

## **COMMITTEE ON EQUALITY OF OPPORTUNITY EOC 02-02(p5)**

**Date:** Wednesday, 6 March 2002  
**Time:** 9.30am  
**Venue:** Committee Room 3&4 National Assembly Building

### **Title: IMPLEMENTING THE RACE AND EMPLOYMENT DIRECTIVES**

1. At the last meeting of the Committee, I said that the Assembly's response to the Race and Employment Directives would be scheduled for discussion at the next meeting of the Committee. I have received a number of representations, which I have outlined below to inform the Committee's discussion.

#### **GENERAL COMMENTS**

2. There were concerns over:
  - The scope of the proposed legislation, particularly the failure to bring in legislation on goods and services in relation to age, religion and sexual orientation;
  - The lack of enforcement powers in relation to these three new strands;
  - The exemptions for religious and belief organisations (especially the impact this will have in terms of discrimination on the grounds of sexual orientation).
1. The underlying concern was that the UK Government's proposal would lead to a "hierarchy of rights" by failing to provide individuals the same level and scope of protection across all the strands. This might suggest that some kinds of discrimination towards disadvantaged groups is tolerable and less important than others.
2. The point was made that given the failure of the UK to protect constitutionally the rights of the individual, and the underlying principle of "negative restraint" – allowing the individual to do what s/he wants as long as it doesn't break the law – the Government's approach gives the wrong signal, and almost amounts to a license to discriminate in non-employment matters.
3. Moreover, it was felt that the document did not offer a robust enough framework for balancing

the interests of one group against another. The exemption for religious organisations was a particular example of this.

## **Goods and services**

4. Although in her Foreword, Barbara Roche says that "these Directives will not be the end of the road on equality", the document contains no commitment to extending anti-discrimination legislation on the new grounds to cover goods and services, or a timetable for doing so.
5. Being denied access to goods and services is, for example, a big issue for lesbians and gay men. There has recently been a case of a holiday company, Sandals, which advertises its services on television as open to "male and female couples only". Such practice is clearly discriminatory, but currently legal. Discriminatory practices are a problem in the public sector, too – e.g. there is evidence that many LGB people do not reveal their sexuality to health care providers for fear of being refused treatment, being pressured into inappropriate treatment, or suffering homophobic attacks.
6. Failure to legislate over goods and services in relation to religion will also perpetuate the situation whereby some religions are awarded higher protection than others – Sikhs and Jews, for example, are covered by the race relations legislation, whereas other religions are not.

## **Enforcement and promoting equality**

7. The document does not specify any institutional arrangements in relation to the three new strands. This contrasts with the existing grounds, where there are commissions which have enforcement powers, advise the Government, and are responsible for promoting equality in their fields. There was broad agreement that appropriate institutional arrangements, with adequate resources and enforcement powers, should be established for the three new grounds.

## **Single equality commission**

8. The Government has used this consultation document to signal its intention to move towards a single equality commission in the long term. Although there were no objections to this in principle, some concerns were expressed about how this would work in practice. It was suggested that there are some minimum requirements that would be needed to make a single commission successful, namely (1) it must have adequate resources, (2) the Commissioner body must guarantee the representation and involvement of all groups, and (3) there should be some mechanism to ensure that no strand becomes dominant, nor any strand under-resourced. Finally, any such body must meet the needs of devolution.
9. It would also be important for a single commission to recognise that some elements of the equality agenda are less developed than others. The disability rights agenda is significantly less

well developed than those relating to race and gender, and religion, age and sexual orientation are newcomers to the scene. Efforts would have to be made to ensure that these less developed areas do not get marginalised in the new body. It is particularly important in Wales that the disability rights agenda does not get marginalised, as there are indications in some of the more rural areas that the social model of disability is less well understood and that the concept of disability rights have still to take firm roots. The same might be said of lesbian, gay and bisexual people's rights. Similar comments might be made about perceptions of age and understanding of differing religious traditions in parts of Wales.

10. Transitional arrangements might include partnerships between the existing commissions and organisations with experience of working in the field of sexual orientation, religion and age.

### **Equality Taskforce**

11. One suggestion was that the Government should set up an Equality Taskforce with membership from the existing commissions and social partners dealing with the different grounds of discrimination. Such a transitional body could consider the provision of advice and representation, joint work with employers, information and education provision, and issues of enforcement. Such a body could also usefully undertake much of the scoping and preparatory work which would be required before the setting up of a single equality commission.

### **Public sector duty to promote equality**

12. Another suggestion was that there should be a public sector duty to promote equality across all six strands, similar to the duty recently introduced via the Race Relations (Amendment) Act, and the National Assembly for Wales' duty to have due regard to equality of opportunity for all people.

### **Proactive duty to consider reasonable adjustments**

13. Similarly this might be an opportunity to introduce a proactive duty for service providers to consider reasonable adjustments which would improve the accessibility of premises and open up employment opportunities for disabled people. At present, employers are obliged to make physical adjustments only to meet the needs of individual employees. An anticipatory duty could have a particularly significant impact in Wales where there is a high proportion of elderly and inaccessible buildings.
14. The following specific comments were made on the document.

### **Chapter 1 – The case for equality and diversity**

15. The suggestion that discrimination usually amounts to exclusion was questioned. For many

groups discrimination is about violence or disempowerment.

16. It is also unfortunate to suggest that treating individuals differently is inherently unfair – in fact, this is the principle upon which need-sensitive services are delivered, and the issue is really about not making the treatment detrimental because of somebody's difference (in other words, the issue is about unfavourable treatment, not different treatment). We need to be consistent in this approach in order to avoid developing one kind of equality for service delivery and another for employment issues.

## **Chapter 2 – what the directives mean for Great Britain**

17. It is not entirely clear in the document whether local councillors, volunteers and statutory office holders are covered by the scope of the Employment Directive. The Assembly has a particular interest in this because of its work to broaden the membership of public bodies in Wales.
18. The sole exception in the Employment Directive is disability discrimination within the Armed Forces. The Disability Rights Taskforce has called for this exemption to be abolished.

## **Chapter 5 – indirect discrimination**

19. There is a disability issue here, in relation to reasonable adjustments. The reasonable adjustment duty in relation to employment is entirely reactive to the needs of individuals. The UK Government have resisted bringing reasonable adjustments within the scope of indirect discrimination, which would focus consideration on group discrimination and encourage the proactive removal of barriers. One way of dealing with this problem would be to extend the proactive duty in Part III of the DDA (the proactive duty on service providers to consider reasonable adjustments) to Part III – thus making employers consider removing barriers in advance of individual complaint.

## **Chapter 6 – harassment**

20. The favoured option was the one that offered most protection to individuals across all the grounds – i.e. the one with the lowest threshold (option 2).
21. The only concern about this was that this would mean dropping the test about conduct intended to create an "offensive environment". This might be particularly important for lesbians and gay men, who often work in homophobic work environments. At the very least employers should be encouraged to think about workplace culture and developing an inclusive workplace environment.
22. It has been suggested that, instead of dropping the third element of the test, this should be retained but replacing the word "and" with "or" – i.e. keeping a low threshold where

complainants would only have to prove two elements rather than three, but keeping three possible elements that might amount to harassment (including an "offensive environment").

23. Doubts were also expressed about the term "reasonable person" (where Tribunals would consider whether a reasonable person would have conduct as violating the dignity of the complainant). In many cases the concept of reasonableness might mean nothing more than the behavioural patterns of the majority of people (which might not always be reasonable).

## **Chapter 9 – occupational requirements**

24. Doubt was expressed whether these issues would be adequately resolved within Courts or Tribunals. An alternative approach would be to provide a number of key principles in circumstances where occupational requirements could be used.

## **Chapter 12 – Sexual orientation: some specific issues**

25. The proposed legislation does not plan to include state pensions or social security schemes – LGB groups are concerned that this will deny equality to many lesbian and gay couples in Wales who work in the public sector.
26. Furthermore, lesbians and gay men will continue to be caught by occupational pension schemes which restrict benefits to surviving spouses, as they are unable to marry in order to secure improved employment benefits.

## **Chapter 13 – Religion: some specific issues**

27. Definition – two points were made here: firstly, that leaving definitional issues to the courts might be problematic, given that opinions and perceptions of these words are inevitably culturally constructed; secondly, that the distinction between a religious and a political belief is a problematic one.
28. Ethos - the provision to allow religious organisations to refuse to employ, or to discipline, individuals who do not "act in good faith and with loyalty to the organisation's ethos" could affect many hundreds of gay, lesbian and bisexual people in Wales who work for schools, hospitals, nursing homes etc that are run, managed or owned by religious organisations. "Out" gay teachers, nurses and so on would be placed at a potentially severe disadvantage in the job market, and the stress for closeted gay men and women would be compounded. Similar issues exist for heterosexual employees whose relationships or lifestyles do not conform to strict religious standards. The big underlying issue is how far religious organisations can go in "policing" the private lives of their employees.
29. Alternative approaches that have been suggested are:

- Providing a narrow definition of what constitutes a religious employer and requiring that these religious employers openly debate their position regarding the employment of lesbians, gay men and bisexuals.
- That any employer seeking to demonstrate that an employee has not acted in good faith and loyalty to the ethos of the organisation should not be allowed to do so by way of a blanket ban (e.g. no lesbian or gay man employed by the organisation may enter into a relationship) and should be required to adhere to strict guidelines showing that they had considered the individual case, made every reasonable effort to accommodate the individual or behaviour in a way which was not discriminatory.