused him to take a fair amount of time off work from 1993 onwards. In early 1997 he was reviewed by R's doctor who agreed with A's GP that he should take 2 weeks off work for counselling and medication. Following this treatment A's condition improved and in May 1997 he applied for promotion. He was turned down for promotion and told that his sickness was one of the reasons he had not been successful. A went sick from work with depression in August 1997 and remained off work until his Employment Tribunal in March 1998.

The Tribunal decided that A was not a disabled person at the material time. Although his impairment was a clinically well recognised condition it had ceased to have a substantial adverse effect on his ability to carry out day to day activities at the date of the alleged discrimination, ie in June 1997 after his successful treatment. They considered whether his was a condition that was likely to recur, because if it was it would fall within the DDA definition, but decided that it would not. They stated that when deciding whether a condition is likely to recur it 'must be looked at in the light of the circumstances prevailing at the date of the act complained of and not in the light of subsequent events.

A appealed the Tribunal decision and the EAT allowed his appeal. They found that the Tribunal was wrong to decide that events which happen after the date of discrimination were irrelevant in determining whether A had a

disability. The Tribunal should have taken into account A's medical condition up to and including the date of the Tribunal hearing
Baynton v Saurus General Engineers Ltd

Mr Baynton the applicant [A] was a forklift truck driver for Saurus the respondent [R]. His job involved driving the forklift and pressing pipe connections. In February 1997 he injured his left thumb at work which left him 15% disabled in his left hand and unable to do the pipe pressing element of his job. He was off work because of the injury from February 1997 to January 1998 when he got a letter from R dismissing him due to long term sickness. When he received the letter A was waiting for an appointment with his consultant to assess whether he was fit to return to his job.

A's claim to the Employment Tribunal was dismissed because A had not shown that he was treated less favourably for a reason relating to his disability than others to whom the reason did not apply. The Tribunal used the comparator of someone who had been off work long term sick but not disabled. The Tribunal also decided that, in any event, A could no longer do his work and there was no alternative work available for him so therefore R was justified in treating him less favourably.

The EAT reversed the Tribunal's decision about the correct comparator following the Court of Appeal decision in *Clark v Novacold*. The correct comparator was someone to whom the reason for less favourable treatment, ie disability, did not apply. The EAT went on to say that the Tribunal erred in finding that R's less favourable treatment was justified because they, the Tribunal, had not employed the proper balancing exercise when deciding whether the reason for justification was material and substantial. The Tribunal should have balanced the interests of R and A at this stage. It had not, in particular it had not taken into account R's failure to warn A that he risked being dismissed or R's failure to enquire about A's medical condition [which would have led R to realise that A was shortly to be assessed by his consultant about returning to work].

MHC CONSULTING SERVICES LTD V TANSELL

Mr Tansell was a disabled man who offered computer services through a company called Intelligents Ltd. He was the sole shareholder, and one of foUr directors, of this company. Tansell placed his name with various agencies which specialised in finding jobs for computer personnel. One of these agencies was MHC. MHC then contracted with Abbey Life to supply them with computer personnel and Tansell was interviewed by Abbey Life. Following the interview MHC and Intelligents Ltd entered into a contract to supply Tansell's services to Abbey Life. Tansell was thus under the control of Abbey Life. Tansell brought a claim to the Employment Tribunal because Abbey Life later rejected his services for a reason relating to his disability. He alleged discrimination by Abbey Life and/or MHC because although it was Abbey Life who rejected his services it was MHC who withdrew him from the site.

The Employment Tribunal at a preliminary hearing had to consider whether Tansell was a contract worker and whether MHC and/or Abbey Life were principals within the DDA definitions. They found that Tansell was a contract

worker but that only MHC was a principal and not Abbey Life because there was no direct contractual relationship between Abbey Life and Tansell.

MHC appealed to the EAT and Tansell cross appealed that there was no claim against Abbey Life. The EAT allowed the appeal and cross appeal because the Tribunal had erred in finding that Tansell could claim against MHC but not Abbey Life who were the 'end user'. Abbey Life was the principal because where there is an 'unbroken chain' of contracts between an individual and an end user, as there was in this case, the end user is the principal. Abbey Life were clearly in control of the arrangements in this case and therefore should be the body complained of because MHC would merely have been following Abbey Life's instructions when removing Tansell from site. The EAT made a very useful point in this judgement when it emphasised that when deciding DDA cases Tribunals must construe the Act purposively and aim to offer statutory protection rather than limit it.

HARVEY V PORT OF TILBURY LONDON LTD

Mr Harvey the applicant [A] was dismissed on redundancy grounds by the Port of Tilbury, the respondent [R]. He lodged an application to the Employment Tribunal for unfair dismissal. He did not include a claim for disability discrimination in his application. In the R's Notice of Appearance they revealed that A's back problems had been a deciding factor in his redundancy selection. More than three months after the Notice of Appearance was received by A he applied to amend his claim to the Employment Tribunal to include disability discrimination.

The Employment Tribunal held that it was not just and equitable to allow A's claim to be amended. They treated his application to include disability discrimination in his claim as a free standing cause of action which was separate from his original unfair dismissal claim rather than adding it to the original claim as an amendment.

A appealed but the EAT upheld the Employment Tribunal's decision.

KAPADIA V LONDON BOROUGH OF LAMBETH

In this case Mr Kapadia had claimed at his Employment Tribunal that Lambeth had failed to make reasonable adjustments for him. He suffered from work related stress. The Employment Tribunal held that he was not disabled because his impairment did not have a substantial effect on his ability to carry out normal day to day activities.

The EAT held that reactive depression, work related stress, can sometimes be covered by the DDA. They went on to confirm that counselling sessions with a psychologist can constitute corrective measures which should be taken into account when assessing the effects on someone's day to day activities, but for the fact that corrective measures are taken.

VICARY V BRITISH TELECOMMUNICATIONS PLC

Mrs Vicary the applicant [A] complained to an Employment Tribunal that British Telecom the respondent [R] had discriminated against her for a reason

relating to her disability. However the Employment Tribunal at a Preliminary Hearing decided that she was not a disabled person within the DDA definition. They decided that her upper arm impairment did not have a substantial adverse effect on her ability to carry out normal day to day activities. They referred to the fact that she could use both hands and 'a loss of strength should not equate to a loss of function. They went on to list some of the tasks that they accepted A could not do and stated that these were not normal day to day activities. The tasks were DIY, filing nails, tonging hair, ironing, shaking quilts, grooming animals, polishing furniture, knitting, sewing and cutting with scissors.

A appealed and the EAT allowed her appeal. The EAT found the Employment Tribunal's decision to be perverse and that it had erred in law. It had misdirected itself in respect of the Guidance on the definition of disability which was only to be used in borderline cases. The EAT held that as the Employment Tribunal had found A's ability to carry out a number of normal day to day activities was impaired, they should then have decided that her disability was substantial – there was no need to refer to the Guidance. The EAT also held that, in any event, the conclusion that the tasks listed above were not normal day to day activities was a misapplication of the Guidance because the list of Guidance examples of normal day to day activities was not exhaustive. The EAT found that the tasks listed above were normal day to day activities which most people do frequently or fairly regularly.

The EAT also made the point of stating that it was not for R's doctor to decide what normal day to day activities are nor whether someone's impairment is substantial. These were questions for Employment Tribunals to decide.

KIRKER V BRITISH SUGAR PLC

Mr Kirker was a visually impaired man who was awarded 103,000 pounds compensation by an Employment Tribunal who found that he had been unfairly selected for redundancy for disability discrimination reasons. The Employment Tribunal admitted that British Sugar may not have realised that they were discriminating on grounds of disability but the fact that they were doing so was enough for his claim to succeed.

His award for future loss of earnings was high because it reflected the fact that he would find it impossible to find alternative employment. In reaching this element of their decision the Employment Tribunal heeded a report from RNIB on the problems visually impaired people have finding and holding onto a job and the fact of Mr Kirker having applied for 45 jobs since his dismissal. Out of 45 applications only one led to an interview at which he could not properly compete with other candidates because the interview involved a test reading a script.

British Sugar appealed on the grounds that the Employment Tribunal had used the wrong comparator when assessing less favourable treatment. Their appeal was dismissed because the DDA does not require a like for like comparison.

DISCRIMINATION LAW ASSOCIATION

January 2000

BRIEFING No 155 **DISCRIMINATION LAWS COVER SELECTION OF CANDIDATES BY POLITICAL PARTIES *Sawyer (on behalf of the Labour Party) - v - Ahsan [1999] IRLR 609***

This was an appeal against a decision by the Birmingham ET that a Labour Party Councillor who had been deselected was entitled to complain of unlawful race discrimination contrary to section 12 of the RRA. The case is important not just because the EAT rejected the appeal but for two other reasons. Firstly, because the EAT approved the decision of the Leeds IT in *Jepson and Dyas v. Labour Party [1996] IRLR 116* in which the Labour Party's women only short lists for the selection of MPs were held to be unlawful.

Secondly, because it gives a well reasoned interpretation of section 12 of the RRA and questions whether the earlier decision of a different division of the EAT in the case of *Arthur v. Attorney General (1 March 1999)* was correctly decided.

FACTS

Mr. Ahsan was a long time member of the Labour Party. He had been a Councillor since 1991 and sought reselection in 1997. He was not reselected but a white man who had not previously been a Councillor by a decision of the West Midlands Executive Committee. He complained of unlawful race discrimination. The Labour Party applied to have the case dismissed on the basis that it was not within the RRA.

Mr. Ahsan, relying on the decision of the IT in Jepson and Dyas v. Labour Party, argued that section 12 of the RRA applied. This section makes it unlawful for a body, which can confer an authorisation, or qualification, which is needed for or facilitates engagement in a particular profession or trade. to discriminate. There is an extended definition of authorisation or qualification to include recognition, registration, enrolment, approval, and certification and confer is defined to include renew or extend.

The IT refused to strike out the claim and the Labour Party appealed. The EAT dismissed the appeal. They concluded that the approval of the Labour Party as an official candidate was within section 12 of the Race relations Act 1976.

Interestingly after consideration of the relevant provisions of the European Convention on Human Rights and the International Convention on the Elimination of all forms of Racial Discrimination they said:

> '…we should…approach the construction of the detailed domestic legislation with a disposition, not only, if we encounter ambiguity, that it should if possible, be resolved in a way that conduces…to the actionability, censure, penalisation or avoidance of racial discrimination, but also that we should not 'be too readily receptive to any argument that there is no ambiguity if that leads to 'something which is humiliatingly discriminatory in racial matters' falling outside the Act…'

Although leave to appeal was granted the Labour Party have decided not to take it any further. This means that the full case will be heard sometime in the summer.

Robin Allen QC
Barrister

DISCRIMINATION LAW ASSOCIATION

January 2000

BRIEFING No 156 **UNREASONABLE REQUEST TO WORK SHIFTS AND SUBSEQUENT DISMISSAL WAS INDIRECT SEX DISCRIMINATION AND UNFAIR DISMISSAL**
Annette Cowley v South African Airways (1999), ET Reading (unreported)

THE FACTS

Annette Cowley had worked for the respondents for 10 years. Her normal working hours were 37.5 hours per week but she "may be required to work overtime". Prior to taking maternity leave she had always worked any overtime that was requested. After taking maternity leave she found that a new rota was in place which required her to work more overtime. She found these requirements difficult to meet particularly when she was asked to work double shifts of 16 hours at a time, which meant that she was unable to care for her baby properly. She raised a grievance and had a meeting with her manager at which she felt that no progress had been made. She then wrote to her manager saying that she could not cover the shortfall in the rota when her colleagues were on leave or attending courses. She also said that she would not work the double shift on the weekend of June 20th and 21st 1998 although she was prepared to work a full shift on Saturday with overtime together with her shift on Sunday. She was called to a disciplinary meeting and dismissed. She applied to the ET claiming that she had been unlawfully discriminated against as well as unfairly dismissed for a health and safety reasons, since she had concerns about the dangers of driving across the runways at Heathrow in a state of extreme tiredness.

EMPLOYMENT TRIBUNAL DECISION

The ET concluded that her dismissal was unconnected with health and safety but wholly as a result of her refusal to work the double shift on June 20th to 21st. Annette Cowley had done her best to meet her employers unreasonable demands and their decision to dismiss her was unreasonable. There would be far fewer women with young children than men who would be able to comply with the requirement to work a double shift. As a result the shift requirements constituted indirect discrimination. She had been unfairly dismissed because the long hours discriminated against her on grounds of her sex. The ET ordered the employers to pay her 3 years pay, a total award of £50,000.

COMMENT

The ET rightly recognised that the employers were making an unreasonable request that was likely to particularly disadvantage women with family commitments. *DLA Briefing no.152*, part E, points out that the Employment Relations Act 1999 s20 provides for Codes of Practice to be issued to "facilitate the flexible organisation of working time". This new Code of Practice, that we a still waiting for, will help to make it clear to employers that unrealistic demands that adversely affect women will not be acceptable and is likely to make them liable for large awards of damages.

Gay Moon
Solicitor

DISCRIMINATION LAW ASSOCIATION

January 2000

BRIEFING No 157 **EMPLOYER IGNORING RACIAL ORIGINS OF ATTACK IS GUILTY OF RACIAL DISCRIMINATION**
Sidhu - v - Aerospace Composite Technology Ltd [1999] IRLR 683.

FACTS

The applicant, an Asian man, was involved in a fracas at a works outing with a new employee, a white man. Mr Sidhu was racial harassed, injured and his glasses broken. The new employee, Mr Smith, was the main aggressor, but Mr Sidhu picked up a chair in self defence. As a result both employees were suspended. At a subsequent disciplinary hearing it was found that both of them had been guilty of violent behaviour towards a fellow employee and both were dismissed. The racial origins of the assault were ignored.

EMPLOYMENT TRIBUNAL DECISION

The ET decided that the incident had occurred 'outside the scope of the appellant's employment' and hence the employers were not liable for racial discrimination. They did however conclude that the dismissal was unfair but not racially discriminatory. The Appellant appealed.

EAT DECISION

The EAT held that the ET had used the wrong test, the correct test was that laid down in *Jones - v - Tower Boot Co Ltd (CA: [1997] IRLR 168* namely whether the incident had occurred 'in the course of his employment'. The case would be remitted to a different tribunal.

They also held that the ET had been wrong to conclude that the employers had not discriminated by taking a deliberate decision to exclude any consideration of the racial origins of the assault. Behaviour that is 'race specific' is less favourable treatment on racial grounds and hence is contrary to section 1(1)(a) without any need for any comparison. The decision to disregard the fact that the cause of an attack is racial is a 'race specific' decision which has a 'race specific' effect and so is 'race specific' conduct. In this case the employers decision to ignore the racial element was itself racial discrimination and there was no need to show that someone else of a different racial origin would have been treated differently. An ET properly directing itself would have concluded that the employer's decision to exclude the racial element of the attack from their consideration was itself racially discriminatory. The case would be sent to another ET to determine compensation.

Gay Moon
Solicitor

DISCRIMINATION LAW ASSOCIATION

January 2000

BRIEFING No 158 PROBLEMS WITH GETTING AN ET ADJOURNMENT; WOOLF REFORMS & DISCRIMINATION CASES *T. Yearwood - v - Royal Mail & others; EAT/843/97 (unreported)*

INTRODUCTION: WOOLF REFORMS

DLA is increasingly receiving *ad hoc* reports that the new "Woolf" reforms (to speed up court proceedings) are having a detrimental effect on the investigation of discrimination cases and creating difficulties for applicants in responding to tribunal orders, meeting tribunal set deadlines, listing problems etc. We are also receiving reports that it is becoming very difficult to get adjournment of hearings, on behalf of applicants, when they seek late advice from advice agencies or there are other difficulties in representing when tribunal hearing dates have already been fixed.

We would welcome comments from DLA members on these issues as a matter of some urgency. Documented difficulties (quoting case reference numbers etc.) would be helpful. If there is evidence of such difficulties, DLA would be willing to make representations to the Lord Chancellor and/or the President of Employment Tribunals.

PROBLEMS WITH ADJOURNMENTS

Independent, small, advice agencies and/or small solicitors' firms may find an unreported EAT decision from 1997 of use in arguing for tribunal adjournments when their advice and assistance is sought from a previously unrepresented applicant, or in circumstances when it is difficult or impossible to represent on particular dates.

In *Yearwood - v - Royal Mail and others, EAT/843/97 (Unreported)*, Wellingborough District Racial Equality Council found itself representing two different applicants at two hearings on the same date. The first tribunal date had been agreed at a part heard case. Prior to this date being agreed the REC had notified the second tribunal (via a listing stencil) that they were "free", but no hearing had been fixed. The REC promptly wrote to the second tribunal seeking an adjournment on the grounds that they now had a listed (part heard) case on that date at another tribunal. They also argued that they did not have the resources, or the time, to find alternative representation for Mr. Yearwood.

The second tribunal refused the application, on the grounds that the date had been previously notified as available (via the listing stencil) and, in any event, an alternative representative can and should be found. The REC then applied to the other tribunal to seek an adjournment of the part heard case, but this was also refused because the tribunal argued that a part heard case should take priority. The REC appealed the decision of the first tribunal to EAT and

asked for a quick decision, since the problem was fast approaching. The EAT hearing was held within days of the request on the basis of written representations alone.

THE EAT DECISION

Whilst Mr Justice Morison (P) expressed some sympathy for the tribunal Chairman ("Justice delayed is, as we know, justice denied, and we can understand the learned Chairman taking the attitude he did…") he nevertheless had a number of interesting things to say about how a tribunal should approach this issue, particularly in the context of a small, voluntary organisation with limited resources:

"…That organisation (the REC) is a charity and is not in receipt of substantial funds. They provide legal assistance in race discrimination cases in their area…

"Had the organisation to which I referred been a professional firm of Solicitors, there could be no doubt but that it would have been the right decision to have refused an adjournment and to require Mr. Yearwood to obtain alternative legal services, or possibly the services of a different partner within the firm. ***But organisations such as the one in question do, in our experience, provide useful assistance to the community which they serve, and we are mindful of the difficulties which listing problems can genuinely cause them***. They have, in our judgement, acted properly and promptly in this matter…

"There is no particular prejudice which the Respondents are able to identify if the appeal were to be allowed…

"Notwithstanding some difficulty, we have arrived at the conclusion that the interests of justice require this case to be adjourned. If it is not, Mr. Yearwood would have to appear…without representation to ask for an adjournment; we imagine that in those circumstances, the Tribunal would be likely to accede to his request. If that were to happen, then the inconvenience to the witnesses would be much greater than if we were to accede to his request. ***If, on the other hand, he turned up unrepresented, and an application for an adjournment was refused, we can well understand how he might well feel at a disadvantage in proceeding with complaints of unlawful discrimination, which are serious complaints to make and to have tried. It seems to us, in general, that it is important that this type of case in particular should be heard after parties have had a fair opportunity to prepare for the hearing before the industrial tribunal***." (emphasis added)

Paul Crofts
Director, Wellingborough District Racial Equality Council

DISCRIMINATION LAW ASSOCIATION

January 2000

BRIEFING No 159 **TRIBUNAL CAN TAKE INTO ACCOUNT TIME IN FULL TIME EDUCATION WHEN ASSESSING COMPENSATION FOR DISCRIMINATION *Farida Khanum - v - I B C Vehicles Ltd, September 16th 1999, EAT case no 685/98.***

THE FACTS

Farida Khanum is a Muslim Bangladeshi who was employed by the Respondents as a robotics apprentice technician from January 1993 until December 1996 when she was dismissed. She claimed that she had been dismissed because of her race, sex and religion. The ET concluded that she had been the subject of race and sex discrimination in *particular for her wearing of hijaab* on the employer's premises, but she had no remedy for religious discrimination.

Shortly before her dismissal she was diagnosed as suffering from depression. Immediately after her dismissal she made a number of job applications but there was evidence that she was being black listed, in one case she was offered a job at interview but then heard nothing more from the potential employers. The ET accepted that there was no evidence of suitable posts for her between the date of her dismissal and October 5th 1997 and that it was reasonable for her not to have accepted work at any General Motors company. The ET found that she realised that she would find it difficult to get employment without a degree, so on October 5th 1997 she started a Computer Systems Engineering degree. She had expressed an interest in doing a degree prior to her dismissal.

EMPLOYMENT TRIBUNAL DECISION

The ET concluded that the decision to go to university was a sensible decision for her to make in the circumstances, however, in relation to her award of damages, it broke the chain of causation. She was only entitled to damages for loss of earnings up until the date that she started the course because: - "she has chosen to take herself out of the job market for a period of some two years".

Despite their finding that: - "she had in reality little choice but to take up a degree course which would given her a qualification more readily accepted by employers than the apprenticeship which she had served with IBC. It is clear that Ms Khanum had been ambitious to succeed in IBC: her dismissal wholly frustrated her ambitions."
The ET also awarded her £6,000 damages for injury to feelings and £2,000 aggravated damages.

Ms Khanum appealed against the limit to the compensatory award of damages to the period prior to her going to university and against the award for injury to feelings as being unreasonably low given the factual findings of the ET.

EAT decision

The decision to limit the compensatory award to the period prior to her starting the university course was wrong, clearly ***but for*** the dismissal she would not have started a full time degree. On the facts it was also open to the ET to find that ***the decision to enter full time education was a direct result of the dismissal***. The EAT remitted the case back to the ET with the express instruction that ***losses incurred after starting the course could be taken into account*****.**

So far as the award of damages for injury to feelings was concerned whilst they accepted that the award was on the low side for a case of this gravity, they did not consider that it amounted to an error in law. They stated that it is very rare for the EAT to overturn an award on the quantum of damages.

Gay Moon
Solicitor

DISCRIMINATION LAW ASSOCIATION

January 2000

BRIEFING No 160 RACE RELATIONS (AMENDMENT) BILL

INTRODUCTION

The Race Relations (Amendment) Bill is the Government's promised legislative response to the Stephen Lawrence Inquiry Report. It is also the first major Bill* in the field of race relations since 1976. It follows three reviews of the Race Relations Act by the Commission for Racial Equality, the latest, in 1998, recommending some 50 changes to make the Act stronger and more effective. It also follows the Report of the Stephen Lawrence Inquiry and the Government' positive response. It is therefore not surprising that high expectations awaited the Bill's publication. While the Bill does propose an important extension of the Race Relations Act, the concern of the Commission for Racial Equality is that both in its scope and in its detail the Bill has not met those expectations.

The Stephen Lawrence Inquiry Report recommended that the 'full force of the Race Relations legislation should apply to all police officers'. As the Government states, the Bill goes beyond this recommendation in that it applies the Act to all public authorities and not merely the police, the Bill does not apply the 'full force' of the Act to the police or any public authority in that it specifically omits indirect discrimination, which the Race Relations Act applies to discrimination in all other areas.

Had the Bill included indirect discrimination this would still have left the Race Relations Act in need of major reform. The CRE's main regret is that the Government has not built on the momentum for change created by the Stephen Lawrence Inquiry to introduce a bill now that could provide a truly effective legal framework to combat discrimination and achieve racial equality. That major reform of the Race Relations Act is what is now required was the clear message from a conference on the day of the Queen's speech attended by some 200 people from organisations from, or working with, ethnic minority communities.

SUMMARY OF THE BILL AND ITS IMPLICATIONS

The main object of the Bill is to extend the Race Relations Act 1976 (the Act) so that it will be unlawful for any public authority to discriminate on racial grounds in the carrying out of any of its functions. The CRE has been pressing for such an amendment for many years.

To appreciate the changes which the Bill proposes it is necessary to look at the Bill alongside the existing law. All public bodies, including the police, are already subject to the Race Relations Act in relation to the employment of their staff and in the way they provide goods, facilities or services. The Bill

leaves unchanged these existing provisions, which prohibit both direct and indirect discrimination.

There are certain functions of public authorities which have not been covered by the Act. These include the law enforcement or regulatory functions of Government departments, the police, local authorities and specialist agencies. In the exercise of these functions these bodies have powers that go well beyond the provision of services, as they are able directly to interfere with individuals' liberty, privacy, property etc. The Stephen Lawrence Inquiry recognised that where, as a result of institutional racism or otherwise, such powers are used in a racially discriminatory manner the outcomes can be particularly damaging.

The fact that under this Bill all functions of public authorities are to come, at least partially, within the regime of the Race Relations Act is to be welcomed, as is the provision that will make chief officers of police vicariously liable for discriminatory acts of their officers.

THE MAIN CONCERNS OF THE CRE

The CRE's three main concerns are: a) the omission of indirect discrimination, b) several exceptions are too wide, and c) the absence of a positive statutory duty

a) Omission of indirect discrimination

In bringing all functions of public authorities within the scope of the Act, the Bill distinguishes the activities that will be subject to the Act for the first time and specified that for those activities the Bill outlaws only direct discrimination and victimisation. Indirect discrimination is excluded (Clause 1, new section 19B(2))

Direct discrimination *means less favourable treatment of the person concerned on racial grounds. In practice, either the racial grounds must be obvious, for example racial harassment, or there must be evidence that a person of a different racial group in similar circumstances would not have received the same treatment.*

Indirect discrimination *is concerned with the imposition of a condition or requirement - not necessarily formally adopted, but operating within an organisation - that is not in itself discriminatory, but in its application it operates to the disadvantage of particular racial groups where members of that group are proportionately less able to comply with the condition or requirement. Indirect discrimination is unlawful if it cannot be justified on non-racial grounds.*
Indirect discrimination can arise in the context of school admissions: If a school that was consistently over-subscribed re-drew its catchment area to exclude housing estates very near the school that were known to have the highest concentration of black and Asian families that could constitute indirect discrimination (the condition being that to gain admission you must not live on one of those estates) and it is unlikely that the school would be able to justify this policy on non-racial grounds. On the other hand, a policy that gave preference to pupils with a brother or sister at the school might also be indirectly discriminatory, but this policy can be justifiable on educational grounds.

In the context of policing, which the Bill will bring fully within the scope of the Act, to

target police stop and search operations in neighbourhoods where there is a disproportionately high black and Asian population could be indirectly discriminatory. If this targeting was in response to a recent major spate of thefts in that neighbourhood it is likely that it could be justified on 'good policing' grounds. On the other hand, if this practice was followed by police officers as an unofficial operational rule based on shared attitudes and stereotypes, then it is unlikely to be justifiable on non-racial grounds.

The 1976 Act introduced two important concepts into racial discrimination law: indirect discrimination and formal investigation by the CRE. As stated in the 1975 White Paper (paragraph 35)

> "…it is insufficient for the law to deal only with overt discrimination. It should also prohibit practices which are fair in a formal sense but discriminatory in their operation and effect

By omitting to outlaw indirect discrimination in critical functions of public authorities the Bill seriously inhibits the ability to challenge institutional racism. For individuals who consider they have been discriminated against on racial grounds the proposal that indirect discrimination will not be unlawful in relation to certain functions of public authorities will make it more difficult and complicated to bring a case, with the result that discriminatory practices are more likely to go unchallenged.

For example, consider a black prisoner who believes that prison officers are treating him and the other prisoners on his wing, where there is a higher than normal proportion of black prisoners, more harshly than they treat other prisoners. While on these simple facts it would seem right that the prisoner could bring proceedings under the Race Relations Act, this may not be the case as there are a number of variables that need to be considered. If this treatment occurs in the context of the Prison Service providing 'services' to prisoners, that is meeting daily living requirements, seeing to medical needs, providing education or recreational opportunities, then under the existing provisions of the Race Relations Act the prisoner could challenge his treatment as either direct discrimination (because he is black) or as indirect discrimination (because he is on that particular wing). If this treatment occurs as part of the Prison Service's functions to maintain prison discipline and to inflict punishment then the prisoner would need to rely on the extension of the Act in this Bill, but he would only be able to bring proceedings if his claim was direct discrimination.

It is the view of the CRE that to establish two regimes under the Act will create new and unnecessary barriers to challenging discrimination. It will be the more insidious covert forms of discrimination that will be allowed to continue unchecked. The CRE doubts that that is the Government's intention. It is essential, therefore, that suitable, and workable, amendments should be approved so that the Act will prohibit all forms of racial discrimination by all public authorities. Any half-way or partial measure will be perceived as making a mockery of the daily experiences of ethnic minority communities

Impact on religious groups

The omission of indirect discrimination may be particularly significant in relation to discrimination which is experienced as being on grounds of religion. There is not currently any legal protection against religious discrimination; the Home Office has commissioned research by the University of Derby, and an interim report will shortly be published. Until there is separate legislation it is essential to ensure that, to the limited extent that the Race Relations Act can provide redress for individuals who experience discrimination on religious grounds, this protection is not inhibited. It is, however, only as indirect racial discrimination that religious discrimination can be challenged. For example, employment cases have established that a dress code prohibiting women from wearing any headgear, that directly affects Muslim women, can constitute indirect racial discrimination against persons of Pakistani national origin.

If as has been the case in the past, there are instances in which Muslims, or Rastafarians, or Hindus believed that they were receiving less favourable treatment by, say, prison officers, on grounds of their religion, under this Bill as drafted they would have no recourse to redress.

Impact on Gypsies

It is also relevant to consider the position of Gypsies and Travellers who are frequently the subject of discrimination by local authority officials with law enforcement functions. Generally action is taken against "Travellers" who under the law in Great Britain have not been recognised as a racial group. Gypsies are a recognised racial group and are often the victims of oppressive treatment that is meted out by police officers and officers of local authorities exercising functions under the Criminal Justice and Public Order Act 1994. By excluding a right to complain of indirect discrimination the Bill may also deny Gypsies any redress for discrimination.

b) Exceptions in the Bill are too wide

The Bill seeks to exempt from its main provision or from the enforcement procedures two public functions where the experience of racism and racial discrimination is most often reported: immigration and policing. These exceptions are far too wide and are likely to permit discrimination to continue without the possibility of challenge.

Immigration

Clause 1, new section 19C, would enable immigration officers to discriminate on grounds of national or ethnic origin as well as nationality so long as they are acting in compliance with immigration or nationality laws or rules or Ministerial orders.

Policing and criminal proceedings

Clause 1, new section 19D, excludes from challenge as unlawful discrimination acts leading up to a decision not to institute criminal proceedings. Despite the findings of the Stephen Lawrence Inquiry, the experience of black and Asian families who have complained of racist crimes and have seen no one prosecuted will be permitted to continue, and they will

not be able to complain that any of the conduct between initial police response and the decision not to prosecute involved racial discrimination.

c) Need for an enforceable statutory duty to promote racial equality

The CRE welcomes the progress the Government has made in requiring public bodies to take a visible leading role in the promotion of racial equality. The legislation establishing the Scottish Parliament, the Welsh Assembly and the Greater London Authority and Metropolitan Police Authority all contain some specific obligations (or, in the case of Scotland, specific powers) relating to equality of opportunity and eradication of discrimination. The Northern Ireland Act 1998 establishes a detailed procedure by which designated public authorities must adopt schemes for regular appraisal of their policies against equal opportunities criteria.

A few days before the publication of this Bill the Government published its Equality Statement, in which the Government has acknowledged that an obligation on public bodies to promote racial equality needs the force of statute. The Government has undertaken to legislate for this purpose 'as soon as Parliamentary time permits'.

It is the view of the CRE, that enactment of a strong, clear, enforceable legal duty cannot be delayed. Only by imposing such a duty on public bodies will the Government give tangible reality, and consistency, to its commitment to racial equality which the Stephen Lawrence Inquiry evoked. A statutory obligation to promote racial equality and to eliminate discrimination is required to prevent prevarication and delay by public bodies in confronting and taking action to eradicate institutional racism.

The CRE has seen no real evidence that the present non-statutory guidelines for civil servants (Policy Appraisal for Equal Treatment) have been effective in changing the factors that influence Government policies. Similarly the obligation on local authorities and police authorities that have existed since 1976 under section 71 of the Race Relations Act have had an uneven and limited impact.
The significance of a positive legal duty is that it will oblige public authorities to act to prevent discrimination. This is far preferable to using the law only to seek redress after discrimination has taken place.

The CRE will be promoting amendments at Committee stage to incorporate into this Bill an enforceable statutory duty requiring all public authorities to work for the elimination of discrimination and to promote racial equality and good race relations.

In this regard, the CRE welcomes the fact that Government has indicated a willingness to consider ways of strengthening the Bill, and will be preparing suitable amendments for Committee Stage.

10/12/99
Commission for Racial Equality

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Annexe 1

RACE RELATIONS (AMENDMENT) BILL: Contents of the Bill

General:
In defining the maximum scope of the Bill, the long title is sufficiently wide to permit amendment to establish a statutory obligation on public authorities to promote racial equality. In its present form, the long title does not appear to allow as amendment the full range of reform that the CRE and others have recommended

As this Bill amends the 1976 Act, it is helpful to have some familiarity with that Act in order to understand the intent and the implications of the proposed changes. Accordingly in the following analysis of the contents of the Bill, where it is relevant there is a short summary of the law as it is currently.

The main object of the Bill, namely the extension of the Act to all functions of all public authorities, is set out in Clause 1; most of the rest of the Bill defines exceptions or limits the scope of this extension.

Clause 1 Clause 1 introduces three new sections into Part III of the Race Relations Act 1976. Part III sets out the areas of activity other than employment in which racial discrimination is unlawful.

19B (1) makes it unlawful for any public body or officeholder to discriminate against another person in carrying out any of its functions. It introduces Schedule A1, which lists or describes by function a wide range of public authorities to whom this new section will apply.
The second subsection, 19B(2), limits the unlawful discrimination to direct discrimination and victimisation.

In the Bill as drafted, in respect of functions of public bodies that will be covered by the Race Relations Act for the first time, there is no scope to ask the courts to examine practices that appear to be indirectly discriminatory; there is also no scope for the CRE in any formal investigation to make findings of unlawful indirect discrimination as a precondition for the issuing of a non-discrimination notice.

Distinction between new provisions and existing law
New subsection 19B(8)(a) is intended to prevent overlap between 19B and the activities in which discrimination is already unlawful under Parts II and III of the Act. Although the drafting is complicated, the Government's intention is understood to be that the existing provisions in Parts II and III should remain intact, including the application of indirect discrimination under section 1(1)(b), and that the new regime applies only to discrimination by public authorities that is not currently outlawed.

Positive action provisions will apply
19B(8)(b) applies any of the existing exceptions in the 1976 Act to the new areas of discrimination by public authorities. Within these is the exception in section 35 that makes it lawful to give persons of a particular racial group

access to facilities or services to meet the special needs of that group in relation to their education, training or welfare. In the context of the Bill, section 35 could be relied upon to enable a public authority to develop and implement a policy that involved differential, positive, treatment for people from a particular ethnic minority group, provided that the special needs of that group could be demonstrated. One of the Government's arguments concerning the exclusion of indirect discrimination from the Bill is understood to be that public bodies could be challenged when they were trying to adopt policies that would operate to the benefit of historically disadvantaged groups; insofar as such policies met the criteria of section 35 there should be no question that they are unlawful.

Who is a public authority for purposes of the Act - Schedule A1 and 19B(2) - (7) It is not clear why the Government did not follow the approach in the Human Rights Act for purposes of defining which public authority functions would be covered by the Race Relations Act as amended by this Bill. The Bill could have stated that a public authority includes 'any person certain of whose functions are functions of a public nature'. Instead there is a long list in Schedule A1. Acknowledging that it is incomplete, and that functions of bodies or office-holders may change, the Bill includes in new subsections 19B(2) -(7) powers for the Secretary of State to make orders to extend the application of section 19B or to delete names or amend the description of their functions.

The present list is unduly complicated, since in relation to some types of authorities or some functions there are numerous entries, but other public functions are, or presumably are, subsumed within generic descriptions, for example paragraph 1(1) "A Minster of the Crown or government department". The full range of non-departmental public bodies has not been included. More significantly, where major functions of public authorities are being carried out by private bodies under contractual arrangements, there is no clear indication that they are to be included. So, for example, while it can be assumed that the Prison Service comes within the Home Office as a government department, under the Bill as drafted it will require an order by the Secretary of State to subject privately run prisons and detention centres to the non-discrimination requirement in 19B.

There are some curious omissions that should be queried, including NHS Trusts and Regional Development Agencies.

Immigration control - limited application of the Race Relations Act
19C introduces a complicated exception for discrimination in relation to immigration and asylum cases. Discrimination on grounds of race or colour are prohibited in all cases, while discrimination on grounds of nationality or ethnic or national origin will only be unlawful where the exception specified in 19C does not apply.
This exception arises where discrimination occurs as a result of a personal decision by a Minister or a decision by an official acting with relevant authorisation. In the Bill 'relevant authorisation' means a requirement imposed or authorisation given:

> a) with respect to one case or a particular class of case, by a Minister of the Crown acting personally; or

b) with respect to a class of case, by specified Acts of Parliament or any rules or orders made under any of those Acts.

It is understood that the intention of those drafting this Bill was to allow discrimination on grounds of nationality, ethnic or national origin only when such discrimination was a necessary outcome of Ministerial decision or primary or secondary immigration legislation.

As drafted, however, the Bill appears to create a much wider exception, allowing discrimination whenever an official was acting in accordance with immigration or nationality legislation or rules, even where these rules do not specifically require discrimination on, say, grounds of ethnic origin. It would also appear to allow the Minister an unchecked ability to discriminate on grounds of ethnic or national origin. In this regard the concept implied in the Bill that decisions will be made on the basis of ethnic origin may conflict with international treaties and covenants of which the UK is a signatory, notably the 1951UN Convention relating to the Status of Refugees.

Special rules for decisions not to institute criminal proceedings
Clause 1 (new section 19D) provides that a decision not to institute criminal proceedings or any acts leading to such a decision will not be excluded from potential challenge under the Race Relations Act.

The second part of this exception could be interpreted very widely. The acts leading up to a decision not to institute criminal proceedings include the initial response by the police, the statements and other evidence obtained by the police, the rigour with which the investigation was carried out, the presentation of the evidence to the CPS by the police, the ways in which the CPS apply the evidential and public interest tests and any representations by or on behalf of the defendant.

The Stephen Lawrence Inquiry heard again and again from ethnic minority communities that when they reported racist crimes these were never investigated or, if they were, no one was every prosecuted. While appreciating the importance of not substituting proceedings under the Race Relations Act for a criminal trial, it is not appropriate to exempt all of the stages preceding a decision not to prosecute from liability for racial discrimination.

Clause 2 - all public appointments
Clause 2 amends section 76 of 1996 Act to bring fully within the scope of the Act all types of appointments by Government departments, Ministers of the Crown or appointments by the Crown. These posts are not protected under the employment provisions of the Act. Where Crown appointments are dependant on recommendations or approvals by a Minister or Government department then the Bill provides that there must be no discrimination at any stage of those processes. The CRE welcomes this amendment; the prohibition of discrimination should apply to the appointment of persons in positions of power and influence in the same way as it does to the selection of persons for all other posts in public and private sector.

Clause 3 - vicarious liability of chief officers of police

This Clause meets the second half of the recommendation of the Stephen Lawrence Inquiry, namely that chief officers of police should be made vicariously liable for the discriminatory acts (and omissions) of their officers. It fills a gap in the Act that came to light in the Court of Appeal decision in *Farah -v- Commissioner of Police of the Metropolis* [1997] 1 All ER 289.

The Clause creates new Sections 76A and 76B in the Race Relations Act 1976, and Schedule 3 repeals the existing Section 16.

76A defines "relevant police office" and provides in 76A(2) that for purposes of Part II of the Act (discrimination in employment) the constable or police cadet is to be treated as employed by the chief officer of police and by the police authority.

76A(3) applies to the police the vicarious liability provisions of the Act (section 32) for all types of discrimination. The chief officer of police is to be treated as the sole employer for any constable or police cadet in, or temporarily seconded to, their force. Anything done by a police officer in the performance or purported performance of their duty is to be treated as done "in the course of employment"

Clause 4 - Special exceptions for criminal investigations and proceedings

The object of this clause is to limit the ability of individuals to enforce the Race Relations Act where to do so might prejudice criminal investigations or criminal proceedings. The clause introduces new subsections to section 57 of the Act, which is concerned with enforcement of non-employment complaints of racial discrimination in the county court or, in Scotland , the sheriff court. It also permits special dispensation from the RR65 questionnaire procedure.

Clause 4(1) specifies limitations on enforcement when the unlawful discrimination arises in the course of criminal investigation or criminal proceedings, including:
(4A) The only remedy should be damages, rather than, for example, an injunction unless the court is satisfied that another remedy would not prejudice a criminal investigation, decision to bring criminal proceedings or any criminal proceedings.
(4C - E) A party to discrimination proceedings under the Act can apply to the court for those proceedings to be stayed (or in Scotland sisted). Where criminal proceedings are to be, or have been instituted, the court must grant a stay or sist unless the court is satisfied that these proceedings would be unlikely to affect the criminal proceedings. Where no decision has been made regarding the criminal proceedings the court should not grant a stay or sist unless it is satisfied that it would not be in the public interest, or might prejudice an investigation or proceedings, if the discrimination case were to proceed.

Clause 4(2) is concerned with the procedure by which individuals who believe they have been discriminated against can serve a questionnaire on the alleged discriminator. Under the 1976 Act the court can draw any inference including an inference of discrimination if the respondent fails to reply.

The Bill proposes that the respondent can apply to the court if they consider that by replying to the questionnaire they could prejudice a criminal investigation or criminal proceedings or would reveal the reasons behind a decision not to prosecute; the court will be expected to agree that they will draw no inference from a failure to reply, unless they are satisfied that a reply would not prejudice an investigation or any criminal proceedings.

This clause fails to provide any mechanism to enable the person complaining of discrimination to go back to the court, once it is clear that no proceedings are to be instituted or after the criminal proceedings have been concluded, to apply for an order requiring the respondent to reply to the unanswered questions in the questionnaire, failing which the court would be able to draw an inference.
These exceptions appear to be too wide, and the Government should be asked to justify clause 4 as drafted. It is not unreasonable to build in protection to guard against prejudice in the particular criminal investigation or criminal proceedings which have given rise to the complaint of discrimination, but there is no obvious justification for the wide scope for special exemptions which this clause appears to offer.

Any restrictions imposed on the courts in their hearing of discrimination cases need to be very narrowly drawn. Otherwise what has been heralded as a great step forward in terms of police accountability may be lost or buried in costly and lengthy litigation on such preliminary matters as whether the police or the CPS should be excused from replying to the Race Relations Act questionnaire, whether the case can proceed at all and if so whether certain remedies are excluded. In view of the efforts made by the police to exclude information from the courts in other types of proceedings, there is a real risk that 'smoke screens' of potential prejudice could be erected to delay or avoid full exposure of discriminatory practices.

Clause 5 - Discrimination in immigration to be considered at one-stop appeal
This Clause introduces further new subsections into section 57 with the intention of bringing together at a single hearing all grounds for appeal under the immigration and asylum legislation and any complaints of breach of the Human Rights Act 1998 and any complaints of racial discrimination, where the Human Rights Act or Race Relations Act issue relates directly to the immigration decision being appealed. Where legal aid has been granted for an immigration appeal it will be extended to include any racial discrimination claim that is to be heard at the same time.

Where an immigration appeal is successful on the grounds that the decision at issue was racially discriminatory, the adjudicator's decision on the discrimination complaint stands ("unless the contrary is proved"). The person can apply directly to the county court or sheriff court for damages or other remedy relying on the finding of the IAA.

Clauses 6 and 7
These Clauses are concerned with the exclusion from the provisions of the Race Relations Act of acts safeguarding national security and the exclusion of parties from proceedings under the Race Relations Act where the court "considers it expedient in the interest of national security" to do so.

Clause 6 provides that the national security exclusion can only apply if the doing of the act in question can be justified for the purpose of safeguarding national security. This amendment provides a useful means to challenge certain discriminatory practices that have operated for many years without challenge because the shield of 'safeguarding national security' has been an absolute defence against any claim of discrimination. This change will apply to all forms of discrimination under the Race Relations Act, including employment or access to premises or facilities.

Clause 7 introduces a procedure already enacted for employment tribunals enabling the county court or sheriff court to exclude the claimant, his/her representative and the lay assessors from all or part of the proceedings on grounds of national security, although the actual reasons are to be kept secret. The excluded claimant must be permitted to make a statement to the court, and can be 'represented' by someone appointed by the Attorney General or in Scotland the Advocate General for Scotland, but the appointed representative will not be responsible to the claimant.

Schedule 2 - Further amendments to the Race Relations Act 1976:

Section 27 which restricts the application of the Race Relations Act to acts committed in Great Britain is to be amended so that decisions granting or refusing entry clearance under the Immigration Act 1971 will be subject to the new non-discrimination section 19B whether the decision is made in Great Britain or elsewhere. This is a helpful amendment.

Section 53 which limits proceedings for breach of the Race Relations Act 1976 to the proceedings specifically mentioned in the 1976 Act is to be amended to include reference to the Immigration Appellate Authority (see Clause 5 above). It is also to be amended to restrict judicial review relating to Crown appointments except as stated in the proposed amendments to section 76 (see Clause 2 above)
Section 75 provides that the 1976 Act should apply to acts by or on behalf of Ministers of the Crown or government departments as it does to private persons. This provision was interpreted narrowly in the case of R -v-Entry Clearance Officer, Bomay ex parte Amin to limit the application of the Act to those acts of government departments that could be done by private persons. Section 75 is to be amended to make clear that it does not apply to the proposed new section 19B or amended section 76, both of which specifically refer to acts by Ministers and government departments.

10.12.99

CRE

Annexe 2: RACE RELATIONS (AMENDMENT) BILL

Background

The 1976 Race Relations Act established the Commission for Racial Equality (CRE) and made it one of the duties of the CRE to keep the working of the Act under review and, when necessary to draw up and submit to the Home Secretary proposals for amending it.

The CRE has now carried out three such reviews. The first, in 1985 received no response. The second, in 1992, received after two years a detailed response rejecting nearly every one of the CRE's proposals.
The Third Review was submitted to the Home Secretary in April 1998. It included many of the proposals for reform from the earlier reviews, but also recognised important legal and political changes such as the growing importance of EC law and the then proposed Human Rights Act that are part of the context for discrimination law

Between August and December 1998, the Home Secretary consulted widely on the proposals of the CRE and other bodies. Some 130 organisations or individuals submitted comments, but there has been no official publication summarising the results of the consultation.

In February 1999 the Stephen Lawrence Inquiry presented their Report. The Inquiry accepted the CRE's proposal that the Race Relations Act should be extended to cover all aspects of policing, and in welcoming the Inquiry's Report the Home Secretary publicly committed himself to introducing legislation that would bring all functions of public bodies within the scope of the Act.
In May 1999 the Better Regulation Task Force published its review of anti-discrimination legislation. While not persuaded of the need for 'major legislative overhaul' in relation to race, or sex or disability discrimination or for merger under a single Act or a single commission, the Task Force did recommend legislation to strengthen or clarify the existing law. The Task Force recommended extension of the Race Relations Act to cover all of the public sector, which should be expected to take a lead role in promoting equal opportunity, by means of legislation if necessary.

In July 1999 the Home Secretary responded to the CRE's proposals, accepting some recommendations, suggesting further consultation on others and not responding to some. In relation to the proposal to extend the Act to cover all activities of public bodies the Home Secretary indicated that he would introduce legislation for this purpose as soon as Parliamentary time permitted, and agreed that 'public bodies' should be defined for this purpose as widely as possible.

On 30 November the Government published its Equality Statement stating that "Public bodies must take the lead in promoting equal opportunities and the Government will put this obligation in legislation as soon as Parliamentary time permits".

On 2 December1999 the Race Relations (Amendment) Bill was published.

DISCRIMINATION LAW ASSOCIATION

January 2000

BRIEFING No 161 EUROPEAN COMMISSION PUBLISHES PROPOSALS FOR DIRECTIVES ON DISCRIMINATION European Commission November 25th 1999

In December 1999 the European Commission announced the details of the three new directives that they are proposing in order to implement Article 13 of the EU Treaty (see *DLA Briefing no. 128*). They have been sent to all Member States for consultation.

1. Directive to implement the principle of equal treatment between persons irrespective of racial or ethnic origin.

The directive is intended to implement the principle of equal treatment between people of different racial or ethnic origins in all Member States. This does not prohibit differences of treatment based on nationality.

It is designed to cover both direct and indirect discrimination as well as harassment and victimisation.

The Directive will apply to: -

- access to employment and self employed activities and working conditions,
- membership of organisations,
- social protection and social security,
- social advantages,
- education including grants and scholarships, and
- access to and supply of goods and services.

There are provisions to exempt 'genuine occupational qualifications' (which should be narrowly construed) and some positive action to correct situations of inequality.

2. Directive to establish a general framework for equal treatment in employment and occupation.

The Directive is intended to implement the principle of equal treatment between persons irrespective of ***race or ethnic origin, religion or belief, disability, age or sexual orientation*** in the fields of access to employment and occupation, promotion, vocational training and employment conditions and membership of certain bodies. It covers direct and indirect discrimination as well as harassment and victimisation. Once again, there are provisions to exempt genuine occupational qualifications and positive action. There is also a provision for justification of differences on grounds of age.

3. Directive to establish a Community Action Programme to combat discrimination 2001-2006.

This proposes a programme of community action to combat discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Speaking after adoption, EU Commissioner for Employment and Social Affairs, Anna Diamantopoulou, said:

> *"Today is a milestone in the construction of a Social Europe. Discrimination blights the lives of so many of our citizens. We want to see a common level of protection against discrimination right across the European Union. We want to cooperate with and support the efforts of Member States, NGOs and the social partners. These proposals will ensure that a real difference is made to people's lives by providing victims with a clear remedy against discrimination."*

Background

The Treaty of Amsterdam, which entered into force on 1 May 1999, introduced a new article into the Treaty establishing the European Community which provides that the Council of Ministers, "acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

The Commission has consulted widely since the signature of the Amsterdam Treaty, involving Member State Governments, members of the European Parliament, European trade union and employers' organisations and non-governmental organisations. The package of proposals is based on the results of these consultations.

The scope and material content of current Member State provisions dealing with discrimination vary greatly. These provisions are enforceable by individuals in some Member States for some grounds of discrimination, but in others individuals cannot fully rely on them when appearing before national tribunals (although they can sometimes be invoked to justify a challenge to a law on the grounds of constitutionality).

The draft Directives can be found at the EU Commission's web-site at:

http://europa.eu.int/comm/dg05/fundamri/docs/work_en.pdf
http://europa.eu.int/comm/dg05/fundamri/docs/ethnic_en.pdf
http://europa.eu.int/comm/dg05/fundamri/docs/action_en.pdf

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DISCRIMINATION LAW ASSOCIATION

January 2000

BRIEFING No 162 **DISABILITY RIGHTS TASK FORCE FINAL REPORT From Exclusion to Inclusion: A Report of the Disability Rights Task Force on Civil Rights for Disabled People. December 1999. DfEE**

The Disability Rights Task Force Final Report was issued by the DfEE on December 10th. In the press release accompanying the report, David Blunkett announced that the government will bring forward legislation to give students equal access to schools, colleges and to the curriculum. The proposed legislation will address key recommendations in the final report of the Task Force and will be backed up with a further £30 million to help local authorities make their school premises accessible under the Schools Access Initiative. The government will also make a more detailed commitment on the education recommendations in the near future.

The proposed legislation will ensure:

- A new duty on schools and LEAs to plan strategically and make progress in increasing accessibility for disabled pupils to school premises and the curriculum

- New rights for disabled pupils ensuring that they are treated fairly by schools and LEAs

- Schools to make reasonable adjustments to their policies, practices and procedures where they disadvantage disabled children

- New rights to improve access to further, higher and adult education, backed up by a statutory Code of Practice explaining the new rights and duties

Copies of the Task Force final report (also in Braille, audiotape and "easy to read" versions) are available ***free of charge*** from the DDA helpline, FREEPOST, MIDO 2164, Stratford-upon-Avon, CV37 9BR. The helpline can also be contacted on 0345-622633, textphone 0345-622644 or by e-mail: **ddahelp@stra.sitel.co.uk**. The full report is also available on the Government's disability web-site at: **www.disability.gov.uk**

Comments on the report should be sent to the Campaign Support Team, Public Enquiry Unit, DfEE, Area 2B, Castle View House, Runcorn, Cheshire WA7 2GJ or by e-mail to **disability.rights@dfee.gov.uk**