



# *Discrimination Law Review: A Framework for Fairness*

## Runnymede Trust Response

### Introduction

The Runnymede Trust<sup>1</sup> welcomes the opportunity to respond to the Discrimination Law Review (DLR) consultation. We recognise the great improvements made by this government over recent years and welcome the proposals as an opportunity to consolidate and build on these successes. Inequality on the grounds of age, sexual orientation, religion and belief, gender, disability and 'race' remains rife in our society, blights our economy, and diminishes our democracy. The government's commitment to deliver improved equality legislation is very welcome. We hope that we can work together to ensure that the legislation meets the urgent need for progress and look forward to further dialogue on these matters.

As the proposals currently stand, however, they will not meet the laudable aims of government and may put in jeopardy the considerable amount of progress made in helping our public services meet the needs of all citizens. The proposals suffer from a lack of foresight in promoting equality, theoretical confusion which leads to incoherence, a lack of clarity in terms of enforcement of the proposed laws, and a blindness to context which will impede the effectiveness of the proposed changes to legislation.

Runnymede is a policy research organisation focused on racial justice. For this reason we have confined our comments to those that have particular implication for the delivery of racial equality in Great Britain. We will also refer to our own research as evidence of the need for and suggested direction of change. We are members of the Equality and Diversity Forum (EDF) and co-signatories of their response which should be read in conjunction with our own. Where possible we have given direct answers to the questions posed in the consultation paper but our response is not confined to only these issues.

This response is arranged in three sections:

- Principles for equality
- Effective delivery of equality
- Access to justice

### 1. Principles for equality

In 2000 we published the ground-breaking Commission on the Future of Multi-Ethnic Britain<sup>2</sup> in which we argued for a single equality act and equality commission. We are pleased to note that both of these recommendations are now closer to fruition. We set out five key principles that equality legislation needed to meet:

#### *a) Twin goals and a holistic view*

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<sup>1</sup> For further information about the work of the Runnymede Trust visit [www.runnymedetrust.org](http://www.runnymedetrust.org)

<sup>2</sup> *Commission on the Future of Multi Ethnic Britain – The Parekh Report* (2000) Runnymede Trust London: Profile Books



The goals should be a) the elimination of unfair discrimination and (b) the promotion of equality with respect to sex, race, colour, ethnic or national origin, religion or belief, disability, age, or sexual orientation.

*b) Clear standards*

The standards in legislation and codes of practice should be clear, concise and easily intelligible.

*c) Regulatory framework*

The regulatory framework should be effective in achieving measurable targets, efficient in terms of cost and equitable in effects. It should encourage personal responsibility and self-generated organisational change.

*d) Participation*

Everyone affected should be able to participate in processes of organisational change, including employees and their representatives, clients and customers, and campaigning groups.

*e) Redress*

Individuals should be free to seek redress for harm they have suffered as a result of unfair discrimination. The procedures should be fair, inexpensive and fast and the remedies should be effective. They should act as a spur to organisational change.

These principles inform this response. In order to ensure that the legislation is clear and easily understood we suggest that the Act **include a statement of purpose**; both to give the Act overall coherence and to situate it in relation to other state commitments such as to Human Rights and the proposed Bill of Rights/constitution.

Such a statement might work to clear **confusion about what constitutes unfair discrimination**. It would also embed the positive approach to equality adopted by the government which goes beyond the negative requirement to not discriminate unfairly. But confusion on this latter point – that discrimination is wrong *when it is unfair* – explains the otherwise surprising decision not to extend equality to cover all grounds. More specifically, the DLR Green Paper suggests excluding 11 million citizens from the scope of the legislation, namely children.

It is of particular concern to us that it is proposed to exclude children from the scope of the legislation. Given the age profile of Black and minority ethnic communities in Great Britain, this is likely to impact disproportionately on these communities. This proposal is predicated on a definition of age discrimination that is in contradiction to other definitions employed in the review, including those found on the same page of the review. We would agree with the statement in 9.23 that

*The general principle underpinning any legislation would be that a difference in treatment based on age should not be permitted unless it can be justified*

Yet paragraph 9.26 provides a contradictory statement:

*The basic principle of age discrimination, that people should not be treated differently on the basis of their age, is therefore rarely appropriate to the treatment of children*



We disagree with the second of these statements, with its implication that the anti-discrimination ideal can *never* allow for differential treatment. This is clearly wrong in principle, but it is also incorrect in terms of existing legislation on the three grounds of gender, race and disability. As we have suggested, **the ‘general principle’ of paragraph 9.23, that differential treatment is not permitted unless it is justified, is perfectly capable of handling age discrimination just as it has proved capable of handling gender, race and disability.** Indeed, it is our view that **differential treatment is sometimes required to ensure important goals, particularly equal access to justice and full participation in democratic life.** The DLR itself seems to accept this point in Chapter 4 on ‘balancing measures’. We expand on these points in our discussion of positive action below.

The contradiction in definitions of age discrimination provides one example of the shortcomings of the review deriving from a more general approach: in trying to highlight the limits of equality legislation, some of the DLR’s proposals shut down the possibility that certain groups could use the legislation to respond to occasions where they may be being discriminated against without justification – however rarely.

The implications of such an approach are that the treatment of school age mothers, and young people in the process of gender reassignment are viewed as outside of the scope of the proposed legislation. This is unacceptable; **schools should not be able to discriminate unfairly on the basis of transsexuality or maternity.** This is because we can think of no justifiable reason why they should be discriminated against in terms of access to education in schools.

The broader point is that the **legislation should be harmonised not just for administrative convenience** (though efficiency gains may be great), but also because of the principle that no one should be unfairly discriminated against without justification. **The advantages are that equality is seen as indivisible, solidarity is promoted among people experiencing or facing discrimination, and that all citizens can see that equality is not about special pleading for minority groups but a crucial component in a successful and just society.** This latter point is important both for ensuring transparency and for accountability – explaining the justification for policy, especially on the foundational value of equality, is not only required of democratic governments but also contributes to citizenship understanding and participation.

## 2. Effective delivery of equality

As noted in the review and even more strikingly in the Equalities Review, persistent inequalities remain in our society. An Equality Act should not only provide protection from discrimination, but also seek to remove these unjustifiable inequalities from our society and promote equality of opportunity. In order for this to occur, there needs to be action in the public and private sectors, and it will need to be applied rigorously and enforced effectively. In these comments we address four key factors where the DLR lacks ambition and may indeed be regressive in terms of race equality legislation

- Public sector equality duties
- Enforcement and inspection
- Private sector involvement in the promotion of equality
- Positive action and affirmative action



## Public sector equality duties

The public sector race equality duty was in part a response to the McPherson Inquiry and set out to respond to the reality of institutional racism in public services. The proposals included in the review appear to have jettisoned the imperative for public authorities to engage in organisational change as a route to promoting equality, opting instead for a much weaker reporting structure, reducing the race equality duty to little more than a public relations exercise. Institutional racism is still a matter of concern – from lack of social mobility, poorer outcomes in education, poorer health outcomes, racial profiling leading to greater surveillance of certain communities by the police, and ethnic penalties in employment – our institutions are failing.<sup>3</sup>

As they stand, the proposals are not well designed to cope with the urgency or importance of these issues. They offer **little or no scope for participation of effected groups or the possibility of maintaining external pressure on public authorities**. Indeed, under these proposals if an organisation was minded to decide that race equality was not important enough for them, they could set priorities which had no race element. The only challenge to this could come from the CEHR which has over 30 000 public authorities to deal with. **This is regression and is unacceptable. It fails to meet the principles we outline above about participation or a regulatory framework that would bring about organisational responsibility.**

We are strongly of the opinion that **the equality duty must remain and that it must enable organisational review, be transparent, and enforceable**. The current proposals do not meet these criteria and would lead to organisations losing their focus on race equality and few tools to address this failure. The proposals should require authorities to collect evidence, including from consultation, to involve, to have an action plan in some form, to monitor progress/outcomes and to make this information public. This should of course be proportional to the specific institutions and their role.

We support the position of the EDF and would argue for **a unified general equality duty with some ground specific elements**. This would mean that the basic version of the duty would incorporate duties to:

- Eliminate unlawful discrimination and harassment,
- Promote equality of opportunity, and
- Encourage participation in public life<sup>4</sup>

There would be additional duties which would apply to specific grounds. In the case of race, this would include the existing duty to promote good relations between people of different racial groups. These duties must be mainstreamed within the operation of the public authority concerned so that they will be under the duty to address race equality in all of their functions – as currently. **The general duty should be extended to cover age, sexual orientation and religion or belief and should apply to all public authorities proportionately to their size and role.**

<sup>3</sup> See Equal Respect – ASBOs and Race Equality A Runnymede Report by Sarah Isal (2006), The Space Between: From Rhetoric to Reality on Race Equality in the Workplace A Runnymede Report by Sandra Sanglin-Grant (2005), School Choice and Ethnic Segregation A Runnymede Report by Debbie Weekes-Bernard (2007)

<sup>4</sup> While this duty does not currently exist in the race equality duty, it has been included here, and adopted from the Disability Discrimination Act 2005, because of the priority we give to participation as a key factor in promoting equality.



Despite the rather patchy performance of public authorities so far, we recognise the importance of equality impact assessments as a means of engaging employees, community organisations and the wider public in the development of policy. We explore the potential of equality impact assessments in our publication 'Guardians of Race Equality'.<sup>5</sup> **There has already been failure on the part of public authorities, including government departments in respect of such assessments** – instead of establishing means of making EQIAs more effective, **the proposals appear to have given up on the possibilities that they could create**; this is another example of the lack of foresight in the DLR proposals.

We welcome the proposal that national government set strategic equality goals as we are keen that Parliament is more involved in discussions about equality and an annual debate/statement on the most pressing issues would offer a regular occasion on which this could happen. **The current duty on the Secretary of State to report on progress in achieving equality in relation to disability could usefully be extended to other grounds.**

### Enforcement and inspection

We support proposals for the CEHR to produce guidance for public authorities on how they can meet general and specific duties. We also welcome recent changes which have extended the ways in which the CEHR can engage with public authorities to encourage change through memoranda of understanding.

The role of inspectorates has proved to be very important in delivering change and the proposals do not go far enough in ensuring that inspectorates remain key agents for change. We agree with the recommendations of the Equalities Review that **there is a need for greater clarity about the priority inspectorates should give to equality**. The work of some inspectorates has been exemplary but others have not gone far enough in promoting race equality. There is no reason why more risk-based assessment approaches should preclude a greater emphasis on equality. While we agree that outcomes are more important than monitoring, unless there is an effective means of external evaluation it is difficult to see how the principle of transparency could be maintained.<sup>6</sup>

The proposal for **a single enforcement mechanism operated by the CEHR is simply unrealistic**. It is essential that members of the public and civil society organisations are able to call public bodies to account on their performance of their equality duties, if necessary in Court. Without this additional pressure for change, the proposed Equality Act is unlikely to deliver across all equality 'strands' and all public authorities.

### The private sector and involvement in the promotion of equality

The proposals for a light touch equality check tool are hardly groundbreaking and such mechanisms already exist without the need for legislation and without widespread effectiveness. We understand that competing pressures from the private sector to limit bureaucracy make this an area in which it is difficult to legislate, but the paucity of ideas for change suggests again a lack of ambition and foresight in an ever more fragmented society.

<sup>5</sup> *Guardians of Race Equality; Perspectives on Inspection and Regulation* (2003) Runnymede Trust: London. See also 'I don't think so . . .' Rob Berkeley Runnymede Bulletin 345.

<sup>6</sup> Ibid.



The private sector is responsible for the perpetuation of inequalities, from equal pay to underemployment of graduates from certain minority ethnic groups. Imaginative ways to engage business leaders in challenging these inequalities need to be found, with remedies enforceable in the law.

In the report of the Commission on the Future of Multi-Ethnic Britain, **we suggested employment equity plans for businesses. These would enable businesses to be transparent about their practices** and explicit about how they plan to address their shortcomings. If government deemed them a step too far in legislating at this stage, support for extending the practice of implementing such plans as good practice should be offered. With the implication that unless there is significant change over a specified time, government would be prepared to legislate to make equity plans mandatory. We have heard the excuses of business leaders over a long period of time and yet government appears powerless to do much more than cajole.

### Procurement

This 'fear' of regulating business extends to the rather **weak proposals on public sector procurement**. Even where the government and its agencies are spending public money there is an apparent reluctance to become 'ethical consumers' in terms of the equality practices of the organisations contracted. This reluctance may stem from the failure to recognise the importance of delivering public goods and services in a fair and impartial manner. Public goods and services are not equivalent to consumer goods and services: we can never justifiably exclude citizens from access to public goods in the way that consumer goods may be inaccessible due to cost. The definition of 'public' goods and services is that they must be provided on an equitable basis; democratic legitimacy requires that public goods are provided in a *just* manner, not simply an *efficient* manner, and this should rightly have implications for those organisations that are procured to provide public goods and services.

In 2003/4 public authorities spent £132 billion on contracts for the provision of goods, facilities and services. This massive spending power could be used to promote equality much more effectively. **While existing duties include public procurement there is some confusion in legal opinion over the extent to which public authorities can require evidence of effective equality practices from contractors when awarding a contract.**

Currently, few public bodies have built equality into their procurement practices, either in terms of supplier diversity or in the way in which contracts are designed or delivered. If equality remains to be seen as coincidental to effective procurement it is unlikely to have the impact that it could in changing private sector practices, but it is also contrary to democratic principles if the procurement is for certain types of public goods and services. **Further guidance on procurement is unnecessary – clear legislation is, however, long overdue.** This should better outline what it is that is actually being procured, and how some goods and services must be held to a standard of fairness.

**There should be a specific prohibition on discrimination in procurement for all sectors.** Companies that have been discriminated against in procurement processes have no legal redress. Discrimination in procurement, like discrimination in employment drives down the quality of facilities, goods and services. The scale of government spending on procurement could be a major fillip, boosting business activity in disadvantaged communities. Without clearer knowledge about the impact and extent of discrimination in procurement, there is no



means of implementing effective positive action programmes to enable diversification of suppliers. Many public sector contracts are sub-contracted; yet there is no mechanism for ensuring that these sub-contracts are delivered without unfair discrimination. **This is a significant gap in the proposed legislation. Proportionate regulation of business should not be something that government shies away from.** Where procurement is for a good or service that is clearly a public one that all citizens have a right of access to, it must meet these minimal requirements unless we are agnostic about the fairness and function of our democracy.

We have argued, above, for an equality duty that applies to all the functions of a public authority's work. If the DLR's suggested approach of mere principle setting is adopted, then an area such as procurement is unlikely to feature. This would make it even more unlikely that public authorities use procurement as a tool to promote equality, but it also fails to come to terms with the nature of the goods and services procurement often entails.

Contractors delivering public services must promote equality in their roles. The responsibility and liability should remain with the public authority rather than the contractor, and the onus should be on the public authority to ensure that the legal requirements are in place through the contracting process to ensure that exemplary equality practices are adopted. To enable this responsibility to be taken and to alleviate confusion over procurement law, **a clause specifically highlighting the procurement of goods, facilities and services by public authorities should be included in the legislation.** In this way, failure to meet the requirements of promoting equality will be seen as a reason to not award a contract. Public goods must definitionally be delivered fairly and to all and doing so will deepen and strengthen our democracy.

Another recent report better understands this point. The Commission on Integration and Cohesion points out the importance of equality in contracting in its discussion about regeneration policies (8.28 pg 121), arguing for Regional Development Agencies to;

*award contracts to businesses that have a clear commitment to employment equality and diversity policies*

It is a shame that here again the government have not been able to respond to the bigger picture in seeing the crucial importance of procurement in addressing equality issues where the Commission on Integration and Cohesion could.

### Positive action and preferential treatment

We are pleased that the DLR devotes an entire chapter to 'balancing measures' and discusses possible changes in legislation. Here we limit our discussion to the issue of positive action, which we have recently considered in a briefing paper.<sup>7</sup>

Turning to the six questions asked in the chapter, **we generally endorse the extension of positive action.** Regarding the first question (4.38), we think that many employers would be willing to go beyond current provisions and that better guidance could be given. Positive action

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<sup>7</sup> *Why Preferential Policies Can Be Fair – Achieving Equality for Members of Disadvantaged Groups* Runnymede Perspectives by Omar Khan (2006)



is being used, including in successful companies in the City, though perhaps not extensively. We give our unqualified assent to the five remaining questions (4.47, 4.48, 4.51, 4.58 and 4.58), most of which essentially ask whether or not positive action should be extended. In particular, **we see no reason whatsoever why it could not be extended on a voluntary basis nor why the CEHR should have a role in approving particular programmes instead of issuing guidance.**

For Runnymede, **the justification for positive action is substantially stronger in the public sector, and the DLR could have gone further in recognizing this point.** The ideal of 'an equal chance of participation' mentioned in paragraph 4.6 is one that Runnymede also places at the heart of any justification for positive action. Participation is sometimes narrowly understood to mean participation in the labour market, but in a democracy it is a much more public or political ideal. As increasingly recognized (for example in the citizenship curriculum), a successful democracy requires engaged as well as knowledgeable citizens and we should not judge the status of Britain merely on its economic record or employment figures, no matter how important those realities undoubtedly are.

To ensure that every citizen does in fact have an equal chance of participation, some groups may seem to require 'differential treatment'. This, however, is justifiable for similar reasons to those mentioned in paragraph 9.23, namely to achieve other goals including social integration, meeting particular needs, efficient service delivery or compensation for disadvantage. But perhaps more relevantly, **if the intent is to ensure that every British citizen has an equal chance of participation, measures must be adopted to enhance the chances for those who currently do not participate in sufficient numbers.** We are convinced that under-representation and unequal participation is indeed a 'real problem' in Britain, though we agree that it is not limited to minority ethnic groups and women.

On our view, arguments for positive action are particularly compelling in the public sphere and indeed in public institutions. Individuals from all groups need to feel that public institutions in a democracy will treat them fairly but also that they will be able to participate as an equal in public debate. Public officials are important arbiters in a democracy and so should be broadly representative of various groups in society. This is not because 'Indians understand Indians' or 'women understand women' but for two different reasons.

First, in a society with persistent and structured disadvantage, it can be hard for members of dominant groups to get access to certain kinds of knowledge. Unless we assume that public officials have full knowledge of the needs of all citizens, we have to accept that members of disadvantaged groups may need to be represented in order for the legitimate and objective needs of those groups to be met. This is as true for working-class Britons as it is for Black and minority ethnic Britons. In democracies throughout the world, there is a noted tendency for policy to meet the needs of more powerful groups before others, a tendency that seems more likely to be the result of a lack of knowledge than any malevolence.

Second, having representatives of a group in important political positions increases the likelihood of political institutions being viewed as fair and impartial. Where there is a lack of diversity in a local council or political party, disadvantaged groups may be hesitant in accessing public services or in contributing to public debate about future policy developments. Again, this is not a question of 'Blacks representing Blacks', but about the self-confidence that is often required to interact with political institutions or engage in public debate.



If these points seem counterintuitive, it is worth emphasizing that the problem of reduced access derives from the existing inequality or disadvantage suffered by Black and minority ethnic people, a social fact that also obviously impacts on other groups. This is not always or only a question of economic disadvantage, though this is indeed an obstacle to providing everyone with an equal chance to participate. When other citizens have stereotypes regarding the skills and competences of different groups, individuals from those groups can have difficulty in participating, and democracy suffers. This is bad for all of us.

The question is not simply one of providing good 'role models' for Black and minority ethnic people, but breaking down stereotypes about the kinds of jobs and roles that BME populations (and indeed working-class Britons) are expected to perform. While Black athletes and Asian shopkeepers are stereotypically accepted, the same cannot be said for Black judges or Asian headteachers. While it is obviously unreasonable to expect all jobs to have a perfect distribution of all groups in society, there is a significant onus on political institutions and the public sphere to be broadly representative if we want democracy to prosper. Providing everyone with an equal chance to participate does not mean that everyone will in fact participate, but it will result in a better democracy that benefits all of us.

The importance of participation and equal opportunities in a democracy may even require more imaginative measures. Major political parties have gone further than mere 'positive action' in trying to increase the number of women and BME candidates and representatives. The relative acceptance of these measures in contrast with their rejection in the private sector should attune the government to a compelling reason why *preferential* treatment can be justifiable. Because equal access to participation and equal opportunities are vital for and definitive of a democratic polity, affirmative action and other stronger measures may also be justifiable in public employment. We recognise that the implementation of such measures may require a change in legislation (perhaps at a European level) but they are not in contradiction with the principle that discrimination is wrong unless justifiable. And where a society is marked by systematic unjust disadvantage, it is not hard to find a justifiable reason for such differential treatment.

In summary, **we endorse positive action and endorse its extension wherever unjustifiable disadvantage has led to under-representation.** Because some private sector jobs are now crucial to respect in society, there is an increasingly persuasive argument for adopting positive action measures in companies that have poor representation among women, the disabled, the working class and of course Black and minority ethnic individuals. It is of course more likely that companies will endorse such policies on a voluntary basis because of the 'business case for diversity', and this is probably the most fruitful line of policy emphasis for the near future.

But if under-representation continues and as success and respect in society is increasingly aligned with levels of income, there may be a case for extending positive action more broadly. If this requires a change in British or European legislation, it can be justified by the central importance of providing everyone with an equal chance of participation in a democracy. And with the DLR Green Paper, we agree that such policies will always be time-limited: where individuals have achieved an equal chance, the justification for positive action or any other balancing measure disappears.

### 3. Access to justice

We have already explained how access to justice requires an extension of discrimination legislation in the case of age, a rethinking on the nature and significance of procurement and



suggests a compelling reason for preferential policies including affirmative action. These are underlined by the principle that democracy requires fair access to public institutions and public goods. Another way of explaining this point is that all citizens must have access to justice. This access must recognize the diversity of experiences and identities that citizens possess as well as be meaningful in practice as well as theory.

### Legal Aid

Black and minority ethnic individuals currently have very unequal experiences of the criminal justice system, but this problem is potentially exacerbated by the government's proposals on legal aid. To take the most troubling example, **we remain disappointed with the unreasonably low time scale provided to legal aid cases on discrimination** as suggested in government reforms. Many legitimate complaints already do not get resolved, and while we do not want to encourage an overly litigious culture, it is important that discrimination cases are fully heard. We have no doubt that combination of the reduced provision for legal aid and the folding of the CRE will result in fewer discrimination cases but are unconvinced that this is because there is now less need for discrimination cases going to court. **We therefore minimally recommend that the amount of time allowed for discrimination cases is raised to ensure access to justice for Britain's most disadvantaged citizens.**

These and other issues arising out of the legal aid proposals were perhaps ignored in the DLR because of its remit for harmonising discrimination law in the context of the new grounds. However, as the DLR foreword emphasizes, this ultimate outcome of this green paper is an *Equality Act*, not simply another piece of anti-discrimination legislation. We will not raise further examples, but note that **laying out clear principles will be even more significant in the final act, and these will also have implications for other proposed legislation.**

### Multiple discrimination

We support the analysis of the proposals presented in the EDF response to the review. Any new equality law should be able to take account of the needs of the whole person, not just one aspect of their identity. The DLR Green Paper suggests that there is insufficient evidence to justify consideration of the problems of multiple discrimination. Such evidence is clearly difficult to collect given actions cannot have been taken under current legislation. Yet a series of reports have focused on intersectional and multiple discrimination and shown that there are, for example, markedly different experiences of racism and discrimination for BME women. The failure to respond to these reports is a weakness in the proposals and undermines one of the potential major benefits of introducing a single Equality Act.

## **4. Conclusion**

As noted above, we welcome the government's commitment to ongoing reform of equality legislation and appreciate the opportunity to engage with this process of consultation. We hope that our reflections on the proposals can make a positive contribution to the development of better policy and ultimately equality for all.