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Work and Pensions Committee

The Equality Bill: How disability equality fits within a single Equality Act

Third Report of Session 2008–09

Volume II

Oral and written evidence

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The Work and Pensions Committee

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The following memoranda have been reported to the House, but to save printing costs they have not been printed and copies have been placed in the House of Commons Library, where they may be inspected by Members. Other copies are in the Parliamentary Archives, and are available to the public for inspection. Requests for inspection should be addressed to The Parliamentary Archives, Houses of Parliament, London SW1A 0PW (tel. 020 7219 3074). Opening hours are from 9.30 am to 5.00 pm on Mondays to Fridays.

Equality and Human Rights Commission – Submission to *No one written off: reforming welfare to reward responsibility*

Federation of Small Businesses – Small businesses in the UK: New perspectives on Evidence and Policy

M Campbell – Charts on the employment of women

Oral evidence

Taken before the Work and Pensions Committee

on Monday 19 January 2009

Members present

Mr Terry Rooney, in the Chair

Miss Anne Begg	John Howell
Harry Cohen	Mrs Joan Humble
Michael Jabez Foster	Tom Levitt
Mr Oliver Heald	John Penrose

Witnesses: **Ms Catherine Casserley,** Barrister, Cloisters Chambers, and Chair of the Discrimination Law Association, **Mr Neil Crowther,** Disability Programme Director, Equality and Human Rights Commission, **Mr Brian Lamb,** Executive Director of Advocacy and Policy, Royal National Institute for the Deaf on behalf of Disability Charities Consortium and **Mr David Congdon,** Head of Campaigns and Policy, Mencap on behalf of Disability Charities Consortium, gave evidence.

Q1 Chairman: Good afternoon everybody. Welcome to our first evidence session of our inquiry into the Equality Bill. Welcome to our witnesses; it is good to have you with us and we appreciate your time today. I am going to start off with a nice, easy question: how does disability fit within an equality bill?

Mr Crowther: I think one of the key things to acknowledge is that disability discrimination law, if you like, has come from a different place and on a different journey. The challenge really is to bring it within that broad family of equality law whilst recognising those key differences. I think the most fundamental difference between our current approach to disability discrimination and other equality law is that rather than being based on the idea of treating people in the same way—equal treatment—it is really predicated on the idea that we need to treat people differently to accord people equal opportunities. That needs to be reflected both in the way we define discrimination in a new equality bill but also in other important areas like the design of a new single public sector duty. That would be my opening statement.

Q2 Chairman: We will have further questions on public duty so I do not want to go there just at the moment.

Mr Lamb: Making a slightly broader point, I think one of the ways it fits is that you have to look at the broader overall prongs of both equality and equality legislation, where that is going and where that fits with the whole rights and responsibilities agenda that the Government currently has. This Committee will be well aware and used to dealing with some of the proposals that have come out on the welfare reform side and I think it has been seen by the sector that there is a balance between rights and responsibilities and responsibilities being picked up very much within the welfare reform agenda and the rights being seen as very much part of the disability equality agenda and the moving from one grounds of disability within disability rights to a more general set of rights. I think there is a kind of trade off there and one of the concerns as we go through this is to ensure that as it moves into this more general equality framework that the rights that we have had through the disability discrimination law are protected and indeed in some areas enhanced. It is a balance between those two elements and if we found that the rights element was being lost within that move towards more general equality that would be a problem.

Q3 Chairman: In the light of those two responses, what lessons should the Government draw from the *Malcolm* case and how should that be reflected in the Equality Bill?

Mr Crowther: The Office of Disability Issues has consulted on how to fix the problem that the *Malcolm* judgment created before Christmas and they proposed a model of indirect discrimination which would essentially be the same as for the other grounds of equality. Both the Equality and Human Rights Commission and a significant number of stakeholders—not just in the disability field but in business and elsewhere—felt that that was not going to work, that we needed something different which reflected the points I made at the beginning about the focus on different treatment. Whilst we think there are benefits for harmonising where effective—so indirect discrimination would be useful—our assessment is that we need something else in the Equality Bill which builds on the model that was there before the *Malcolm* judgment but is an added area of the discrimination law.

Ms Casserley: Indirect discrimination as a concept is a very powerful tool dealing with group disadvantage but it is not going to deal very easily with the sorts of situations that were covered prior to the *Malcolm* decision, essentially less favourable treatment of disabled people as a result of the consequences of disability as opposed to on the grounds of disability itself. Indirect discrimination is a very complex tool and it is also very unpredictable, particularly in relation to disability. The importance of the Equality Bill is actually making sure that we

get to a position that we were in prior to *Malcolm* and that the consequences of disability and less favourable treatment based on those consequences is actually addressed by the Bill itself and not merely as indirect indiscrimination. Prior to *Malcolm* knowledge had never been a feature of disability related discrimination; knowledge was dealt with in the context of justification. I think it is very important to preserve that aspect of what was called disability related discrimination. It is important that employers and others think about the consequences of what they do when they are treating someone differently because of what is in essence a consequence of their disability. We would certainly think it is important that in the Equality Bill the issue of knowledge was addressed and it was made clear that you do not have to have knowledge of someone's disability in order for you to potentially discriminate, not necessarily definitely discriminate, potentially discriminate. It is particularly important given how people are often reluctant to disclose their disabilities both in the recruitment context but also when someone is in a job because of fear of the adverse consequences if they do disclose.

Mr Crowther: That is of critical importance in terms of the overall impact of the legislation, certainly in employment where we know mental health counts for so much unemployment amongst disabled people and is a highly stigmatised condition that many people are uncomfortable about revealing.

Mr Lamb: Also on that, we have had recent examples where a deaf man, for example, was not able to take a case post-*Malcolm* because it all depended on prior knowledge on the part of the employer for the case to succeed. So we already have examples of where *Malcolm* is making a substantial impact in terms of people's ability to take and win cases.

Q4 Chairman: I think I am right that all four of you in your evidence said you are in favour of the social model of disability. How can that be made to work in practice? Would that not in fact of itself widen and broaden the legislation and consequences to that?

Mr Crowther: There have always been perceived problems with the definition of disability in the DDA; it is primarily that which we have been interested in. The Disability Rights Commission was asked by the Scrutiny Committee of the Disability Discrimination Act in 2005 to look into this issue, to consult stakeholders and to propose an alternative. The alternative they proposed was that people should be able to bring claims of discrimination in relation to their impairment and that we did not need this hugely complex definition because of the problems that it caused. It is right that it potentially broadens the reach of the Act but what it does really is focus the attention onto the barrier or the discrimination somebody experiences rather than interrogating the impairment they have. Clearly it still needs to provide safeguards against unrealistic claims or the legislation being abused. So with the reasonable adjustments duty, in order to bring a claim, somebody would have to prove that they experience substantial disadvantage. By way of illustration, we were referred a situation by an MP of a constituent who had one eye and wanted to join the fire service in his local area. He was aware that there were serving firemen and women with such impairments but he failed the fitness test and he wanted to bring a claim of discrimination. The paradox in the Act was that he would have had to have proved that having one eye meant that he had a substantial and adverse effect on his ability to perform a normal, day to day activity which would undermine the whole basis of the claim that he was making. There are a number of other problems with it but I think that illustrates one of the key ones well.

Ms Casserley: The way that the definition is structured at the moment, because you have to go through so many different aspects of it—you have to show that there is a substantial adverse effect, it has to be long term—if, as a lawyer, you are advising employers and service providers and it is not what you might call an obvious disability, then you will advise them naturally to dispute the definition of disability. That is the first thing you would say to them; it is not clear that this person has a disability so what you need to say is that you do not accept they are disabled and then they will have to prove it. That is one of the difficulties with the current definition whereas if you have a definition that is based on impairment what you do is get to the heart of the matter which is the treatment and whether or not the treatment was justified if it is disability related, for example, or whether it was on the grounds of someone's disability. That should be the focus of anti-discrimination legislation.

Q5 Oliver Heald: We have had a lot of reports from the Citizen Advice Bureau, the Chartered Institute for Personnel and Development, the TUC and others to the effect that really twelve years after the disability legislation in employment there has been very little improvement. Mencap have even gone so far as to say that the number of people with a learning disability in employment has not increased at all. Why do you think that is the case and where are we going wrong?

Mr Congdon: Perhaps I could say just a few words on this. There is no doubt that employment for people with a learning disability has not improved certainly since 1995 (it may even have been before). There are two figures that are quoted: one in ten people known to social services with a learning disability are in work and many of them only work a few hours a week, many of them on very low pay. If you take the broader definition of learning disability it is round about 17% but again with some caveats as to exactly how many hours people are working. One of the reasons is that in order to recruit people with a learning disability you do need to make reasonable adjustments. In fact you need to use the concept that was mentioned earlier by Neil of favourable treatment. One of the things very clearly in that is about giving people the opportunity to have what is called a work trial with the expectation that if they do well in that they will get a job. One of the realities is that with a learning disability if people go for the standard interview of answering

questions, if they have communications difficulties *et cetera* they are liable to fail at that stage. It is also why we are very, very keen (I know we will broaden out to this a little bit later) in terms of the public sector duty saying to public bodies, "You need to look not just at your employment record but also how you provide services in the field of employment. What are you doing in terms of employing people with a learning disability? Are you monitoring it? Do you know how many people with a learning disability you are employing and are you taking steps to try to increase the percentage?" So it is about those sorts of adjustments. It is fair to say that even within the last couple of months we have had enquiries from local authorities saying, "Can we do this? Are we allowed by law to give more favourable treatment?" The answer is "Yes, please go on and do it and you then you will succeed in employing more people with a learning disability".

Q6 Oliver Heald: Does anyone else have a perspective on this?

Mr Lamb: I think this position is obviously very complex; it depends how far back you go. For about ten years the participation rate of disabled people in the labour market was 38%; it is up to about 48% now but that has been tapering off in terms of a rise over the last three or four years with a very slight rise between this year and last year. How much of that general improvement before and after implementation can you ascribe to the Act versus the general improvement in the economy is, I think, always going to be a slightly moot point. I think what is important to recognise, however, is that the requirements around many of those employment measures have made a fundamental difference from the perception of those of us that run employment services that are trying to get disabled people into employment; it has given us a completely different context within which to work both at the level of individual rights and in terms of some of the general duties that David is talking about and the way that employers are beginning to respond to that. I think it is very difficult in any direct causal sense to look at the Act and say that this has had this definitive impact, but I am sure some of that rise in employment participation rate, although it is nowhere near good enough, has actually been down to the general context of the legislation and certainly in terms of the way we have been working with employers it would be very difficult to see some of the things we have been able to do being done without that protection and without that more general context to work within.

Q7 Oliver Heald: A third of CIPD members were prepared to say that they excluded people with a history of long term sickness or incapacity. The TUC was reporting a figure of 60% of employers saying they disregarded applications from people with particular problems, including mental health. Is this a cultural problem or is it more one of enforcement? Why are people prepared to admit that they behave in that way?

Mr Lamb: Colleagues may want to come in on this but I think it is a problem both of culture and of enforcement. I certainly think enforcement could be stronger but I also think there is a cultural issue and cultural issues take an awfully long time to shift and therefore in terms of the longevity of the Act I would say we are still in the earlier stages of shifting that culture of it being okay to discriminate against disabled people in general. Partly that is going to be a continuation of pushing away at the culture and part of it is going to be about easier and better enforcement.

Mr Crowther: I think the first thing is to not divorce enforcement from culture change; I think it is an overall culture change we are looking for and the legislation helps us with that process. Just to reflect on your first question, I think the other big change over the last ten years is a growing awareness of the complexity and diversity of who disabled people are. Ten years ago many people would have been thinking about wheelchair users or people with visual impairment. Now what dominates the debate around employment is mental health. You cannot look at the DDA in isolation of the welfare reform programmes. Perhaps in the earlier part of that it was looking at, for want of a better phrase, the lowest hanging fruit—the people nearest the job market. As we have moved through that process we have found that Jobcentre Plus services have not been sufficiently personalised to reach people with complex needs. The most disadvantaged groups we are talking about are often the clients of multiple public services, not all of which are necessarily geared to supporting them into employment and very often antagonise that objective as well. People may require adjustments that are less tangible and more difficult to understand. I think we have a job of work to do to refresh our approach and make sure it reflects that added complexity about who it is that we are now actually dealing with, in addition to enforcement. I would echo what Brian said, I think what you have seen over the last ten years is a complete change in the context and expectations. We have a Welfare Reform Bill in front of us that frankly ten years ago large sections of the disability community would have probably rejected out of hand and that debate has moved on quite radically. We have seen a big shift in terms of the expectation that disabled people should and can work with the right support, but we still have a long way to go to build on that.

Q8 Oliver Heald: Are enough court cases or tribunal cases being taken?

Ms Casserley: Discrimination cases generally are very hard to win because it is very rare that someone will overtly discriminate. In the recruitment context it is even more difficult because there is no on-going relationship, there is no personnel file that you can look at and often, in my experience, it is after the eighth or ninth time that somebody has been rejected for a job that they begin to wonder why they were not shortlisted or interviewed, and that maybe there is a case of discrimination. People can use what is called a questionnaire procedure to get information

about why they were treated in the way they were treated. Those sorts of questionnaires are very underused and they are a very useful tool for people. I think one of the other issues as well is that when someone brings a claim it is often quite a difficult process and there is often not the support or the advice there; there is no legal aid available for employment tribunals. If someone wins a recruitment case the tribunal cannot make any recommendations about what the employers should do because they are only allowed to make recommendations that will affect the individual person. They cannot say, for example, "We think that the recruitment process was discriminatory, we think you should change it". They cannot do that at all so it is quite difficult for individuals to look at that process and think that that is something they should go through because something good will come out at the end of it; that is not always the case.

Q9 Oliver Heald: In terms of the support individuals get are you saying that you think more representative actions or support of some kind is needed in that way?
Ms Casserley: Certainly representative actions would be a very useful tool and the ability to make recommendations beyond the individual situation so that if an individual brings a claim about recruitment the employer has to do something to address that situation and to address the future for other people.

Q10 Oliver Heald: The evidence we have seen so far seems to suggest a bit of a mismatch between what is actually happening in the tribunals and the perception of people with disabilities that recruitment and employment is pretty unfair, but the results in the tribunals do not seem to fit in with that. Why would you say that is, is it just the difficulty of taking these cases?
Ms Casserley: I think it is because people do not bring them. They will think they have been discriminated against, they will know there is something not right, but all they get is perhaps a letter saying, "Sorry, you have not been shortlisted" and what do they do then? If they do not know about the questionnaire procedure, for example, they will not think that there is any way of them getting hold of that information. If they do bring a claim again the burden is on the individual to show that they have been discriminated against and unless, for example, they get hold of all the notes of those shortlisted and those sorts of things, then it will still be very difficult for them to bring that claim. I think representative actions would be useful. A greater awareness of the questionnaire procedure as well would be useful and, broadly speaking, better knowledge of employers' obligations that they cannot discriminate.
Mr Lamb: I think one other thing that would be very helpful here—it is a recommendation that goes right back to the original disability rights taskforce—is actually tackling pre-employment questionnaires around disability and having to say that you have a disability at that stage. There is a lot of very good evidence stretching back a long time that this will often deter people from applying in the first place and it gives employers evidence that they can use either for good or for evil and there are ways round being able to get to whether somebody needs reasonable accommodation at a later stage in the application process. By actually stopping those questionnaires at that point not only helps the individual but it creates a different climate for disabled people when applying for jobs. I think that would make a substantial difference to the amount of people applying in the first place and the transparency around the process. It is something the disability rights taskforce looked at right at the beginning of the whole process. It was one of the few recommendations (apart from including things like the MoD) that was never taken up in subsequent legislation.

Q11 Oliver Heald: The accommodations would come up once you have the job.
Mr Lamb: Yes.

Q12 Miss Begg: Going back to what you were saying, David, about the fact that the numbers with learning disabilities in work have not gone up, I was just wondering to what extent that may be because the nature of work has changed over the last couple of decades. There are fewer straightforward manual labour jobs. Even for a job that does not require someone to read and write you still have to have a CV, you still have to have a formal interview; gone are the days where you went to a factory with your dad and he got you the job. I am just wondering whether there are barriers that have been put in the way of people with learning difficulties to get jobs that did not exist 20 years ago.
Mr Congdon: I think that is a very good question and of course it is quite difficult to prove. I think I would agree with you that there will have been changes in the labour market that would have created some of those difficulties, but I think the interesting thing is that if you get an employer who wants to take a very positive approach and says, "I do want to recruit more people with a learning disability" then there are creative ways of overcoming that, for instance there is the concept of job carving where you look at the sorts of jobs you have and take bits of different jobs to create a role that would really work for the individual. You can get a very positive approach from an organisation and one of the examples I would always give is that years ago when I first started work you had these enormous photocopying machines and the only people who could do photocopying were in the photocopying department. That does not go on any more but you can recreate things partially like that where you give people roles that have added together some of those tasks and they will do them very well or you can take the equally positive approach that a council like Sutton will take where they have a lot of people with a learning disability working for them. If an employer is prepared to take a positive approach towards employment they can do it. However, I come back to the other point, if an employer simply goes through the normal recruitment processes then

sadly, and almost inevitably, many people with a learning disability will not get a job because they will fall foul of the quite tough interview processes that are followed through and that is why the concept of giving people a trial—I do not mean work experience followed by work experience followed by work experience which can be an abuse with people not being paid for it—with an expectation that providing they demonstrate that they can do the job they will be taken on. That is working very well indeed. Where employers are taking a positive approach they are employing people with a learning disability.

Q13 Mrs Humble: I have a series of questions about equality in goods, facilities and services, but can I just press you, David, on this very important point again because we have had a debate about culture and cultural changes and there has been a huge cultural change over the past 20 years. When I look back to my early dealings with people with learning disabilities they were cocooned in adult training centres and their parents wanted them to remain cocooned because they were fearful of them going out into the big wide world, but over the past 15 to 20 years schools have encouraged young people with learning disabilities to aim higher, to get out into the community, use community facilities and also engage in the labour market. Do we have a whole group of people out there whose expectations have been raised only to be dashed by employers who will not look at them and will not take them on?
Mr Congdon: There is no doubt that expectations have improved and society's attitudes have improved for the better but sadly, in terms of the figures of numbers of people being employed, they have not significantly changed and that is clearly a major problem. I would not want to pretend that those are the only problems; there are problems around perceptions that people with a learning disability themselves have so some of them will still say to you that there are major problems in the benefit system which I do not want to get into today because it is quite complicated. If people believe that the chances of getting a job are not going to be that great and also your friends are telling you that actually there might be some problems with benefits, you can easily get to a situation—particularly if you go for an interview for a job and do not get it—where you can easily start to lower your expectations. There is still a lot to do about raising expectations so that people do feel they can get a job because you are right, the changes that have occurred have been significant but we have still not delivered on the employment front. From Mencap's point of view we are very much looking forward to the positive approach we are hoping will be in the new employment strategy for people with a learning disability which is coming out shortly. There is still a lot to be done.

Q14 Mrs Humble: Thank you. I will move on now to what I should be asking you questions about. First of all, Catherine, in your submission you state that it "is not difficult to see on any high street the number of service providers who have failed to comply with the reasonable adjustment duty". How do you think that can be addressed? Do you think the problem lies with the provisions in the Act or in the way that it is enforced?
Ms Casserley: I think it is probably a combination of reasons and one of them is obviously a cultural one that service providers are not taking their responsibilities seriously. The way that the duty is framed, particularly because it is an anticipatory duty, has in the past been very useful particularly when the duty first came in when I think there was quite a lot of activity around it. Subsequently there are really significant difficulties with people enforcing these provisions. It is not like employment; you do not fill in a form and send it into the tribunal. You have to apply to a county court, you have to pay money in order to put in your application, then you have to pay more money for them to decide which bit of the county court your case is going to be allocated to. If it is not allocated to what is called the small claims then you risk paying the other side's costs if you lose. For disabled people that is a very significant deterrent in actually bringing those cases. I think there is a very big problem with enforcement. Some courts have come out with very good decisions when people have brought cases but the problem I think lies in people not being able to bring those cases as well as the cultural change that the DDA has not yet brought about. However, it seems like a very long time, in some respects it is not because it was only 2004 when the physical feature provisions were brought in. Speaking in a personal capacity I would favour the introduction of equality tribunals where both employment cases and goods and services cases are all heard together. You would remove the potential barriers of people having to pay out costs if they bring cases and you also concentrate the expertise of the judiciary in those who have experience in discrimination law and who are able to deal with those cases in an appropriate way.

Q15 Mrs Humble: Do you think that if the EU Directive is incorporated in the new Equality Bill it would be helpful to the situation?
Ms Casserley: It would definitely make some positive changes to the duties. There are some areas in which it would be particularly beneficial such as housing for example. The Directive does not itself prescribe a particular way in which cases have to be brought but what it does mean is that there have to be appropriate sanctions and people have to be enabled to bring cases. There is an issue at the moment about whether or not people can bring cases with the way the present system is set up.

Q16 Mrs Humble: Can we just park the issue of housing for a moment because I want to ask a separate question on that, how do the other witnesses think that the EU Directive is going to help or not?
Mr Crowther: Clearly setting a standard that applies across the EU is beneficial and obviously our hope would be that that is a standard that is at least as

developed as that which we have in the UK, improving the opportunity for disabled people to move across European states. That consistency of provision is clearly important in its own right. I think there are potential opportunities with the convention in areas like housing; I know we are parking that but I think there are opportunities in that area as well. Those are the key ones and there is also the opportunity, given that it will be a cross-strand directive to a degree, to benefit us and have consistency with our domestic equality law as we develop it this year. Those would be the key areas.

Mr Lamb: There is not a lot to add to that except obviously it helps in terms of standardisation and increased protection and also the fact that the Government has to deal properly with association which I suspect you will be coming onto more in the next session. I think it helps with that as well.

Mr Crowther: On the specific point about physical access and access on the high street, one of the requirements of the UN Disability Convention is that governments take more pro-active steps to promote accessibility. That is not the same as having it embedded in your anti-discrimination law, but to take those kinds of steps is something we would like to see reflected more strongly in the final directive and it could help address some of the issues that we are talking about here. I would support Cathy's point that more cases are important. We should not forget that there was a very significant case on Friday and a judgment handed down in the case of *David Allen vs the Royal Bank of Scotland* which is hugely significant in terms of part three of the Disability Discrimination Act where the judge not only awarded the highest compensation yet under that part but also served an injunction on the Bank to make the adjustments needed so that David (who was a 16 year old boy) can open and use his own bank account. I think that will make a difference in terms of how people perceive that case because the vast majority are settled out of court; they do not lead to a court claim, there is a small amount of compensation. They are not delivering the sort of systemic change really that we are looking for.

Q17 Mrs Humble: We will have to look up the details of that particular case.

Mr Lamb: I can give you a more encouraging example of it working quite well but not so much in terms of the enforcement but where voluntary organisations can help enforcement. We have had major issues at RNID around the provision of loop systems not so much because people are not willing to put them in but actually they do not maintain them. That has allowed us to go round both to public authorities and private authorities and ask to do surveys of their loop systems. Often we find they are not properly maintained. We have been doing some work with London Transport recently, for example, where although they provided loop systems there were then issues about how many were working. We have been able to work with them to ensure that all their loop systems are working. Indeed, we have been doing similar things with some of the banks. It has a leverage in that kind of respect rather than the individual rights respect.

Mrs Humble: I feel my colleague Tom Levitt is dying to get in on the loop system so I will hand over to Tom and then I will ask the question on housing.

Q18 Tom Levitt: As a former trustee of RNID you will not be surprised. A deaf constituent of mine did a survey of all the shops in the high street and he found that most of them had good policies in place and most of them had loop systems. However, if you then took out loop systems that were not working, that were not maintained, where the staff did not know how to operate them or where they were kept in a drawer and the individual had to ask for them to be used, then there was about 5% or something like that; it was dreadful. My worry is that those shops have done enough to show they have made a reasonable adjustment but the individual will then have a very great problem in proving that there was negligence in maintaining that reasonable adjustment. Is there case work on this?

Mr Lamb: I think that is quite typical in terms of people's experiences and that is what we are trying to address at the moment even to the extent of giving deaf and hard of hearing people a little card when the loop system is not working allowing them to place this card with the name of a service provider saying that their loop is not working and this is how you can get it fixed. I think that illustrated the problem. The idea that an individual in an individual shop tried to prove that the loop system is not working and then take a county court case is simply not going to happen at that level and we have to look at enforcement at different levels and encourage vigilance at different levels to get at that.

Q19 Mrs Humble: How has the DDA helped access to housing for people with disability? What more could be done and how has the *Malcolm* case affected it?

Ms Casserley: The *Malcolm* case has had a massive effect on housing cases. It took quite a long time for housing lawyers to realise that there was actually a piece of anti-discrimination legislation that dealt with disability and housing. When they did, they did make quite a lot of use of it and obviously we have *Malcolm* as a result. To give you an example, there have been a few cases where people with either mental health issues or learning difficulties have fallen behind with their rent because they had not filled in the benefit forms. They did not have any assistance to do it, they had not filled in the benefit forms, they had fallen behind and possession proceedings were taken against them. Before *Malcolm* they would have been able to resist the possession proceedings on the basis that the reason they had not paid the rent was because they had not filled the form in, that was because of their disability and the result there would have been essentially for the authority to help them to backdate their benefit so that they could make sure their rent was paid. After *Malcolm* they cannot use the DDA any more at all; there is no scope for using it as a result of that

judgment. There has only recently been a duty to make adjustments in relation to housing but that is a very, very restrictive duty; it is not in any way the same as you have in goods and services so it is not an anticipatory duty which means that individuals have to request an adjustment. Then there are a number of other hurdles that they need to go through in order to get that adjustment. The last thing I think I would say on housing is in relation to harassment. There is no free standing anti-harassment provision in the parts that deal with housing. There is in employment so if you are harassed because of your disability you can bring a claim based on that, but there is not in relation to housing or goods and services. You have to show essentially that the landlord is good at dealing with harassment on the grounds of race but not on disability so you have to compare yourself to someone else and their treatment. The DDA has not been able to tackle harassment in housing. Reasonable adjustments are few and far between. The landlords' awareness of the duties in any event is quite low and I think when they consider adjustments they think of social services, they do not think of themselves as having to do anything. There are very few cases around housing that have been brought. The positive thing I would say is that I think the disability equality duty which I know we will come on to does have the potential to make—and has in some circumstances already made—a big difference to housing in the public sector.

Q20 John Howell: I would like to look at the public sector equality duty. What can we learn from the existing users?

Mr Crowther: We can learn things in terms of what works and there are things that we think need to be improved. We do have three quite different public duties across race, gender and disability but just focussing on the disability duty and the key benefits we think that has brought, there is little doubt that it has changed the profile and the approach towards disability across many public authorities. I do not think that has been uniform; we are aware there are some public authorities that have taken a real lead on this, there are some that merely do what they have to and there are some that are not doing enough at all. Of course, we have to address all three of those situations in an appropriate way. From the evidence that has been produced (some evidence by the Office of Disability Issues and some that was commissioned by the Disability Rights Commission) there is no doubt that greater priority is being given to disability issues by public authorities and in particular a shift in the perception of disability as being an add-on issue to one of being the core business of what public authorities do: improved perceptions of an increasing respect for disabled colleagues in the workplace and a better understanding of people's support needs; the greater involvement of people with hidden impairments; improvements in the quantity and quality of data that public bodies have to be able to make informed decisions rather than assumptions about what disabled people want. A report the DRC commissioned found real, real benefits in the emphasis on involvement which is unique to the disability equality duty, involvement rather than consultation. To give some examples: a local authority had trained disabled residents to monitor planning applications; a hospital trust involved disabled people in the redesign of its buildings; a local fire and rescue service involved people with learning disabilities in delivering fire safety advice to their peers. This whole idea which I think the disability world has really cultivated around co-production and involvement is very much a part and parcel of the way those duties work. We are still carrying out our assessment but the early suggestions would say that the secretary of state duties have particular benefits. From what we hear from many stakeholders but also from Whitehall departments, they believe in many ways that approach whereby they have to look back and see how well they were doing and also look forward at actions has been giving them the opportunity to relate disability equality again much more closely to their core business, to what they are doing, to have a conversation with all their partners in the delivery chain. I think those are the high level benefits.

Mr Congdon: Adding to that, in a way the public sector duty is a further additional power for the original DDA. You can have a debate about which has led to the most change but it probably would not get us terribly far. The example I would use where I think the DDA and then the public sector duty is starting to have a significant effect is on public authorities generally but also in relation to the work we have done in the health field. We uncovered some dreadful things going on in terms of the health of people with a learning disability, that we produced death by indifference. It is amazing how health trusts now are asking what they should do. They had not really got on their radar screen the original DDA; they certainly were not performing with that. Now they are having to say, "Well, we've done our disability equality scheme, we have to make sure it really works". We must bear in mind that disability equality schemes only came in in December 2006 so it is quite early days and the message to all of them is that if you are going to prove beyond doubt that you are giving disabled people a fair deal in terms of the services you provide, the move towards equal outcomes, you need to do things: you need to have a proper plan; you need to know what is going on. Are we delivering good quality healthcare to people with a learning disability? How is their mortality or morbidity comparing with other sectors of the population? There will be a gap so what are we going to do to actually improve it? So it has got on the agenda that public bodies have actually got to take disability seriously, in fact as seriously as they have addressed in the last ten to 15 years the issues of race and ethnic monitoring. They need to take disability very, very seriously but I would stress it is early days to be able to give you a balance sheet of exactly what is happening. We have certainly found it a very powerful lever by saying, "What are you doing to ensure you are getting equality of outcomes for people with disabilities?"

Q21 John Howell: What would you like to see then in terms of improvements in order to bring those strengths in?

Mr Congdon: I think a much greater focus probably on the need for action than the scheme itself. Schemes are important but what is more important than the piece of paper which says there is a scheme is what we are actually going to do. What are we actually going to do to change how we deliver our public services to ensure we get equality of outcome? That is perhaps the most crucial thing, otherwise the danger is that it is a paper exercise; we do not want it to be a paper exercise, we want it to bring about real change. I think Neil's point about the secretary of state reports was actually very, very revealing. They were clearly varied—they were bound to be varied in terms of quality—but the most significant thing was that government departments have to think about what was actually going on in their area to bring about improvement. It is the start of a process and I think we all look forward to their reports in three years' time to see what progress they have made.

Mr Crowther: To second that point, I think we want an action oriented public duty where the emphasis is less on the production of a scheme and more on the tangible, visible results. We obviously need to build a number of tools for public authorities to be able to do that effectively and be clear what we want from them, but I think there is general consensus that that is where it has fallen down and we need to move on.

Mr Lamb: What is also really important is the issue of compliance both in terms of all the DCC organisations where there has not been enough compliance but also at the moment I am doing a piece of work for the Government on parental confidence in special educational needs and one of the major early findings from that is that if you look at schools they are not actually complying with their disability equality duties and the production of disability equality plans in terms of the planning duty that is required of schools, but you could make exactly the same comment about other public authorities and the way they are delivering those. I think we need to look at the compliance regime. Secondly in terms of looking at the way that the Equality Act is going to be put together, we mentioned at the beginning the asymmetrical nature of disability discrimination compared to the other areas and that is reflected in the notion of more favourable treatment. We need to see that very clearly expressed within the wording of the general duty that there does need to be required more favourable treatment in relation to disabled people within whatever the new duty is because without that everything else that colleagues have been talking about falls by the wayside.

Q22 John Howell: One of the major means of compliance has been through the equality schemes but I get the impression that none of you are particularly in favour of the equality schemes. One of the questions that I would ask is whether in your experience there is enough understanding of the difference between outcomes and outputs in the public sector and whether those equality schemes actually work. How is what you are proposing different from the equality schemes?

Mr Crowther: To date there has perhaps been too much of a focus simply on whether or not a public authority has a scheme and not on the substance of that scheme. If the best way a public authority feels it can address this is the development of a scheme and continue down that road then that is okay. We think actually there may be more benefit in them being able to develop a set of tools, come up with their action plans and then embed that in their overall business plans and their overall approach. That is the kind of shift we are looking at so the focus is much more mainstream and much more outcome-focussed and less simply ensuring compliance with a process which is not really going to move us on at the speed we need to move at.

Mr Congdon: I think it is about the practical measures that are going to be taken. If we take the health field as an example, we know that if you are going to go for equal outcomes for many people with a learning disability who cannot communicate particularly well GPs need to give them longer appointments. That is a pretty good example. If you do not give longer appointments there is less chance of getting a diagnosis. Another example in diagnosing what is wrong with somebody who cannot communicate is that you have to have a lower threshold for intervening because you do not actually get all the normal warning signs you get when you or I go to a doctor and say, "I've got a pain here, an ache there" and we go back next time if it has not gone. Those are practical things that need to be done in order to get the equal outcomes that we are looking for. The more things they can put into a plan that is specific and deliverable the better.

Mr Lamb: Obviously there are issues on the compliance side about how far the Equality Commission in general can police this massive number of public bodies so we want to look at mechanisms that look both at self-analysis and reporting mechanisms. We do not have a particular position on it but I think it is going to be interesting to look as the debate goes forward about how much compliance issues can be pushed down to other monitoring bodies as well and the more they might take and enhance what they might have in being able to do that.

Mr Crowther: The Commission's position is that we do believe inspectorates and regulatory bodies should have specific duties to monitor compliance with these duties. That is a kind of step further than I think what the Government is currently proposing which is resting on an assumption that the fact that they have the duties would be enough. To build on Brian's point, I think there are 44,000 public bodies in Britain and clearly the process of understanding and knowing what is going on and influencing them is not something the Commission can do on its own. Some of the practical steps that we plan to put in place in the next year are to develop a database whereby people can access and find out about any public body and their schemes and what they are doing in the country. So there will be that

comparability and visibility. We will do more work with local voluntary organisations to understand what they can do with the duties and there will be memoranda of understanding with these key regulatory bodies. We are trying to broaden that impact.

Q23 John Howell: One aspect of that is procurement and I must admit I am fairly cynical about the effectiveness of procurement. Where I have seen it all that happened has really been a tick box exercise for saying: "Does my supplier have an equality scheme? If yes, then I can do business with them." Is it able to be any more effective?
Mr Crowther: I think it is. It comes back to the issue about the duties. There is a difference between the law itself and how different organisations implement it. There are very good examples in London (which Cathy might want to build on) of the way the GLA and Transport for London have used procurement to achieve real outcomes. There is quite a strong example in terms of the Olympics and the fact that Action for Blind People are doing all the catering for the building workers on the site. Procurement can be used to achieve and drive real, positive outcomes; it can also be a tick box exercise. What we are doing is updating our guidance, trying to find case studies of good practice and where it works to promulgate and promote those.

Q24 Oliver Heald: I would like to ask a question about the idea of a single equality duty. Some lawyers have suggested to us that it is very important that you do not lose the ability to treat people more favourably by means of reasonable adjustments when they have disabilities, but if you were to write the single duty in that way would that favourable treatment and reasonable adjustment have to apply equally to people who are being discriminated against on the other two grounds? If not, why not?
Ms Casserley: I think all you would have is a sub-clause that says that in the context of disability you have to have due regard to the need to take account of people's disabilities even where that involves treating them more favourably. It would not mean that you had a duty that was exactly the same for everyone but I think that is the important aspect, that that concept of more favourable treatment is retained in the context of disability. It may not look as though it is completely harmonising but it is particularly important that it is retained in the context of disability. That does not prevent the rest of the aspects of the duties from being harmonised. The issues around public participation and positive attitudes, for example, are things that you can look at across the grounds; they are not just limited to the context of disability. It can certainly be done and I think it is important that it is done.

Q25 Oliver Heald: You are not suggesting and nobody that you are aware of is suggesting that treating individuals more favourably or making reasonable adjustments should apply to the other two limbs of discrimination.
Ms Casserley: No, it is certainly not something I have heard anyone raise. On the procurement aspect, I think there have been some really positive things done with it. I have come across people who have gone into their suppliers and, for example, examined their equality opportunities policies and actually looked at how they are dealing with them in practice. I think the difficulty is that because of the guidance that is sometimes put out and because of the European Directive on procurement there is a fear that if people use procurement to promote equality they will fall foul of European legislation in some way and actually that is not the case, you can be a lot more proactive about procurement. I think the important thing for the equality bill is to make it clear on the face of the legislation that you can use procurement to promote equality and that procurement is a public function and, as a result, you need to promote equality within your procurement policies and practices.

Q26 Tom Levitt: I want to ask some questions on Access to Work to conclude this section. How do you think the Access to Work scheme can be improved to better enable people to obtain work, stay in work and make progress, in particular I am thinking of those people with a mental illness or fluctuating conditions?
Mr Lamb: I will have to answer more generally; I think fluctuating conditions is slightly more complex but we can come to that. Access to Work is one of the Government's best kept secrets in terms of encouraging disabled people and retaining them in work. Secondly, in terms of its economic effectiveness, for every pound spent £1.70 goes back to the Treasury in the form of saved benefits, National Insurance contributions and taxation. In principle it is difficult to see why it is actually cash limited except for the fact that it sits in one bit of DWP's budget rather than another. Given that the Government is moving towards the situation with the Freud's proposals where it is looking at a different model of spend and invest to save on employment, the first way I think it could be improved is to look at the way it is actually funded within the departmental budgets and whether it could not be seen as either a hybrid or move from the departmental expenditure into the other budget which is more open ended because we see no reason in principle why Access to Work should not have more open ended funding, welcome though it is that the Government is committed to doubling that already by 2014. In general principle the first way I would recommend that Access to Work could be improved is to look at the whole funding machine around it. In relation to your specific question on fluctuating conditions, obviously one could look at whether more interim support could be available rather than the rather complex way of having to claim for it at the moment. That could have implications for the budget but it is certainly something we are looking at in terms of whether you could have someone that could substitute for part of the job for part of the time as a way of helping fill the gap left by someone who is there for part of the time

and not for part of the time and more research into that would be very helpful. Secondly I think, looking back to the reasonable accommodation type arguments around whether someone with a fluctuating condition could have a different work arrangement during that period then Access to Work could actually help that. Thirdly related to that I think we can look at the more attitudinal issues that often do not get addressed directly by the Access to Work scheme and looking at policy practice and procedure which in a way brings you back into the legislation. As part of an Access to Work assessment what tends to happen is that you look at the DDA assessment, the policy practice and procedure over here and then in another place you look at what physical adaptations or support someone needs under Access to Work and actually something that starts to bring those two assessments together and look at them as a unified whole would be really helpful especially when dealing with fluctuating conditions.

Mr Crowther: The Commission has recently set up an employment and mental health working group chaired by Liz Sayce who some of you may know, she is a member of the Commission's Disability Committee. The first task they had was to come up with some ideas and proposals around this which I think need further development and further thinking. One of the key things that was said was the degree to which you can focus Access to Work far more on the individual than on the employer so that it became a part of the individual's capital when looking for work, certainly where people have needs and requirements that stay fairly constant over time. Liz was reflecting on a situation where she had interviewed somebody and during that interview they had been able to reassure her that they had this package, they would be able to bring it in, it was not going to be a concern as an employer which I think was quite interesting. In terms of specific issues around fluctuating conditions, the group looked at the idea of Access to Work being available to pay for temporary cover during short intermittent absence from work due to illness which could otherwise impact on the resources of small employers and to explore it in that way, that it might be provided in the form of credits so people could draw down on it when they needed it, almost like a kind of call out service. That is an interesting idea to explore so that people might secure out of hours support, mentoring, counselling, stress management as and when they needed that sort of support to maintain work, to use it to pay for in-work job coaching as well. It requires a sort of re-imagining of what Access to Work is there for and I think we need to think through some of those issues and also the balance between the responsibilities of employers to make adjustments and the state to actually provide that funding. Those were some of the ideas that they collated and I would be more than happy to share that in more detail with the Committee.[1]

Q27 Tom Levitt: You are basically suggesting that there is some mileage in the DCC proposal for Access to Work to be able to pay for that cover where that is appropriate (because obviously there would be other circumstances where it would not be) rather than having a right to rehabilitation leave.

Mr Crowther: It may be a blended solution of both of those things. That is why I think that proposal needs more thought but I think it addresses a very real problem that many people with mental health conditions face in terms of the fact that their condition fluctuates and can unpredictably mean that they are not available for work which can clearly have an impact and a perception of them in the workplace. If that could be managed more effectively and made smoother then that could be beneficial.

Q28 Tom Levitt: I think we have a number of people who have now called Access to Work "the best kept secret"; there cannot be many left who have not heard of that phrase let alone Access to Work, but even so the figures we have been made aware of suggest that the amount of money in Access to Work that has been spent on on-going support is increasing rapidly whereas the amount that has been spent on what you might call one-off or capital expenditure is actually falling and there are fewer instances of that than there used to be. Why do you think that is dropping off?

Mr Lamb: Certainly in terms of larger employers I think a lot of larger employers are now much more willing and much more aware because of the consequences of the Act to actually take on some of those expenses for themselves, but I do not think we should deduce from that that is an option that is available for all employers in all circumstances, even some times large ones. I think even in terms of larger employers Access to Work still has a very important role to play and certainly that can be part of the explanation. We have to be very careful in speculating too much around this because there is a fairly major study about to come out that the Government has commissioned which I think will provide much more systematic evidence around a number of these issues. If asked to speculate that would be part of the explanation I think.

Q29 Tom Levitt: Would that be consistent with DWP's position of perhaps not providing Access to Work funding within the public sector and expecting the public sector to take on that cost from their own resources. Are you aware of that happening at all?

Mr Crowther: I think our understanding is that that may have been something under active consideration. The Commission's view is that that would be a great leap of faith into that area. I think we need a much more systematic review of the impact that has had within central government departments where that is already the position before we move forward and extend that to the broader public sector, certainly given the economic situation as well that we are finding ourselves in.

Q30 Tom Levitt: They were not denying Access to Work assessment, just expecting the government department to pick up the tab. What else might be

[1] *Note by witness*: See our response to the Green Paper on Welfare Reform (not printed).

done to engage employers? Is it going to be through exhortation from campaigning by disabled people who are going to be pushing the business case? What else could be done to promote Access to Work?

Mr Lamb: I certainly think there is an opportunity at the moment because of the way Employment and Support Allowance is going to work. That gives an opportunity at an early stage for claimants to essentially have basic Access to Work assessments as part of their action plan. It would not be a big step from that, for example, to look at, if you like, a mini evaluation at a very early stage when people are actually seeking employment before they have actually gained it or even at the point where they are gaining it to look at a very quick assessment of what they may need even at that stage. That might help both in terms of making people seeking work aware of it and making employers more aware of it. I think secondly the Government has done quite a lot with SMEs to ensure that they are more aware but a lot more could actually be done in promoting it to those areas in the employment market that very obviously are not going to be in the same position as either public authorities or very large employers. I would agree that we would not accept that even for the public sector and large employers that more promotion does not need to be done nor that Access to Work does actually need to be provided. You cannot make a direct link but we have noticed that employment rates in DWP of disabled people went down about the same time. Again that would be a complex position, you cannot just assume that one relates directly to the other but it would reflect our concerns going into economic recession. We researched some of the reason why you have to look at ways in which you can extend Access to Work at the moment as a potential protection for disabled people going into a recession where we know they will be the first to be hit in looking at participation rates in the economy.

Mr Crowther: There is always a big challenge to reach small and medium sized employers. The DRC in its last few years did a lot of research around this and one of the key things that we found was the best reach is often through intermediaries—through their accountants, their lawyers, through chambers of commerce—so there is an issue about how my organisation, Jobcentre Plus and others target those intermediaries to make sure that information is there. Also the fact that often what those employers will do is only engage in an issue once they are presented with it. A large organisation with a well-resourced HR department have consistent polices and practices. I think there is a big role here, as Brian has said, for Jobcentre Plus and its agents. How is the whole issue of Access to Work embedded into the personalisation agenda, into the Freud proposals and the way these providers work closely with employers and employees and think through those needs as well. I think we need more work in that terrain as well.

Chairman: Thank you very much. This has been very interesting. You may not have thought so, but we did!

Witnesses: **Mr Yusef Azad,** Director of Policy and Campaigns, National AIDS Trust, **Mr Andrew Harrop,** Head of Policy, Age Concern England and **Ms Emily Holzhausen,** Head of Policy and Public Affairs, Carers UK, gave evidence.

Chairman: Good evening, it is good to have you with us. I noticed you were all very attentive in that first session. We will start the questions now.

Q31 Michael Jabez Foster: Is a single act welcome? Do you think the Equality Bill builds on existing legislation to improve equality and inclusion of disabled people? Do you think it is a good idea?

Mr Harrop: Before I start I would like to clarify that I am representing both Age Concern and Help the Aged in advance of our merger in April. A single act is absolutely essential for older people because they are the 'poor relations' when it comes to equality protection in that they have no protection under goods and services legislation and no equality duty. The reason why we support a single new bill is because it will 'level up'; it will go beyond the workplace protection that already exists for age to comprehensive protection as with other areas of equality. On top of that, however, there are real advantages in having a single piece of legislation rather than six different pieces of legislation potentially. You can see that most clearly when you think of the impact on public bodies of implementing public sector duties. Would you want to have six different requirements, potentially six different timescales, reporting cycles, *et cetera*? It is clearly much more sensible to have an integrated approach where the public body thinks about all the different equality issues within a single framework.

Q32 Michael Jabez Foster: Is that the view of you all?

Mr Azad: It certainly is, yes.

Ms Holzhausen: You will find us agreeing with what Andrew said very eloquently, but you will know from our evidence that we would also like to see a single equality act incorporate more for carers who feel very discriminated in our society. I can go through that now or later if you wish.

Q33 Michael Jabez Foster: Could I ask you in particular, Yusef, about the definition of disability? You particularly say that you are in favour of the social model approach to the definition but there are those who say that that would expand the scope in such a way as to make it unworkable. What do you say to that?

Mr Azad: I think you have already heard some eloquent and legally expert advice on that from the EHRC which I do not necessarily want to repeat other than to say we agree with it. The social versus

medical model debate can seem very academic or philosophical I think, but for people living with HIV it is an extremely practical issue. When we had the unchanged definition of disability in the DDA 1995, people living with HIV who were beginning to do well on treatment and so had no current functional difficulty but were nevertheless, because the condition is so stigmatised, often experiencing discrimination, were finding in courts that they could not get the redress which was their due. This was basically because the definition allowed a very limited and medical model of what disability was. To address that fact the Government made sure the DDA 2005 included people with HIV within protections from the point of diagnosis—which is great—but they did not really change the definition of disability itself. To some extent people living with HIV can say, "I'm alright Jack, we're covered". But to give you one example of a very practical issue, a significant proportion of people with HIV are co-infected with hepatitis C. Is hepatitis C a disability? I would argue that that may be a matter of debate in a court and could significantly disadvantage people who are infected in that way if they do not have any current functional problem as a result of their infection, even though discrimination can certainly apply in their case. I think that gives you one example from our perspective of a social model which may cover more people but that is because they need to be covered.

Q34 Michael Jabez Foster: You also expressed your concerns in your paper that the Government may step back from plans to include multiple discrimination in the new Bill due to concerns about costs. Can you elaborate on why you think that would be a problem?
Mr Azad: 77%, roughly, of people living with HIV are also either gay and bisexual men or black African men and women. For people living with HIV it is usually the case that they have another aspect of their identity, if you like, which is itself vulnerable to marginalisation, stigma and discrimination in our society. You will have received, I am sure, many submissions that make the very basic point that we do not have just one identity, we are a mix and combination. The current legal processes basically only allow for you to make a claim of discrimination on the grounds of one aspect of your identity. We think that for people living with HIV who may be experiencing a combination—an intersection—of discrimination on the basis of not only their HIV status but their sexual orientation or the fact that they are from Africa, the current regime does not really address the specificity of their experience appropriately.

Q35 Michael Jabez Foster: Is there not a risk, at least, that people may simply take the blunderbuss approach and claim discrimination all over the place simply because they have a problem with the individual organisation or whatever it is that they wanted to challenge?
Mr Azad: I think we have heard already that the problem is that people are often not willing to take cases even when they have a very strong case. I hope I may have the chance later to talk about the way we need to reform the tribunal system. There are processes to identify vexatious complaints and I do not think that is a realistic worry. There are a number of specified grounds. The grounds are not limitless; they are limited in number and identified in legislation. We are not going to increase the number of grounds so I do not think that is something that you should be concerned about.

Q36 Michael Jabez Foster: Would you see there is a need for a main purpose claim because otherwise if you have a whole series of claims the length and cost of just litigation would be absolutely astronomical?
Mr Azad: In a sense one is arguing for one claim. One is saying that a single claim should be able to express the wholeness of the person's experience of discrimination. One is not arguing for one claim, followed by another claim, followed by another claim. That, in a sense, is the problem we have at the moment. One is saying that the single claim should be able to address the social reality and complexity of human experience and of human discrimination. Again I think that what multiple discrimination will do is possibly even reduce the number of claims rather than increase them.

Q37 Tom Levitt: Is it the case with older people, that it is often something other than age that is in the background to the discrimination?
Mr Harrop: It certainly is. If you think in an employment context of the spate of stories over the last year of older women in the media who have, I think most people would agree, been singled out because of their sex as well as their age in the way that male broadcasters have not been singled out. There are also significant issues about the intersection between disability and age. We have heard from experts on disability in the previous session who did not really pick up some of the issues affecting older people, who make up around half of those who are DDA disabled and who frequently do not identify themselves as disabled. I think there are advantages in not just seeing discrimination as a series of parallel potential claims; at the moment it is really a case of "pick your best one and see how you get on". With modest tweaks to the law around how comparator tests work you could enable people, as has been said, to represent themselves as their whole person and make the most appropriate comparator.

Q38 John Penrose: I would just like to broaden this out a little. As you would expect, as the Work and Pensions Committee, we are interested in barriers to employment and equality in employment. Clearly there are many barriers to employment which start with discrimination but move a good deal further beyond it and move out into wider attitudes in society and all sorts of things. How broadly should the Equality Bill go in order to achieve equality in employment?

Ms Holzhausen: If I might start and then hand over to my colleagues, you are probably all aware of the *Coleman* case and how important that is for carers. There are enormous barriers to employment as you know from having done your report last year on valuing carers which we warmly welcomed, as you know. One in five carers have to give up work in order to care; they are more likely to retire early. It is incredibly hard to get back into the labour market; well over 80% said they felt less confident and less skilled and able to get back into the labour market and particularly when they are still caring for somebody not having the right kind of services that can get them back into employment makes it incredibly difficult. If we had a protection from discrimination in employment where carers are not treated any less favourably plus a positive public sector duty to promote equality for carers and get the right kind of services for carers, then we would see the barriers coming down. There are good business reasons and arguments for actually implementing this and introducing flexible working can bring improvements to the bottom line. Employers have found that their retention increases, they do not have to pay the costs of recruiting people (£12,000 per staff member), so it is not just looking at another layer it is actually looking at positives that we can get out of this as well. Businesses will obviously want to recruit and retain key staff members even during a time of downturn and recession. It is absolutely critical that they keep the right people and retain the right people.

Q39 John Penrose: If you were to go for that broader duty, how would you make it enforceable against a public body that was not providing sufficient training opportunities for people with caring responsibilities or some other such shortfall?

Ms Holzhausen: We would expect the same thing to happen that happens with the current public sector duties and have EHRC to have legal powers to take that body to court if need be. The evidence has already shown that it is difficult to enforce but I think, as you know probably from your constituents as well, carers do feel very invisible and just having a public sector duty to promote equality, as we have seen in Northern Ireland, really helps to raise the profile, helps people to change policies and can actually bring about real changes to individuals' lives because that is what this piece of legislation is about, about improving people's lives at the end of the day.

Q40 John Penrose: So carers' organisations feel very strongly that it should be much, much broader than pure, narrow discrimination. How about Help the Aged?

Mr Harrop: We have already discussed the point about multiple discrimination. People in their fifties and sixties who struggle in the labour market often are carers, disabled and perhaps have low skills as well. We have also talked about the public sector duty and the potential it has. I would single out Jobcentre Plus and the learning providers and funders as having failed to really think inclusively about age in their work and the need to support and re-equip people in their fifties and sixties to get back into the labour market. There is still too much of an approach of supporting people as if it was their first time into work when actually the needs of people who have lost their jobs in their fifties and sixties are complex but different. The biggest single thing that we want to see in the field of employment from this Bill, however, is an end to the law that permits forced retirement at 65 by employers. The current age discrimination law brought in in 2006 had this gaping hole, which means that half a million people over 65 who are currently at work have no discrimination protection. We think that is both extremely unfair—it causes outrage and very full mailbags for us—but also has a clear economic downside in terms of trying to promote people staying at work longer and supporting businesses. At the moment it is very important, thinking about the current economic conditions, because this is a group who will never work again. If they lose their job they will not be able to find others so we think it is particularly important now that we do not give a licence to employers to discriminate at 65.

Mr Azad: In a couple of years there are probably going to be over 100,000 people with HIV in the UK. We know that under half of them are in paid employment. I need not tell your Committee all the implications of that—the poverty, mental distress, social exclusion—and we very much welcome the key ambition of the welfare reform agenda which is to support people back into work. We know the vast majority of people living with HIV can work and want to work. With a willingness to work we also need a willingness to employ and the problem for a highly stigmatised condition like HIV (and it applies to mental health as well) is that we need to change our civic culture, the attitudes of employers in both the public and private sector to a whole range of disabilities. To that end the Equality Bill is a really important opportunity where we must maximise change, I would argue. That includes discrimination by association; we have talked about multiple discrimination. The single equality duty is, I think, a really important opportunity. One of the problems we have found around HIV and the Disability Equality Duty is that disability is such a broad category. We did a survey of a large number of disability equality schemes where you would expect HIV to be mentioned and found that HIV was only included in a small minority of cases. I think in addition to what has been said about the EHRC taking cases we would welcome post the equality bill in the statutory code the EHRC can produce and which can be used in evidence in court, some clearer advice to public bodies as to how, without naming every single disability, to encourage and enable public bodies to be more disaggregated and nuanced in how they look at disability and cover the range of different challenges that people are face.

Q41 Oliver Heald: When I was asking Catherine Casserley about the single equality duty we were talking about whether disabled people would need a sort of sub-clause saying that, "save that an

advantage may be given to a disabled person by way of a reasonable adjustment". Would that not also apply to a carer given that you are obviously often looking after somebody who is disabled and may need to go urgently to the premises or have some special dispensation made? Would you agree with me that it might well be necessary to have that exemption covering both disabled and the carers?
Ms Holzhausen: I would indeed. I think the *Coleman* case illustrates that very well, as well as the very negative language that was used around disabilities, the actual problem that Sharon faced whilst she was at work was around flexibility. Reasonable adjustments in relation to carers is all about good practice of employers. The reasonable adjustments that are required and which are fairly easy to implement, they are all part of common knowledge and good practice within good employers, so it certainly would not be a burden in any way. It would be a lot harder to see how the single equality duty and certainly protection from discrimination at work would work without that kind of thing. To pick up your point about training it would be about what time are the courses put on, can carers access them, do they need slight adjustments there? That would certainly be right and be workable for them.

Q42 John Penrose: Can I just encourage all three of you now to look into a crystal ball and look forward a series of years? Let us make a heroic assumption that some kind of general equality duty has been imposed and has worked, just picking up the point made by my colleague, John, earlier, what at that stage would "good" look like in terms of outcomes? What would you class as success?

Chairman: Would your organisation being wound up mean success?
Mr Harrop: Every charity always says that our aim is to put ourselves out of business but it has never happened yet. I think in terms of the public sector we have some really visible examples of age discrimination, which the Department of Health actually has put numbers on in terms of several billion of quantified discrimination in the health service and in social care. Clearly seeing that gap close would be a major achievement. More widely discrimination law is a tool to change attitudes and we have seen that with race and gender over a 30 or 40 year period. It is not the only solution but it is part of a social movement. This country still faces massive issues around prejudice against both older people today but also the ageing process and coming to terms with the fact that we all grow older. What we need, as an ageing society, is a complete sea-change in all our attitudes to the second half of adulthood and particularly to periods of great frailty at the very end of our lives. This legislation and the work that public bodies will have to do as a result of it can make a major contribution to that.

Q43 John Penrose: Can I focus the question down a little more and ask in relation to employment—which is where we started off the questions—what would "good" look like there for your organisations in terms of access to employment and employment levels?
Mr Harrop: I think the key thing to watch is the average age that people leave the workforce. It has been improving in recent years and we will have to see what happens over the next few years. We will need to see over the long run that average retirement ages rise in line with life expectancy so that people spend roughly the same share of their adulthood in work as they do today. We also need to make sure that we do not see widening inequalities so that people of the same age do not have very different experiences of the labour market from their late fifties onwards. At the moment it tends to be people with fewer skills, poorer health and caring responsibilities who are forced out of work well before they wish to go and others who are able to carry on on their own terms with a gradual reduction of work. We need to see everyone having the opportunity to save for their retirement by being able to work for as long as they wish to.

Q44 John Penrose: Do either of your organisations have any figures for target levels of employment for people between the ages of 65 and 70 or some such equivalent which maybe government should be aiming to achieve if it gets this right?
Mr Harrop: We do not have targets over the age of 65 because over state pension age we believe it should be a matter of choice. There is plenty more room to increase employment between the ages of 50 and 69 which is the current age range that DWP uses. There is no reason to think that it could not get significantly closer to the main employment rate but I will not give you an exact number.

Q45 John Penrose: I may come back and ask you to do so. I take your point about it being a matter of choice, but nonetheless there must be examples of what "good" and "bad" would look like to illustrate that discrimination and inequality has been reduced so people are only exiting at the moment of their choice rather than somebody else's.
Mr Harrop: There are three quarters of a million people over the age of 50 who are out of work who say they would like to work in ideal circumstances, so that is a good benchmark at the moment. Not all of them will be out of work because of discrimination and prejudice but for other complex reasons, but that is a good indication of the scale of the challenge.

Q46 John Penrose: Thank you, that is very helpful. I am going to ask Emily and Yusef the same question, do either of you two have examples of what "good" would look like in relation to employment levels in particular?
Ms Holzhausen: Yes, I was going to talk about employment but I also want to talk about health as well and public bodies. A lot of the examples that we get are around health and social care where they are discriminating against carers. To give you some examples of how success would look, one carer, for example, has had bowel cancer and she has not had

a check-up for eight and a half years because the pre-check-up medication that she needs to take would leave her ill for a week and she cannot get the social care for that so she is dropping out of the health system. Another has not registered with a GP for two and a half years because he cannot get to the GP services in the morning because he cannot get the social care to look after his father in order to do that. Success would be social services and health working together to look at their policies and make sure that carers are not invisible, that they are able to access health and employment in exactly the same way. We have aspirational figures as well of carers who want to work and there are times when it is just impossible because the caring situation is so complex, where there are several members of the family who have a disability or who are chronically ill.

Q47 John Penrose: Are those aspirational figures in your submission?
Ms Holzhausen: They are not but we can provide them for you afterwards.[2]

Q48 John Penrose: That would be helpful.
Ms Holzhausen: We would see an increase in the number of carers in employment and we would also see a decrease in the number of carers who felt they were forced to leave employment early.
Mr Azad: As the effectiveness of treatment continues to increase our aspiration is that people living with HIV will enjoy national average employment rates. We see no reason why not. One of the problems at the moment is that because too many people are being diagnosed late—which is sometimes as a result of discrimination within the health service—they are not able to access treatment as early as they should, so treatment is less effective. As this problem is resolved with earlier diagnosis, our aspiration is normal levels of employment. There are very real problems at the moment with fears of discrimination. To give you one example, there was some research carried out recently that showed that employers are the people that people living with HIV are least likely to disclose their status to; they are at the bottom of the league table as it were. When you think of remaining in work, you cannot access reasonable adjustments unless you have disclosed your status to your employer. Going back to the point Andrew made about the bigger picture—which is about culture change—what we need is an equality act that will, through the duty and through various very concrete measures—like banning pre-employment questionnaires, ensuring confidentiality when necessary in employment tribunals—change the culture around stigmatised disabilities and stigmatised conditions.

Q49 Miss Begg: Yusef, you have just talked about a culture change and I have questions on equality in goods, facilities and services. In terms of disability we have had the legislation on the statute book for a few years and while there have been improvements there are still huge gaps, as was said in the previous session, in terms of physical access to buildings. How do we make that change systemic? How can we embed it in the culture in terms of access to goods, facilities and services for all people regardless of which strand of disability? How do we get that change embedded into the culture?
Ms Holzhausen: I think that is a really difficult question, having had equality legislation on things like gender for a good many years.

Q50 Miss Begg: I will try to make it easier: is the problem in the actual legislation itself or is it in the way it is implemented and enforced?
Ms Holzhausen: I do not think the fundamental problem is in the legislation necessarily. The Equal Pay Act was brought in in the 1970s and we still have not necessarily achieved equal pay between men and women. I think the issue is more about implementation really. We have had enormous culture change across many of the different equality strands but it is about culture change and change of hearts and minds as much as it is any of these really important practical measures. I just think it is down to continual enforcement as well as showing the real positives that can be generated out of all of these measures: making communities more inclusive, disabled people and their families being able to go out together rather than just separately because the environment is not accessible; and constantly underlining the positives as I talked about with business, for example, where flexible working is not negative it is positive. I think that is the other half of the coin to enforcement.
Mr Harrop: I would agree with all of that. Another point we should think about is the opportunity that having the new Act brings. Events do create awareness so it is very important that the Government and EHRC use this as an opportunity to shake up public debate and raise awareness of both existing legislation and the new rights that are coming. Linked to that is the implementation programme. What is being proposed, for age at least, is a phased and gradual implementation programme. It is really important that that does not mean that the impact of the legislation is diluted, kicked into the long grass or indeed just never happens—that secondary legislation is never brought in. To keep the culture change momentum going we need to see now the Government set out a clear timeline and plans. It must get all the secondary legislation sorted quickly even if there are long commencement periods so that it can work with EHRC and other partners on a planned and phased programme to make sure that people with new duties are ready and aware.

Q51 Miss Begg: Have you learned anything from the delay in bringing in the physical access provisions under the DDA 2005? They might have had ten years to do it but everybody stumbled around to do it the year before it came into force. Have you learned from that? Is there anything you would do differently?

[2] *See* Ev 232

Mr Harrop: We made exactly that point to the Government when it was considering the timing of the legislation and it is a very similar story for the age employment law which was introduced six years after the European Directive that it came from; everyone sorted themselves out in the last six months. The truth is that, in some bits of the public sector, there are public spending implications from age equality legislation so it is understandable why ministers are nervous. But there are other areas where you can just get on with it, particularly in the area of financial services where current discrimination against older people, particularly in things like insurance and credit, is extremely ill-founded; there is not much good data or rationale to back it up. I think financial service providers will find that in a couple of years' time, after the law comes in, they won't know what they were worrying about two years previously—they will adjust very quickly.

Q52 Miss Begg: Yusef, legislation or implementation?
Mr Azad: I do not have much to add. Without wishing to sound too cynical, I think you do need to be hard-nosed and have effective and accessible processes for complaint, application for change and redress; the culture change needs the stick as well as the carrot, as it were. We need to see an equality bill that improves the situation.

Q53 Miss Begg: If it is enforcement that is the problem, Yusef you have already made reference to how you might do that. Do we have specialist judges? Do we have specialist tribunals? What is your favoured way of making sure we can raise the number of cases that are actually brought?
Mr Azad: Could I mention one very specific issue around stigmatised conditions? It applies to HIV but also to mental health and a number of other disabilities and conditions. Certainly we know when it comes to HIV related discrimination that a large number of people are simply put off or are scared of putting in a complaint to a county court or an employment tribunal because of the fear of the disclosure of their status to a large number of people. Perversely it can be the case that your complaint is about an inappropriate disclosure of your status to colleagues at work and yet to actually get redress you have to go to an employment tribunal where there is no guarantee that your HIV positive status will be protected. There is some allowance in the regulations for the tribunal to take place in private around strictly confidential information but lawyers do not believe that really applies to medical status and I think we need to be much clearer on that front. There are also reporting restrictions that are possible but they only last, as far as we can see, for the duration of the tribunal. We need much clearer and stronger confidentiality measures to allow people with stigmatised conditions or conditions they wish to remain private to access appropriate justice and redress.

Q54 Miss Begg: Is there a particular problem with stigmatising conditions in as much as the chairman of the tribunal or the judge might have the same prejudices as the general population?
Mr Azad: That is something we are working on with the Judicial Studies Board at the moment to get better training for judges and tribunal chairs around HIV; it is absolutely something that needs to be addressed. In preparing for this evidence session we asked colleagues in a range of HIV organisations round the UK to give examples to us of problems which they thought needed to be addressed. We had one from Northern Ireland from someone who was discriminated against in further education and had a very powerful case. The equality body in Northern Ireland wished to support him but when it came to the court, the court simply refused to admit or agree that his HIV positive status was sensitive enough to allow for his identity to be protected and as a result he withdrew his complaint. That is a very practical example of how we need training for judges and we need the regulations to be much clearer and firmer in providing for appropriate degrees of confidentiality during legal process.

Q55 Miss Begg: Emily, how do you think these cases should be dealt with?
Ms Holzhausen: We run an information and advice line and have the problem across the board of people accessing redress through the courts really. On top of caring it is incredibly stressful to take any form of redress even if it is just going through the normal complaints process and then to the local government ombudsman, so we would say anything that was easier and quicker like a tribunal system, even though that would still be very stressful.
Mr Harrop: There are obviously major issues about access and the complexity of discrimination law. It was originally intended that the employment tribunal was somewhere you could go without lawyers but that is clearly not the case for discrimination legislation. With the specific issue of whether there should be equality tribunals, which I think Cathy touched on earlier, we are not sure that is the best approach simply because in employment cases it is very difficult to untangle a discrimination claim from a wider employment claim; they almost always come together. What we really need is employment judges all being experts in discrimination. In goods and services there is a case for some sort of specialist role for some judges so that they have at least seen a sensible flow of discrimination cases in the county court rather than it being a rarity; when you might see some of those issues of prejudice, as we have heard about, coming up. We would also want to see a much bigger role for the small claims court in discrimination cases so that it does not feel like a big and intimidating process; then people can get relatively modest compensation easily and quickly.
Miss Begg: So we do not actually have a consensus as to which is the best way forward; different people have come up with different solutions.

Q56 Harry Cohen: I want to ask about the public sector equality duty in your view. It is obviously going to be in the new Act; how do you think it should be formulated? What sort of enforcement should go with it?

Mr Harrop: It is obviously extremely welcome that it is being extended to the extra strands from the three it covers at the moment. I think the experience of the three existing equality duties is fantastically helpful and we should aim to bring the best. We heard earlier about the importance of involving people rather than just seeing them as passive recipients of consultation. That applies well beyond disability, particularly to marginalised older people. We have also already heard about the importance of seeing equality as being about supporting people who are different rather than just treating everyone the same. I think that needs to be built into the equality duty. There is a risk that public bodies have a rather formulaic process of thinking about equality which might actually lead to harm if they do not appreciate that you can treat different age groups differently. You can provide them with different services, be they children or young adults as well as older people, as long as you are thinking about fair outcomes for each age group and the different sorts of services they need. That does not necessarily need to be about reasonable adjustment in the formal sense within discrimination law; it is about a common sense approach to equality; it is about focusing on the outcomes you are aiming to achieve rather than the 'input' of everybody being treated the same. Finally, one suggestion for an additional element that the duty might contain in relation to age. Ageing is a dynamic process, we are getting older as a society, our demography is changing. The current duties do not really think about future-proofing. There might be a case for thinking—in guidance or in the detail of the duty—about requiring public bodies to think about their future populations and their needs rather than just people today.

Q57 Harry Cohen: Are there any other points on that?

Mr Azad: We also really welcome the extension of the duty to a number of grounds. Obviously with so many people living with HIV being gay men, to have a duty that covers sexual orientation is particularly important around issues such as education and provision of decent health services, *et cetera*. I do not want to repeat what I said in detail about the need for a more nuanced piece of guidance around disability from the EHRC. However, to give you one concrete example, we are having an argument with the Department for Children, Schools and Families at the moment because, even though the number of young people and children with HIV is quite small, we are hearing increasing numbers of stories of them being discriminated against in schools—schools trying to exclude them; schools saying that their status has to be told to every teacher and every parent in the school; schools passing on information about the child to another school, et cetera—all utterly unwarranted and profoundly discriminatory. We have asked DCSF to send a very brief and straightforward circular out to schools explaining that this is unnecessary, that their health and safety worries are unnecessary, *et cetera*. They referred us to a piece of guidance to schools on disability. HIV is not mentioned other than briefly to say that it is included within the definition of disability. It does not address any of the issues about confidentiality; it does not address any of the misplaced concerns around health and safety. It is not enough to tick a box and say, "Yes, we've done disability". The point that was made very eloquently earlier on in your session was that it should be about the way we think and about due regard rather than simply ticking boxes in a scheme; the key issue is responsiveness and having a well-founded approach. That is what we are not seeing at the moment from that department and where we need, I think, even stronger advice from the EHRC; there is a concern that the single duty will be one step further removed from the reality of disabled people's lives on the ground and we need to make sure that does not happen.

Ms Holzhausen: We warmly welcome the extension as well but of course we would welcome it even more if it included carers. To give you an example, one of our members was seriously ill in hospital and the local social services phoned her to tell her that the amount of her husband's direct payments that he was receiving was going to be reduced because he had just reached his 65th birthday. That obviously is discriminating against his age in the provision of goods and services, but in terms of her, she was a younger woman of working age and by reducing the amount of direct payments that meant she would not be able to go back to work when she came out of hospital, besides the immediate problem of how would she manage when she got out of hospital. If there was an extension across the Act in a single equality duty and protection for carers we would see both the carer and that older person being protected rather than just the one.

Q58 Harry Cohen: This might be a bit of an unfair question, but I will put it to you to see your initial reaction. As part of the evidence to us we got something from the CBI and they say they want to see value for money outcomes rather than processes like targets and audits. They said that would bring more commitment rather than compliance. There are some interesting points there and they are a powerful voice as a lobby. What do you feel about that approach?

Mr Harrop: Are you referring to the public sector duty or the private sector?

Q59 Harry Cohen: The public sector at this stage.

Mr Harrop: It is a fair point that there has been an awful lot of paper produced. Equality schemes have been reasonably criticised for being exercises in job creation rather than leading to outcomes for

disadvantaged groups. I think the lessons have been learned and you have heard from the EHRC earlier that they want to move beyond the current generation to requirements to ones based on outcomes and where you report in your mainstream planning and reporting documents—rather than through some special process—what you were doing for all the discrete groups in your community. That obviously seems to make sense.

Q60 Harry Cohen: Can I move onto the private sector? It has been argued that the equality duty, in relation to race anyway, should be in the private sector as well. Do you think a wider equality duty in the private sector is workable?
Mr Harrop: We are absolutely delighted that we are getting a public sector duty covering age so we see making that work as the top priority. We very much welcome the proposals on voluntary approaches and kite marking in the private sector.
Mr Azad: Similarly I think we are interested in the idea and keen to talk about it, but there are things higher up our agenda immediately, for instance prohibiting pre-employment health questionnaires, having effective employment tribunals.

Q61 Chairman: We will come back to the pre-employment questionnaires in a moment.
Ms Holzhausen: I certainly think that the procurement by public bodies as well is a very important way of working with the private sector to look at outcomes and mechanisms. We would certainly be very much in favour of that.

Q62 Harry Cohen: One of the suggestions put to us, I think by the CAB, was that there could be a greater role for regulators and indeed as part of that the trading standards people at the more local level. There are some really bad employers who will do nothing. Would that be a way forward in trying to get this equality duty into the private sector a little bit better? How do you feel about that?
Mr Harrop: There are definitely roles for intermediaries in the private sector. I can actually think of more examples with relation to goods and services rather than employment, but I am sure it is analogous. For example, the sector regulators covering things like finance; the Financial Services Authority has really washed its hands of the debate on age discrimination in finance. That is a good example where a bit of sector leadership, involving the regulator who really knows the industry well would be really helpful.

Q63 Oliver Heald: I just want to follow up the question I have been asking other people about the nature of the single equality duty given that you have to make an exemption for those who are disabled and carers. Is it not also true of the group you represent, that you might want to see reasonable adjustments made and advantages given in order to achieve equality for the elderly?
Mr Harrop: I think that the duty can potentially be sufficiently flexible so that you do not need to get into lots of specific exemptions for specific groups, as long as you explain clearly in the legislation what we mean by equality and that it does not imply treating people all the same. In terms of the prohibition on discrimination, you are absolutely right that there are issues around making sure that things which benefit a particular age group—where there is a clear social reason for it, like free bus passes that enable older people to remain active in the community. These practices should be either exempted in the law or it should be made clear that they can be justified on a case by case basis. What is being proposed on age uniquely—unlike any other equality strand—is that direct discrimination in service delivery can be justified so that a service provider will be able to say, "Here is the evidence, here is the reason and here is why it is a proportionate response to the issue we are tackling". It is a different approach from reasonable adjustment but it is trying to meet a similar sort of concern.

Q64 Chairman: I would like to ask about pre-employment questionnaires. Why do you think this is a legitimate route and not just using the DDA? Are there not parts of the economy where actually having a pre-employment health questionnaire could actually be productive?
Mr Azad: The problem for people with HIV and indeed again, as I said, it applies to mental health, is that the apparent need to disclose their status at an early stage of recruitment is something which many people find profoundly off-putting when applying for a job. Secondly—and this was talked about earlier—when it comes to recruitment it is often very difficult to demonstrate that discrimination has actually taken place. You are quite right, of course, health related issues can be very relevant to a job. I think what would be expected is that whilst in the initial process of application you could not ask health-related questions, but once a provisional job offer was made there would quite often and appropriately be the opportunity to ask relevant health related questions. Should it become apparent that someone has a disability for which no reasonable adjustments are possible or some health issue which cannot possibly be addressed, then it would be possible to withdraw the job offer. This ensures the process is transparent and someone can, if they really feel it is necessary, make a complaint. At the moment that is not the case and many people living with HIV simply find themselves, if they do disclose their status on application forms, rejected out of hand again and again and again. The only other thing I would say is this is not a sort of out of left field idea; such pre-employment questions are prohibited in France, in Belgium, in the Netherlands, in the USA and indeed in a lot of industrialised developed countries. I think what we are really hoping—we are working on this with the Terence Higgins Trust who have been campaigning for this for a long time and Rethink, the mental health charity—is that the Government, as they look at the Equality Bill, will look seriously at the experience in other jurisdictions. Of course there are legitimate issues and concerns the other way, but it

can work and it does work effectively in other countries. I think it would really encourage people living with HIV at a time when they are being told to go back into the job market to make applications and not worry about discrimination.

Q65 Chairman: How many countries in the European Union take this route?

Mr Azad: I have a list of some here.

Q66 Chairman: Just the European Union.

Mr Azad: On my list I think there are six European Union countries but that is simply ones that have been brought to our attention; I have not done an exhaustive and comprehensive analysis.

Chairman: Thank you very much, this has been very useful and we appreciate your attendance here.

Monday 2 February 2009

Members present

Mr Terry Rooney, in the Chair

Harry Cohen	Tom Levitt
John Howell	Greg Mulholland
Mrs Joan Humble	John Penrose

Witnesses: **Mr Rupert Harwood**, Chair, Public Interest Research Unit, **Mr Peter Purton**, Policy Officer, Disability, Lesbian, Gay, Bisexual Transgender Rights, Equality and Employment Rights Department, Trades Union Congress, and **Mr James Sandbach**, Social Policy Officer, Citizens Advice Bureau, gave evidence.

Q67 Chairman: Good afternoon, everybody. Welcome to the second evidence session for the inquiry into the Equality Bill. We have never had such a small audience, but I am sure it is quality! Feel free to cheer at the appropriate moments! A special welcome to our witnesses, we are very grateful that you are with us. I am sure what you have to say will influence the outcome of our inquiry. We have had 12, 13 years now of disability legislation in employment but the employment prospects for disabled people seem not to have shifted much at all. Would you have any comment on that?

Mr Purton: Quite a few. At the TUC we have spent the last ten or 12 years commenting on this; sometimes Government has listened and sometimes it has not. The key issues that we have identified just as headlines if you like are, firstly, put crudely, although it is a problem with disabled people applying for jobs, or in many cases getting jobs, the problem is being retained in jobs once they have got them. It is like a revolving door effect with people getting jobs and then the same people losing them at some point in the future which has kept the statistics moving at a snail's pace forward. Forward still, but at a snail's pace and in the present economic circumstances it is likely that we will see a halt to that progress. The second headline reason is because there continues to be significant discrimination within employment itself. The CIPD survey of a couple of years ago showed one-third of employers actually admitting to breaking the law, not simply unknowingly breaking it, so one wonders what percentage of employers are unknowingly breaking the law as well as the ones who know they are. Crucially, and I know there is a question on this at some point in the future, there does continue to be discrimination at the point of recruitment especially, as I noticed in your questions, for people in particular impairment groups, those with learning difficulties and those with a history of mental health conditions which continue to have 80% unemployment levels, and we believe a lot of that is down to the refusal of employers to recruit people through ignorance, prejudice and discrimination at that point.

Mr Sandbach: Adding to that, the Citizens Advice Bureau deal with about 22,000 discrimination cases a year and the number appears to go up rather than down. What we see in the evidence and the cases that come to us is although the majority of employers are aware of the DDA, there is very little awareness of what the DDA says, so there is very little awareness that there is an underlying concept of reasonable adjustments and how that can be operationalised. Secondly, everything we see suggests that employers very much have a kind of hierarchy of disability in mind when they are approached by disabled applicants or continuing employment relationships with disabled employees. There is a hierarchy of disability and what I mean by that is there are certain identifiable physical impairments the employer thinks they can manage work around, but when it comes to degenerative conditions or unpredictable conditions or mental health problems it is a different story altogether. We come across a lot of cases where people have serious migraine problems and things like that and these are the cases which are much harder for employers to deal with.

Mr Harwood: We conducted research into the first ten years of the Disability Discrimination Act and concluded that on balance it would be best described as a qualified failure. It enabled several thousand employees to get some financial redress at employment tribunals and also made an important difference to employment practice, but it failed to adequately tackle and reduce discrimination and disadvantage. We also looked at some of the factors which might lie behind those weaknesses and limitations, and these seemed to include, for example, employees were unlikely to make a claim to tribunals and were unlikely to succeed if they did make a claim. On the employers' side, in general employers seemed to have a poor understanding of the obligations under the Act, and those obligations did not seem to be adequately integrated into relevant HR policies and procedures. That seemed to lead to employers not facing a big deterrent not to discriminate because there did not seem to be a great chance that they would be taken to a tribunal and that a case would be successful. We also looked at some of the factors behind those and, in terms of claims being unlikely to succeed, one of the big problems seemed to be the wording and the interpretation of the legislation. For example, the main problem seemed to be the medical functional model and the fact that however much discrimination somebody faces, except in the case of victimisation, they have no redress at tribunal unless they can prove to the satisfaction of that tribunal they are disabled. I understand we are getting on to

that later, but it does not seem that is going to be addressed in the Equality Bill. The other thing was the European Employment Framework Directive, and the impression we get is the Government has continually ducked its obligations to give proper effect to that Directive. I suppose what we would like to see is the Government take the opportunity now with the Equality Bill to look at that Employment Directive and decide what they need to do and do it now. One of the things the Government seems to be saying is they want to simplify the law and avoid confusion. The way to get more confusion is if it is not properly implemented now and it has to be implemented in dribs and drabs over a period of time as a result of ECJ judgments and pressure from pressure groups. The third and final thing in terms of problems with the DDA over those ten years was it does not seem to be well-designed to bring about organisational change as opposed to individual redress. There is no anticipatory reasonable adjustments duty in the employment field. The Government, we say quite disingenuously, is arguing if you get an anticipatory reasonable adjustments duty in employment what it means is you lose the individual duty. We are saying there is no reason why the two cannot be combined and complement each other. The final reason why we think it has not brought about enough organisational change is the matters at Section 18B(1) which are factors which need to be given particular regard to in determining whether or not an adjustment is reasonable. Those factors allow the tribunal to take account of the individual benefits to the employee of an adjustment and the cost to the employer but not to have particular regard to the benefits to the organisation as a whole. What we would like to see is an anticipatory duty and changes to reasonable adjustment so that organisational change can happen as well as individual redress.

Q68 Chairman: I do not wish to appear negative, but the phrase "anticipatory duty" sounds like a lawyers' paradise.
Mr Harwood: I do not think so necessarily because it has worked to some extent in the goods, facilities and services field. What it means has come to be quite well understood. The other thing is we would argue that it should make it easier for employers. For example, if you have got an employee with a mental health problem and the employer has to keep making adjustments for that employee that becomes very expensive over time, but if you have got an anticipatory duty, and you have to remember it is reasonable adjustment, you only need to do what is reasonable, the employer can look at changing the whole environment and that should reduce the number of employees who get mental health problems and who leave work, or for whom adjustments have to be made. In that sense, it should help everybody.

Q69 Chairman: James, these 22,000 cases you mentioned, are those mainly people who are in employment who suffer discrimination or people who fail to get jobs because of it?
Mr Sandbach: It is mainly retention cases, but a certain proportion is recruitment cases.

Q70 Chairman: Is this a case of Government not engaging enough with employers in terms of the educative process or is it a lack of enforcement that is the problem?
Mr Purton: I think our view on that would be my shelves are creaking under the weight of good practice advice from every source imaginable, much of it from the Government. If you go on the DWP website there is loads of excellent advice. If you go on the EHRC website, it still links to the old Disability Rights Commission which produced clearly written model advice for employers and everybody else on disability equality legislation. I know you are going to hear later from the Employers Forum on Disability, an organisation for which we have much respect, and that organisation has been doing fantastic work for a long time to engage with employers and give them practical good practice advice on complying with their duties under the legislation. It is certainly not the case that there has been a failure to produce advice material.

Q71 Chairman: Is that actually engaging with employers, putting things on websites? There are a million pieces of personal health advice out there and how many of us actually take it.
Mr Purton: Exactly, that appears to be the case. Our view on the carrot and stick issue is we need both. The Government should use every avenue to highlight the issue of disability discrimination with employers. I do think as well that you have the remarkable effect of reaching many employers with a few of those well-publicised court judgments awarding hundred thousand pound damages and other sorts of salutary warnings to employers that they are in breach of the law. I am afraid, reluctantly, we think it is a weakness on the enforcement point, which echoes the points my colleagues have just been making about the effect of tribunal judgments and the weakness of the law itself, and is a weakness that we hope the new legislation will begin to rectify. Also, we hope that rectification will, as well as the points my colleagues were mentioning a moment ago, pick up issues such as the additional powers of tribunals to make recommendations to employers so that it does not become a single case dealt with at a single level and then you take some money and go, but a recommendation to the employer about how they should change their practices and the power to order reinstatement, a crucial issue for disabled people which does not really arise in other employment dispute cases to anything like the same extent. I remember five years ago bar one week sitting in this room giving advice to the scrutiny panel on what is now the Disability Discrimination Act 2005 on precisely this point and the point about anticipatory duties that you were speaking about earlier and, unfortunately, neither was picked up.
Mr Sandbach: I would like to add that I certainly think it is both enforcement and engaging employers in a proactive way. One of the ways the Government can engage employers better is leading by example.

The DWP and other departments should have essentially better targets for employing more disabled people and to show how it can be done and to set the example. On the enforcement framework, the big weakness is that it is difficult for people to go through a system of complaining, the enforcement system kind of lacks teeth. That is not a deficiency in legal powers and legal obligations, it is much more a deficiency in terms of access to the appropriate channels to get your complaint heard.

Mr Harwood: We did a report called *Teeth and Their Use* which looked at enforcement action by the former three Equality Commissions and found there had been a good deal of enactment but not a great deal of enforcement. We looked at the DRC, for example, and found over a six year period it had used only two of its seven direct enforcement powers. We would quite like to see the EHRC do a lot more enforcement, especially in cases which will educate employers as to what the law requires. The other thing relating to what my colleague said is with regard to the equality duties there are 44,000 public authorities and you cannot expect the EHRC to monitor compliance in the case of all of those. It seems the best way to enforce the equality enactments is through individual action in the employment tribunals but, as my colleagues alluded to, that seems to be extremely hard at the moment because at least at the employment tribunal level rather than the appeals level there is no legal representation level of community legal service funding, so you have the ludicrously inequitable situation where, for example, you have somebody who has a severe anxiety disorder and who cannot leave their house who has to go along to a tribunal by themselves to prove the fact they have a severe anxiety disorder and cannot leave the house.[1]

Q72 Chairman: If they cannot leave the house, how do they go to work?

Mr Harwood: What often happened in some of the cases we looked at was people had, say, OCD or other anxiety disorders while in work and got worse over time, so they had to resign from their work or they got dismissed because they did not go back to work soon enough, and they would end up at home and would feel they were being discriminated against because the employer did not consider reasonable adjustments and they wanted to take the case to the employment tribunal, but if they could not get representation they could not do that because they could not go along to central London to the tribunal. You get similar things with learning disabilities, for example. Again, it seems ridiculous that somebody with a severe learning disability would have to prove to the satisfaction of the tribunal making reference to extremely complex DDA law, which as we know judges and even law lords find difficult to understand sometimes. That person with a severe learning disability would need to prove they are covered under Section 1(1) of the DDA. That is one of the main problems, the difficulty in enforcing in the case of individual claims.

Q73 Chairman: In terms of discrimination in recruitment, is the answer things like banning pre-recruitment health questionnaires or is it in better support for disabled people wanting to apply for jobs, or something else?

Mr Purton: We certainly fully support all the programmes and moves to give greater support and access to training, skills training and so on, for disabled people to get into work but, as we said in this room five years ago, and the Disability Rights Task Force set up by the Government in 1998 said, we should ban pre-employment questions about disability and such information needed should be asked by a question of, "Do you need a reasonable adjustment for the interview?" something like that. That would cover that angle.

Mr Sandbach: We would agree with that. The problem with where the DDA applies to recruitment is there is an assumption at the front end of the recruitment process that the DDA does not really apply, it only applies when you get down to shortlists, interviews and that level of recruitment, but at the actual application stage or advertising stage there seems to be an assumption that the DDA does not kick in at that point, even though clearly within legislation it does, and it is harder to establish.

Mr Harwood: The research I have seen does seem to suggest there is a lot of discrimination right across the recruitment process—from putting out adverts to making the final selection. I also get the impression it is very hard to take a case to a tribunal. For most applicants it will not be worth the candle and it is easier and better, for example, to fill in another application form, ie try with another employer, rather than fill in an IT1 to tribunals.

Q74 Chairman: Is the answer better support to people in that application process?

Mr Harwood: Yes, I think so. One of the things which is relevant to that was we looked at the DWP's JCP disability symbol user scheme where they had the guaranteed interview scheme and what we found was they would guarantee an interview to people, they would go along to the interview, and we got copies of HR policies and procedures off those organisations and looked at the recruitment ones and those did not seem to include help at interview or reasonable adjustments in terms of judging two candidates on the basis of who would be most suitable after they had made any reasonable adjustments. There does need to be more help at the interview stage. The understanding of reasonable adjustments needs to be put into HR policies and procedures so that HR personnel can take account of it when they make the selection, not just when they make adjustments to the interview itself.

Q75 Chairman: How can we make Access to Work work better, particularly for those with fluctuating healthcare issues?

[1] *See* Ev 224

Mr Purton: We think Access to Work is a great scheme.

Q76 Chairman: Everybody does, I do not need you to say that.
Mr Purton: There is no issue with that. I just wanted to be clear that we are starting off from the same point. We welcomed the announcement of trebling the budget over the next five years and we think it should be trebled, trebled and trebled again because in terms of the percentage of resources actually spent by the Government it still remains a very small figure. Its very success seems to suggest that it needs to be much more widely known about and we know from all the research that has been done that it is not. There also need to be changes and improvements to its administration which I think have been identified by DWP. I have not had the evidence yet to show how effectively they are taking place but I know changes in administration have been put in place. Portability would be one of the key areas within that, ie the adjustment being paid for would go with the worker rather than necessarily remain with the employer. That would be one of the things that would be fairly crucial to improving the impact of the scheme on employment rates of disabled people. I have got a lot to say about its impact on the public sector but I will leave that for separate questions.

Q77 Chairman: Is there not an issue that a reasonable adjustment for one individual will be a reasonable adjustment for subsequent individuals as well, a bit like an adaptation to a house, you do not take it away when the person moves?
Mr Purton: In some circumstances that will be the case but they are all individual, they are tailored to meet the needs of the individual worker, and some of them will not be stuck in the premises, as it were. It depends what they are.
Mr Sandbach: The big problem with Access to Work has been that it is not widely publicised, it is not widely known about. Although there is some resource available for it there seems to be a lot of ambiguity about what is really meant by mainstreaming and how far mainstreaming gets into and across different government departments. There are things that could be done to improve the Access to Work scheme. Possibly the Employment Support Allowance might be an opportunity to make Access to Work assessments very early on. There really needs to be some greater policy consideration about how the Welfare to Work reforms work with Access to Work and other programmes that help people get into work. Finally, there needs to be much more promotion of the fact that reasonable adjustments are not expensive. The average reasonable adjustment is £100 per employee. That is the kind of figure that can be incorporated within the Access to Work budget. Perhaps that is not widely understood, it is felt that Access to Work is too limited a resource.

Q78 Chairman: How can it be made to work better? You have given me all the problems with it, what is the solution?
Mr Sandbach: The solution is mainstreaming it across Government and more publicity for it across government departments.
Mr Harwood: We are not 100% happy about it. We think it is very good in lots of ways, but one of our main concerns is the way it has been conceptualised and presented by both Government and employers. In particular, the Government seem to present it as one of their means for increasing compliance with the DDA. If I can just read one sentence from the *Raising Expectations* White Paper, it says: "We also need to make sure that employers do not discriminate against people who are sick or disabled, so we will double the budget for Access to Work". We are not quite clear how they get from the first sentence to the second sentence without blushing. As I understand it, Access to Work should really be about helping employers to go beyond what the DDA requires. Similarly, we looked at a lot of HR policies and procedures and looked, for example, at their capability procedures and what struck me were the numbers who gave the impression that you only need to make reasonable adjustments if Access to Work funding is available, which is quite startling. For example, one capability procedure under the heading "reasonable adjustments" simply said "Check if Access to Work is available". Our big concern is people assume that you only make adjustments when Access to Work is available. Because of Access to Work and how it has been presented people do not understand the magnitude of their duties in terms of—

Q79 Chairman: There are a very large number of employers who are fully aware of the Access to Work budget and never make a claim on it, they fund it out of their resources, do they not?
Mr Harwood: Yes, I think that is true. What we looked at particularly, and I know this is an issue the TUC have looked at, was public authorities and in a lot of cases they did seem to be relying quite heavily on Access to Work. That whole Access to Work idea seems to be distorting their understanding of their duties under the DDA. What we would say is the Government in terms of their publicity need to squarely knock that on the head. I do not want to go on about anticipatory again, but what is very relevant is you can have a situation, and I know with Access to Work the DWP is looking more at people with mental health problems, where in a company somebody has a mental health problem, Access to Work goes in and helps them to stay in work but they make no changes to the organisational arrangements. Then a little way down the line another person has a mental health problem and Access to Work has to go in again because, for example, maybe there is an environment of bullying management. What we are saying is that when Access to Work goes in, in addition to providing help to individuals they should work with employers to change the environment so it is more friendly to people with disabilities.

Q80 Chairman: Access to Work does not fund addressing bullying.

Mr Harwood: No. What I am saying is that if there are problems with people with mental health problems getting sick in work and not being able to continue, in addition to providing those people with individual assistance, as I understand is being discussed and is starting to happen, it would be useful if the people from Access to Work with their expertise are able to sit down with an employer and say—it does not just have to be bullying—"Is there anything wrong with your work environment and your organisational arrangements which is leading to a lot of people becoming sick with mental health problems or other health problems? Can we address that so we do not have to keep coming back and providing more assistance?"

Q81 Chairman: That is a completely separate issue from Access to Work, I think. Can I move to you, Peter. A year or so ago the Government announced that they were going to withdraw Access to Work funding from public bodies and the TUC said this would have a catastrophic consequence for disabled workers. Have you been proved right?
Mr Purton: What we said was the withdrawal of Access to Work from the public sector would have catastrophic consequences. The pilot that was undertaken within central Government ministries was clearly understood—certainly as we read the material out at the time—as a pilot for what would happen if you withdrew it from the public sector more broadly. The basis of our view was, and is,—

Q82 Chairman: But have you been proved right in your forecast?
Mr Purton: If I may answer the question my way. We do not know what has happened in the central Government ministries because we are still waiting months after the original date for the evaluation report. In the broader public sector our concern is precisely that we have many examples of public sector organisations which are not fulfilling their obligations even under the existing DDA, let alone the equality duties, in many cases because of budget restrictions.

Q83 Chairman: I am sorry, can I stop you because you are drifting off from Access to Work. As a principle, is it not right that the public sector should be a top class employer and you do whatever is necessary without relying on taxpayer funding? As a principle should they not set an example?
Mr Purton: Absolutely they should.

Q84 Chairman: So they should not be drawing down Access to Work funds. Would it not be better to apply what funding is then not in the public sector to particularly the SME sector?
Mr Purton: If that were the reality, that the public sector were model employers, the 44,000 organisations we are talking about were tackling disability discrimination in the way we would like them to, I would completely agree that is what we should do tomorrow but, unfortunately, all the evidence we have from many unions operating in the public sector is that is simply not the case. A key issue for that is the resources question. I did check this before coming, the 2005 Court of Appeal Case *Murphy v Slough Borough Council*, a very important case, which determined that when it came to a school, of which there are many thousands of public sector bodies in this country, the school was saying, "We have not got the resources to employ this disabled person" and the Court of Appeal said, "No, that is fair enough, the school is the budget holding body. We do not take into account the resources of the local education authority, we are simply talking about the resources of the school". That is something which has been replicated time and time again across small, budget-constrained public sector organisations. If they are denied access to the Access to Work scheme, the consequence in the present circumstances will be catastrophic for many disabled people working in the public sector and many who would want to work in the public sector. It has not happened in the ministries because, as the Minister told us last week when we met him, you would expect central Government departments to be the beacon of good practice and we are hoping that the evaluation might tell us that is the case; we will wait and see. Certainly out there, for the other 44,000 bodies, some of them very small with their resources constrained, this will not be the consequence.

Q85 Chairman: So it is leadership?
Mr Purton: It is leadership, resources and understanding.

Q86 John Howell: Let me stay with the public sector. You have outlined a whole lot of problems there, but can you give us some examples of where you think the Disability Equality Duty is actually working well in the public sector?
Mr Purton: We did a survey of trade union responses and it was only six months after the duty came in, so it was quite new, but we have also looked at the evidence that the Office for Disability Issues (ODI) has published and the Equality and Human Rights Commission has adduced in its studies of the Secretary of State's reports, and they all point to the same picture of the public sector. There are some excellent organisations, first class examples of doing exactly what the equality duty is meant to do, a proactive engagement in—

Q87 John Howell: Such as?
Mr Purton: —various ministries, some health authorities, some higher education institutions. I have not got the list, but there are plenty. There are plenty more in the middle who are treating it as a tick box exercise, "We have to comply with this duty", which means they are halfway there, if you like, but also halfway not there. Then there are the laggards who are really not complying with their legal obligations at all and these presumably fall among the 170 public sector bodies that we understand the EHRC is currently investigating for failure to comply with the duty nearly three years in. I cannot name the organisations, I am afraid, but they are in those reports that have been published or announced.

Mr Sandbach: One of the things that does need to be done is a little bit of pushing and shoving on the public duties. When that pushing and shoving takes place the evidence suggests that some public authorities will respond. I can think of one case where a little bit of pushing and shoving from the Bureau persuaded a council to make a car park accessible and another local authority where a little bit of pushing and shoving from the Bureau persuaded a council to change its policy on letting disabled people's carers into the swimming pool without charging them double. With a little bit of pushing and shoving the public duties are effective, but the problem is that pushing and shoving does not occur a lot of the time.

Q88 John Howell: Hang on a minute. The picture that I am getting from you is essentially a negative one. I am all for pushing and shoving and that will play its part in small boroughs, but essentially the picture that has come across to me so far from what you have said in this session is a negative one, there is nobody out there doing it really well without having to be pushed and shoved. Is that really the picture?
Mr Sandbach: To a certain extent, yes. There are certainly a plethora of equality schemes in the public sector and they publish documents but, as my colleague said, too often they are very much a tick box exercise that is done at one particular stage and in one particular department but there is not a mechanism to see those schemes through.

Q89 John Howell: Is that not largely because public sector organisations have consistently failed to see the difference between outcomes and outputs?
Mr Sandbach: Yes, I would agree with that.
Mr Purton: I would endorse that. The proportions, plucking these figures sort of out of the ether, if you like, we could maybe talk about 10% of organisations which are really good across the public sector, 10% which are probably really bad and the rest somewhere in-between. We are only into the third year of this duty being in existence, we are not yet at the point at which those original equality schemes should be monitored and evaluated. When we get to that point that will give us a clearer picture of where we are at. As we said, the difficulty is there are 44,000 organisations and one EHRC to monitor them all. It is going to be hard work to collate this information.

Q90 John Howell: Given that, how are you going to ensure that the best of the current Disability Equality Duty is transferred over into a single duty?
Mr Purton: The key point is to get across two messages. One, no retreat from the good things that are there in the duty which, if they were complied with, would mean the public body was doing what it should be doing in a proactive way. The other is the understanding that in the legitimate rush to harmonise, to iron out the differences between the different equality statutes, which we support, they should not lose sight of the specificity of disability and the fact that you have to treat disabled people more than equally in order to achieve an equal outcome much of the time. That specific nature of disability discrimination has to be reflected in the Act as a whole, but specifically around the duties and in the drafting of the duties, particularly with regard to the specific duties when we get round to doing them later this year. We have not got a clue what is going to be in them at the moment. For us, that is the essential step. We have got to preserve that. If we lose that in the rush for harmony then the advances that have been made will not be spread and there is a risk indeed that they will be falling back. I did not want to be negative in saying there were not many good examples, because there are many good examples, but what we want to do is highlight the good examples and hold them up as exemplars to our organisations to follow and that is a role the Government can play.
Mr Sandbach: One of the important messages, the powerful message of an integrated Equality Duty is that you cannot just cherry-pick equality and you cannot cherry-pick this group or that group. Nevertheless, what also needs to be clear in the way the duty is framed is that does not mean this is an excuse for dropping reasonable adjustment because we are complying with the general duty. There is quite a fine balancing act that the Equality Bill needs to meet in that respect.
Mr Harwood: It is a mixed picture. It only came into force relatively recently and it did seem to take quite a bit of time for the Race Equality Duty to start to happen, in fact, and that came in in 2001. Our concern is some of the weaknesses of the equality duties will be carried over into the Equality Act and some of its strengths will be attenuated. Our particular concern is the understanding which is consistent with the decisions in *BAPIO* and *Elias*, that all the duties require an assessment of proposed policies but the duties do not necessarily in law require that subsequent action be taken after that assessment. For example, you could have a public authority which is excellent in terms of promoting equality but it does not assess all of its proposed policies in terms of an equality impact assessment and it might, therefore, be breaching the duty, or you could have an authority which assesses all its policies and procedures that is appalling in terms of equality but it would be compliant. What we are saying is that it should look at subsequent action as well as the need for an assessment.[2]

Q91 John Howell: That brings me on to the next bit of my question. I am not sure I totally understood what you were saying about what is the best way of enforcing this when it came up in the Chairman's question earlier.
Mr Purton: Enforcing the duty?

Q92 John Howell: Yes.
Mr Purton: We would say that the Judicial Review that is currently available for enforcement of the general duty is an essential tool that needs to be preserved and it needs to be clear in the new

[2] *See* Ev 224

legislation that all interested parties, and we would include a relevant local trade union, should have the right to follow that route. In terms of how you are going to do that across the board, clearly there are some major issues in terms of the resources available to the EHRC in terms of its enforcement powers and at the moment they are not adequate. The powers are adequate, but the resources are not. We need to look at that. In terms of enforcing specific duties, at the moment within the trade union movement we are thinking about how best to extend beyond the current restriction of that to the EHRC. There are a number of issues there and we would need to see what the duties were before we could come up with a cast iron view on how they should best be enforced.

Q93 John Howell: What I understood you to say earlier was that one level of enforcement was to bring it back to individuals taking claims to tribunals and now you are saying Judicial Review. I have to say, I find that an incredibly confrontational way of achieving enforcement. Surely you must have thought of some other way that is going to achieve that without going to those extremes.
Mr Purton: Absolutely, and we would not use the word enforcement in those cases. My apologies if I misunderstood you but it was because you used the word in the question. We would say as well that a public body that followed the good advice that has been given to it on its duties to involve disabled people, to involve its workforce and its trade unions in the drawing up of its equality plans and their implementation, would not need to be worried about enforcement because it would have everything in place to carry out the scheme successfully. We would add within that, banging on an old drum as the TUC has done many times before, equality reps are now being developed within the workplaces around country and if they were to get statutory recognition, which unfortunately they currently do not have, they could play a major part as well in working with the employer in the public authority on their equality schemes in a collaborative way to get the best out of the collaborative outcome. That would be a much more constructive approach than having to find the enforcement mechanisms that we have to have as well as a backstop, but only as a backstop.

Q94 John Howell: I do not want to push this one too far, but, in my experience, where local government is involved in their equality duties, the major problem has been in order to get to the position you need to be in for the level three equality tick-off all you have to do is produce a scheme and that is the assessment by Government of whether it works or not. What do you want to see changed there?
Mr Purton: This is a question of changing culture. As we have said throughout this evidence, all of this is about changing the culture so that you do not need to resort to enforcement so that the employing body understands what it is trying to do, which is written down as the basis of what these equality schemes are meant to be and I am sure will be in the new Act as well. They are doing it in order to make the changes that need to be made both within their service delivery and in their employment practices. If they understand what they are doing it will improve their service and their efficiency and everybody wins.

Q95 John Howell: Let us look at that in a specific example. Rupert, your organisation has been very hostile to DWP, if I can say it that way—
Mr Harwood: Hostile to some things.

Q96 John Howell: —because you think it is breaching its duty.
Mr Harwood: Yes.

Q97 John Howell: And you want something specific to DWP.
Mr Harwood: Yes.

Q98 John Howell: Could you explain how you come to that and why you think that is the right outcome?
Mr Harwood: What we are looking at at the moment is whether DWP and its contractors may be discriminating against welfare benefit claimants with mental health problems. The impression we get is that could be happening to quite a large extent. Also, it could be counterproductive in that it might be making it harder for claimants to participate successfully in training programmes. In terms of the effect of sanctions, it might be making people's conditions worse and pushing them further from the job market. What we also looked at was whether DWP had been compliant with its equality duty and it appeared that it had not been doing equality impact assessments on all of its policies and proposals relating to welfare. What we are thinking is whereas under the DDA at the moment, apart from educational organisations, everybody has pretty much got the same specific duty and we are saying the specific duty on DWP should take account of their particular circumstances. When we looked at the possible discrimination the biggest problem appeared to be the failure to make reasonable adjustments for claimants. For example, somebody might be unable to fulfil something in their Jobseeker's agreement, and they might be unable to do that because of a disability, but despite that there was no reasonable adjustment in the cases we looked at and the person still had a sanction imposed. We would like to see DWP do an assessment of each claimant to see what reasonable adjustments they need in terms of how DWP and its contractors carry out their functions.

Q99 John Howell: If you are asking for a specific equality duty on DWP, why are you not asking for a specific equality duty on other organisations? I suppose the question that follows on from that to all of you is if you go down that route are you not totally undermining the whole idea of a single public sector duty?
Mr Harwood: No, not at all. There will be a single duty on everybody in the Equality Act but under the DDA at the moment, for example, there is a power to have different specific duties on different organisations and that does seem to make a lot of

sense. In our submission, we pointed out that on the Sir John Soane's Museum there is the same duty as there is on the DWP with an impact on several million claimants. It does make a lot of sense. They would still be under the same duty, but the thing about the specific duty is it is there to help them achieve the general duty, and what needs to be done in different cases will vary. DWP needs to do different things from other bodies and that is why we think they need a different specific duty.[3]

Mr Purton: On this one, the TUC does not agree with your submission. It is our view that the equality duty, properly applied to the DWP, will have exactly the consequences of putting it right if there is a problem.

Mr Sandbach: I think the debate between the general and single duties can be a bit misleading and it is all part of the single duty. It becomes a bit of a lawyer's argument about the way legislation is constructed. Going back to the original question, you asked about enforcement and how enforcement can be improved. One of the things we have argued for very strongly is this is not something that the Equality Commission can do alone because it does not have the resources and, therefore, within the Equality Bill there does need to be what we would call a regulation clause. The Equality and Human Rights Commission is very interested in being able to work with inspectorates, regulators and other public bodies that interface in regulating employment. The Equality and Human Rights Commission should be empowered in a very constructive way, in fact obliged, to work with those regulators so that they can do inquiries and enforcement actions jointly, because if there is any of that greater reach across the public sector that is going to be an effective joined-up regulatory enforcement system.

Q100 John Howell: I have got a hundred more questions on that area but let me move you on to my last group of questions which is about procurement as a lever for securing equality outcomes. Is it realistic to see that as a lever for doing that or is it always going to be a tick box exercise that favours big organisations?

Mr Purton: Our view is it has not even been a tick box exercise over the last few years. The guidance that has been issued is extremely conservative in its interpretation of the law and seems to have been designed in the past to deter public sector organisations from procuring their supplies and services from organisations employing disabled people. I am very, very pleased to say that seems to be changing. I downloaded a Welsh Assembly announcement of 14 January by the Minister for Finance and Public Service Delivery, which is a new procurement scheme directed at supporting employment in Wales which looks to be exactly the right approach that should be followed. I had a chance to see the new Office of Government Commerce (OGC) guidelines this month on procurement for supported factories which is a radical change from the approach that was adopted before and opens up possibilities quite considerably. There are plenty of good examples, the GLA is one of them, where procurement is being used in the right spirit and with the right approach and in that situation it can do a great deal to encourage employment for disabled people.

Q101 John Howell: Do you have a different view from that, or would you largely endorse that?

Mr Sandbach: I would largely endorse that. Procurement is a tool, but it is not the only tool and we need to remember that. We need to be a bit clearer about where in the procurement process these duties are going to kick in. One of the things that there should be greater clarity on is if, for example, a public sector purchaser is doing a bidding exercise and there are two companies or providers that are putting in to run a particular service, should it just be value for money criteria they are choosing on or should there be some criteria about which of these providers will perform better on equality.

Mr Harwood: In the research we did before, which seems to be relevant to procurement, we got the impression that DWP was not taking adequate measures to ensure that its contractors complied with the Equality Duty. Of more relevance to what we are talking about at this moment, we looked at the 11 prime contractors for ESA and found that with the exception of Remploy none of them had conducted any equality impact assessments and none of them, apart from Remploy again, understood themselves to be subject to the Disability Equality General Duty despite the fact that DWP clearly regards them as subject to it. Our big concern is that unless the definition of functions of a public nature is made clear in the Equality Act, there is a danger that as more and more public functions are contracted out the equality duties will become of ever diminishing practical significance. That is very relevant to procurement and that is why we think there needs to be a definition in the Act, such as along the lines of the Joint Committee on Human Rights' definition in their inquiry into the meaning of public authority, to make clear to people such as the contractors that they are subject to that duty.

Q102 John Penrose: I just wanted to take all three of you back to one of your earliest answers to the Chairman's question about setting the scene about where inequality is strongest. I think you gave examples of particular groups of people who have problems getting access to employment because of particular issues they are facing. The question I had coming out of that was what would good look like? If we got all these problems sorted out presumably still at the end of this there would be some groups of people, even if you sorted out all the discrimination with some waving of a magic wand, who would be under-represented in the workforce because of disadvantage and others still for whom any adjustments that could be made would be unreasonable and, therefore, you would not expect them necessarily to be able to get access to the

[3] *See* Ev 226

workplace in such numbers either. How far can we get by sorting out discrimination before we run into those other two barriers?
Mr Purton: It is a bit difficult to answer that briefly, but I will try.

Q103 John Penrose: If there are figures that would help.
Mr Purton: I have not got any figures. If we can get anywhere near equalising employment rates for disabled people by the target date of 2025, which I think will be pretty much of a miracle, and as an atheist I do not believe in miracles, then that would give us a judging point, if you like, for where we would be able to take into account some groups of people for whom perhaps standard mainstream employment was not ever going to be an option. In those circumstances I would hope that by removing the barriers that still continue to exist everywhere many more disabled people, who cannot be written off as unemployable, will find fulfilment and reward in access to some form or other of suitable employment.

Q104 John Howell: Just to be clear, you said "equalising", equalising employment rates for disabled people with who?
Mr Purton: With non-disabled people.

Q105 John Howell: So you are assuming there that—
Mr Purton: 80%.

Q106 John Howell: You are assuming if you got rid of discrimination they would have the same employment rates as non-disabled people regardless of the fact that some adjustments might be unreasonable and there might also be some degree of disadvantage which they would still be facing.
Mr Purton: There are always going to be people who for a lot of different reasons, not all of them associated with disability, are not going to be able to participate in the employment market, which is why a target of equalising at around 80%, give or take a few, is not an unreasonable thing in my view. If the approach is one of removing the barriers then a lot of the disadvantage that you are talking about in the question is removed.

Q107 John Penrose: Would James or Rupert either agree with that or disagree, and in which case how?
Mr Sandbach: You are getting into a discussion about the relationship between discrimination and social exclusion and how exactly you define or model that relationship.

Q108 John Penrose: I am just trying to work out where we stop when we think the job is done. I appreciate that is a wonderful position to get to, but I want to know what good would look like because at the moment we are all assuming it is terrible but there must be some point at which we say, "We have achieved something". I do not know what point that would be.
Mr Sandbach: It is about the perception of a fair workplace and a fair marketplace in which people have a decent chance in which the odds are not so stacked against people so they cannot participate at all. That is what we are talking about when we talk about systemic discrimination. It is overcoming that kind of systemic discrimination which is what success would look like.

Q109 John Penrose: I was hoping for a quantification rather than a qualification. Do you have any numbers that we should be aiming for?
Mr Harwood: That is a very good question and it is a question which should be addressed in the equality duty to some extent. One of the things it talks about is promoting equality of opportunity but it is not clear what that means. In particular, does it mean addressing historic disadvantage? Does it allow more favourable treatment? The danger is that the courts could decide to interpret that quite narrowly and they might make something of Parliament's intent in using the term "equality of opportunity" and not "equality". That is something which needs to be made clearer because that is the important question and it may need to be addressed. It is very difficult to come up with numbers, but it is something that needs to be addressed in the Bill.

Q110 John Penrose: Can I move you on to some specific questions about equality in goods, facilities and services. This question may be applying the Disability Act more broadly, but do you believe that there should be differential standards for what is required to achieve equality in goods, facilities and services from large organisations as opposed to small organisations? Should we hold them to different higher standards in some cases than others?
Mr Harwood: This is an area which as an organisation we have not looked at too much. I do think there is a strong argument for a private sector equality duty in relation to employment and goods and services. In relation to what you have just said, the point about that equality duty is that you would only need to do what is proportionate, you would only need to have due regard, so that would mean a smaller organisation would not have to do as much as a bigger organisation. I noticed that when they debated the Disability Equality Duty, one of the things the Government Minister said was, "We want the duty that will have the biggest impact on disabled people, so we will apply it to those organisations which have the biggest impact on disabled people". That could clearly be organisations like Tesco, for example.

Q111 John Penrose: You used the example earlier on of the difference between the Sir John Soane's Museum and the DWP.
Mr Harwood: Yes.

Q112 John Penrose: I suppose the problem from the employers' point of view, be they public or private sector, is that if they are a middle-sized company or public organisation they do not know precisely what level of standard they are supposed to hit because

they are somewhere in the middle, and might find out they have been aiming too high or too low when it is too late and they are receiving a rather large damages claim.
Mr Harwood: Absolutely. That is the problem with due regard, that nobody is quite clear what it means. People like the EHRC should be able to give guidance on that and I guess test cases should be able to make that clear or at least clearer over time.

Q113 John Penrose: Yes, but does that not still leave you with an inherently very complicated system where it will be extremely hard for any employer, public or private, to work out where they sit in the hierarchy and therefore gauge what standard they are supposed to be achieving?
Mr Harwood: I think that is true. Also because at the moment—and we think it should do—it does not require subsequent action, it just requires assessment, and that does not necessarily mean that much. In the case of a small or medium sized company, the EHRC could quite easily produce a tool which allows that organisation to quickly assess its policies, tells them what they need to look out for and what they should add and, with relatively little effort, they should end up with a better set of policies and procedures for meeting the needs of their customers. It does not have to be onerous and it can be made clear, I would think.

Q114 John Penrose: Would either James or Peter want to comment on that?
Mr Sandbach: We have not supported the clarion call for the duty to be applied and banked away across the private sector, we do not think it is realistic to expect every corner shop to be up to the same standard as the larger corporate employers. But I think there are other policy tools which it can look at which are not being examined, for example, tax credits as incentives and other tools like that for reaching particular equality standards which would be more targeted at smaller employers.
Mr Purton: I think there is a distinction. We did actually continue to support the extension of the duty to the private sector, by the way, to go on the record to say that again. There clearly is an issue because small and medium sized employers have those equality duties and obligations under the DDA to all the people they employ anyway, and the duty to make reasonable adjustment for them anyway. We do support the extension in the law of equal provision to goods and services in equal provision of adjustment duty. The TUC is chiefly concerned with employment issues obviously rather than goods and services issues so I would not want to go much beyond that. But I would support what my colleagues have said, it does not have to be particularly complicated. We have the word "reasonable" in there permanently, and we have already had ten years of people trying to work out what is reasonable or not, and by using the same tools you have to apply that in the same way. If you can make a business case, which people have been making for many years, for why smaller organisations actually profit from making adjustments for potential disabled customers and service users, then that is a reinforcement to the mechanism of doing it. If you can make support available to small and medium organisations for them to make the adjustments they need to make, that would be another inducement for people to go down the right road.

Q115 John Penrose: When you say you would be interested in extending it from the public sector to the private sector, would you also include the third sector or not?
Mr Purton: Yes; everybody.

Q116 John Penrose: So not-for-profits, clubs, societies, everybody would be subject to this?
Mr Purton: That is what we would like to see, yes, but it would take a different and more proportionate form to the one which applies to public bodies.

Q117 John Penrose: Rupert or James?
Mr Sandbach: As before, we do not quite share the same view as the TUC.

Q118 John Penrose: Rupert, would you extend it to not just businesses and private businesses but to the third sector as well?
Mr Harwood: Definitely, yes. The idea was to have the greatest possible impact in terms of reducing inequality and discrimination so you have to apply it to relevant organisations. Just as there is more and more contracting out to the private sector, there is also more and more contracting out to the voluntary sector, so absolutely they would need to be included.

Q119 John Penrose: A final question from me is about enforcement. A number of people and a number of submissions we have seen have raised the idea of having a dedicated set of tribunals or earmarked judges in the court system which would specialise in this kind of work to make sure there was an even and rather more predictable and simpler way of accessing enforcement in this area. Do you have strong views about how that should work? Peter, your organisation is one of the ones which does not think this is sensible, so can I start with you?
Mr Purton: After long consultation with our member unions, we have come to the view we would not support in effect what would be an extension of the employment tribunal system becoming a much broader forum for people to take complaints on goods and services and so on because of the specific employment expertise those tribunals are meant to have and the service which is meant to work. We are afraid of losing that. As you know, we have a trade union side on those employment tribunals which is relevant to the employment field and clearly would not be extendable to the broader tribunals that people have been lobbying for. So we think the answer instead—and I am not a lawyer or a legal expert—is that clearly measures can be taken to make access to the existing judicial system easier and cheaper, more advice available about how to go about pressing a claim, but crucially I think as well, as we say in our submission, more effective training

in equality legislation for judges. This applies to employment tribunals as well but at the moment there does seem to be a gap there in terms of the expertise, there is a very limited number of expert judges. We do not think having a few expert judges is the answer because that would narrow the access to the system even more; let's have broad training for people.

Q120 John Penrose: I am conscious of the time. You would presumably take a different view, both of you, or would you agree with that?

Mr Sandbach: In principle, we would welcome a shift to certain businesses from courts to tribunals. The experience has been that the county courts are not terribly effective in dealing with these cases. It is a good idea but it would need a lot more work to get there because there are issues about the way the tribunal system is formed anyway, so it would mean a great deal more work on this area to be clear we can make that shift in the civil justice system towards tribunals. The key underlying question here is about access to representation and that is not available in discrimination cases for either courts or tribunals and that has to be a big weakness.

Mr Harwood: It is probably very contentious but we would like the Government to look at the idea of the social security tribunals being able to decide whether there had been unlawful discrimination against benefit claimants. The problem you have at the moment is if somebody has their benefits stopped they are focused on going to a tribunal and getting that benefit started again and they are not therefore able to take an unlawful discrimination case. We would like the tribunals to be able to decide that as well at least under Section 21B discrimination by public authorities. We would like that to be looked at and we think that would be a very big area in terms of discrimination that has been going on.

Q121 Greg Mulholland: I am conscious of the time so perhaps you could keep the answers as concise as possible please. Can I ask you all some questions about the Single Equality Act which we have already touched on. First of all, a fairly general question, which is how you see disability fitting in within the Single Equality Act? Do you broadly think it is a good thing and do you have concerns?

Mr Purton: We do think it is a good thing that equality legislation should be in one statute and that equality provisions should be levelled up across the board to eliminate discrepancies that exist now to the highest levels. Secondly, as I have already indicated in answer to another question, we believe it is essential in the single Equality Act the specific nature of disability discrimination is recognised in the disability provisions. In other words, the key lesson, which I cannot repeat too often, in order to get equality of outcome you sometimes have to have unequal, more favourable treatment for disabled people. That is the key message which needs to come across, in our view, and I have already expressed views about how we think the equality duty itself should be covered in it.

Mr Sandbach: As for the benefit of a single equality duty that is covering all the strands and bringing those strands together, you cannot cherry-pick equality because it is very much about disadvantage based on certain characteristics that you might not have chosen into your life but are part of your life circumstances. We do think there is support for continuing those strands in disability discrimination that encourages and obliges providers and employers to make these sort of adjustments.

Mr Harwood: We think that combining strands could lead to compromises which disadvantage disability especially in relation to the duty and whether there is something equivalent to the more reasonable, more favourable treatment thing. We are also concerned, for example, that harmonisation might be an excuse in part to get rid of the disability related less favourable treatment but also overtime there could be harmonisation upwards as well, so it could go both ways. Our real concern is whether the major weaknesses in the DDA will now be addressed, not whether the different strands are combined.

Q122 Greg Mulholland: Specifically in terms of the *Malcolm* case, what lessons do you think the Government should learn in terms of how disability differs from other strands of equality legislation, and how therefore should the Equality Bill reflect that?

Mr Purton: The Equality Bill needs to reinstate disability related discrimination and our proposal argues that you do that by changing the old provision by removing the need for a comparator which will deal with the issue which the *Malcolm* case highlighted. Just to clarify, we support the introduction of indirect discrimination into disability law as well. We are quite happy with that. We just do not think, as our submission says, it is in any way an adequate replacement for disability related discrimination. I mentioned earlier some elements of the judiciary needing more training in equality legislation and I am afraid to say that the *Malcolm* lesson in our view reflects a certain failure to understand disability discrimination in the House of Lords, so you have the House of Lords actually changing the law and not Parliament, which was not the intention at all behind it originally. We cannot do anything about that, except by writing it in such clear and unambiguous terms that it is always going to be interpreted according to the meaning. For that, we have always argued that the new Equality Act needs to have a purpose clause which would then be used as a lever for interpreting all the subsequent clauses within the legislation.

Mr Sandbach: I endorse everything that has been said there. I think that particularly disability legislation has become very hung up on the comparative approach and we need to reinstate disability discrimination and have an over-arching values or statement clause to help interpret what actually the legislation is trying to achieve in public policy terms.

Mr Harwood: I guess the concern is we are getting an indirect discrimination provision with one hand and we are getting disability related discrimination taken

away with the other. I think we agree with the EHRC that because of the different nature of disability discrimination certain problems, such as one-off acts of discrimination, will not be covered by indirect discrimination, so that needs to be addressed. Obviously we welcome the indirect discrimination idea but there are certain problems such as whether there will need to be a requirement for knowledge to prove a *prima facie* case of indirect discrimination, and we think it needs to be made explicit in the Act that there is not a requirement for knowledge. As regards the comparative thing, the impression I get is that Parliament has made it absolutely clear what the proper comparator was and the proper comparator is the one set out in the *Clark v Novacold* case, and I think all that needs to be done now is the Act needs to make it clear that that is the right comparator. Lord Bingham's other concerns in terms of justification in the premises area is now taken account of anyhow because of the objective justification defence.[4]

Q123 Greg Mulholland: A final question. You are all in favour of the social model as opposed to the medical model definition of disability, do you think that implementing the *Coleman* case could be a way of moving the UK definition more towards the social model?

Mr Purton: A two-part answer. On the one hand we very much welcome the *Coleman* ruling and its hopeful implementation through future legislation as a means of broadening the coverage and scope of the definition of disability within the law. On the other hand, it does not in and of itself change the focus of the law away from a medical approach of defining disability to one which identifies the barriers faced by disabled people as the problem; it continues to see disability and disabled people themselves as the problem. The short answer, I guess, to a fairly philosophical question, is philosophically no.

Mr Sandbach: Certainly bringing *Coleman* into the Single Equality Bill and therefore bringing essentially discrimination by association and perception and those issues being potentially covered, would be quite a big step forward but I think it does also have some longer term policy implications and even policy implications in the way DWP delivers some of its services and some policies such as Carers' Allowance and other areas like that which would need to be looked at in light of that change.

Mr Harwood: I have not seen the judgment but definitely the European Directive seems to require that it covers associative discrimination but also discrimination on the grounds of perceived disability and I think both of those now need to be included in the Act. Also I think the Directive covers harassment on grounds of disability so that might have to be included as well. As my colleagues have said, it does not address the fundamental weakness which is the medical model of disability, which means for example in an employment context that it would be lawful for an employer to dismiss without considering reasonable adjustments somebody who is likely to have a leg injury for ten months but not somebody who is likely to have a leg injury for 12 months. So it does not really seem to make sense. For the discrimination law to be effective, there does need to be a definition along the lines of what the DRC put forward. The Government seem to be saying in their response to consultation that now is not a good time to change the definition because there is so much else going on, but we would argue that now is the ideal time and not to change it now would bring a lot of confusion into the future.

Greg Mulholland: Thank you.

Q124 Chairman: A challenging session, for you rather more than us! Thank you.

Mr Purton: Thank you.

[4] *See* Ev 226

Witnesses: **Ms Susan Scott-Parker,** CEO, Employers Forum on Disability, **Ms Audrey Williams,** Employment Law Partner and Head of Discrimination Law, Eversheds, on behalf of the Confederation of British Industry, and **Mr Colin Willman,** Chairman, Education, Skills and Business Support Policy Unit and spokesperson on disability issues, Federation of Small Businesses, gave evidence.

Q125 Chairman: Good afternoon and welcome particularly to Susan, again. You are almost a Member of the Committee, you have been that many times.

Ms Scott-Parker: How nice!

Chairman: We are sorry we kept you waiting.

Q126 Tom Levitt: You have said that the DDA has improved employers' attitudes towards disabled people but it has not had a significant impact upon employment rates of disabled people. That appears to be a paradox. How do you see that?

Ms Scott-Parker: We are tackling such a complicated issue, as your earlier questions made very clear. First, I think the DDA was ahead of public opinion and I think it still is. It is not enough to suggest what good practice looks like when people do not understand why the DDA was needed and when the way in which disabled people experience discrimination is still not accepted as similar or fundamentally no different from that which is encountered by someone from an ethnic minority, for example. A system that is supposed to help people into work itself has low expectations of disabled people, the hugely complex sort of questions that you were getting at earlier. Disabled people themselves point to things like inaccessible transport, stuff we do not possibly have a chance to look at today. The DRC has gone. The focus that was starting to help people understand why the legislation was needed is not there any more and I think that has had an impact. Most of all, we are still

up against a view that treating people fairly means treating them exactly the same—the old equal opportunities definition. Then we add to that, I suppose, factors in the system that we have not talked about today so far—like the private sector recruitment industry, which is not notorious for best practice in this regard.

Q127 Chairman: That is a polite way of putting it.
Ms Scott-Parker: It is very complicated.

Q128 Tom Levitt: Is there not an issue—I have seen this in lots of service organisations—where the leadership has good policies but those are not always reflected in the practice on the shop floor?
Ms Scott-Parker: I think the leadership can have good policies and I particularly see it in the public sector duty debate but not in how to explain to the shop floor why it is in their interests, why it is exciting to get them to make a fundamental shift in their assumptions about the way they should be doing their jobs and the impact their work has on others. How do you communicate some of the important, clear, simple messages that the leadership still struggles with? There is the complexity of making adjustments for a whole range of human beings that your doctors say are sick and the complexity of trying to get HR managers, who do not have a lot of training in this area, who do not really understand the basics in terms of what good looks like, still to offer support to people in line manager jobs when they themselves do not know how to do it properly causes us a huge difficulty.

Q129 Tom Levitt: You have always emphasised the business case for disability equality. Do you feel it is more difficult in a time of recession to put that argument across or is it more important to do so?
Ms Scott-Parker: I was really pleased to see the way the government is reinforcing the message that now, above all, is the time to treat people properly and, I would argue, to create a more efficient labour market for everybody because, if it does not work for people with disabilities, it is not going to stop a lot of people moving on to long term benefits as a result of this recession. The business case needs to change. We now talk about the business case for understanding how disability affects your business, for being barrier free for groups, for being skilled at making adjustments. We are not trying to argue the business case for hiring millions of disabled people. You cannot generalise about disabled people in any meaningful sense, but you can point to business benefits in terms of attracting talent, enhancing productivity because you are skilled in the way I have just described and meeting the needs and expectations of customers. I think we need to be saying that the business case for disability confidence combines the more unethical benefits in terms of your reputation and treating people properly with direct business benefits. It needs to be matched by a message from Government which says that the system designed to help disabled people into work will be designed so that it makes it easier for employers to attract suitable candidates for the right jobs at the right time.

Q130 Tom Levitt: Can I assume that the other two organisations broadly agree with what Susan has just said about the business case? Can I ask you two whether the time for promotion and exhortation is over and the time for a big stick is looking closer?
Ms Williams: I would say by and large, yes, I do agree with what Susan says. From the CBI's perspective, what we would add to that is we do have a large number of members and employers that are endeavouring to do the right thing and take positive steps. One of the areas where I think, rather than the big stick, there is still more effort to be made is in attracting and helping applicants who are disabled to come forward. The CBI survey demonstrates for a number of years that nearly two thirds of those responding just found that they were not getting disabled applicants coming through the door, so I think that is another element to what can be done to improve the position, aside from any legislative change. I think most employers are getting to the point where they understand their obligations. What is needed is practical guidance and advice about what that means, but also getting applicants through the door will help to educate and get members of the workforce, not just at the senior level, familiar with the sorts of issues that they should be addressing.
Mr Willman: Small businesses do employ a lot of disabled people because they are very flexible and they work with the right person for the job. Also, the percentages anecdotally of disabled business owners are greater than the percentages in government departments. There is an understanding. People tend to work as friends with somebody and make the adjustments that are necessary. What they do find is, when they are trying to look for somebody, it is very difficult to find somebody because the schemes out there to help people back to work tend to look at jobs which are not those in small businesses but are menial tasks, which are not what the disabled person wants and is definitely often a quick fix to satisfy figures.

Q131 Tom Levitt: You said yourself that this is anecdotal evidence.
Mr Willman: The latter bit was not.

Q132 Tom Levitt: Okay! You have said, "SMEs tend to employ more women, older people and disabled people in their workforce than large firms." What is the evidence for that?
Ms Scott-Parker: The labour force survey. 14% of the workforce in the small business community are disabled compared to 12%.
Mr Willman: Our survey over two years shows the demographics. We do not ask our owners actually for disabled figures, we try to find some way to circumvent the survey without breaching the rules.

Q133 Tom Levitt: What more do you think SMEs could do to recruit and retain disabled people? It is obvious that they have the expertise and willingness to do it. Perhaps they can do some more of it.
Mr Willman: I do not think they could do much more themselves. They need the access points. As with many things, in a small business, it is not easy to find where they can get in contact with people or engage with the Government scheme. Often because you are only one hit they are not really interested, they are more interested in going to Tesco where they can place 100 as opposed to the small business where it will take as long for one person. The barrier is the accessibility.

Q134 Tom Levitt: Susan, Access to Work in the public sector. What is your view about public sector employers who may not have access to Access to Work funding in future and will be expected to do the job anyway without the funding?
Ms Scott-Parker: The concern always is that any employer or any manager who hears the message that you cannot get help, whether it is an assessment—we have not talked about the assessment component of Access to Work—what needs to be done or some financial help is going to—

Q135 Tom Levitt: The right to an assessment would remain.
Ms Scott-Parker: But they are not using it very much, because the message has gone out, no Access to Work, so people are hearing that that means you cannot get the assessment either, so you cannot figure out what the individual needs. I think the message reinforces the deep rooted assumption in public and private sector managers that this is too hard and too costly and then the reality of devolved projects which were mentioned earlier. We have—anecdotal I think is the way you would describe it—messages like a manager saying, "Don't send us anyone who needs JAWS, I just don't have the money."

Q136 Tom Levitt: Can I ask the other two how you think Access to Work could be better accessed by your members? What changes to Access to Work would be needed for your members?
Mr Willman: People who have tried to use it have found it difficult to engage and also the time chain is too slow for the needs of business. They end up going and buying a suitable chair and paying for a private occupational therapist to come in to check what is required, or they buy a piece of equipment. They do that because then they know who owns it because, if it is a chair, the chair will go with the employee. They do access it occasionally but very few times, most people say they have given up both for the disabled person's sake and for the employer's sake.

Q137 Tom Levitt: This could explain why one-off applications to Access to Work have actually gone down although on-going support has gone up.
Ms Williams: I think the timing is an issue because it is a frustration both from the employers' perspective and the individual's perspective. I do think the suggestion from the TUC about some sort of portable provision has merit. I can see from an employer's perspective that would again ease any concerns quite quickly if the individual is able to reassure them on that. In addition to the funding and the increased budget, there needs to be some addressing in terms of Access to Work around work placements. There are some good examples where putting in place through Access to Work some training and work placement prior to recruitment or a work job shop can also have some merit.

Q138 Harry Cohen: I want to ask about recruitment, particularly equality in recruitment issues. The Chartered Institute for Personnel and Development four years ago now in 2005 produced a report that showed that something like over 60% of employers were saying that they would not recruit from the core jobless group, people with either drug or alcohol problems or criminal records or a history of mental health problems or incapacity. That was when there was a shortage of labour. How do you think generally that issue should be addressed?
Ms Scott-Parker: I am always very wary of generalising from these studies about employers. It is not my experience that most employers make such sweeping generalisations all the time. However, we do see that we have a problem. I am particularly struck by this case in the press at the moment where a woman who did not declare that she had a mental health history has been told that, had she declared it, they would never have hired her, which is as good a reason for not declaring as I can think of. The point is that I think we still have a very real problem in the system where it is not understood that in her situation they are managing a disability within the discrimination issue. They think they are managing someone who is sick and not fit for work. I guess they do not realise, presumably, because it is publicly quoted in the press as saying that it is unlawful to discriminate on grounds of a diagnosis in the way that they are suggesting. We do have some pretty deep rooted problems there, but I think most employers would find that kind of behaviour very puzzling now in the same way that, a few years ago, they would have welcomed the introduction of the DDA, largely because the aim was to treat everybody fairly, enhance productivity and make it easier for good people to find jobs.
Ms Williams: There is already, perhaps contrary to the CIPD publication, a large body of employers that are doing good work in terms of the two ticks approach and guaranteeing interviews if you meet the minimum criteria, encouraging individuals to apply for jobs through advertisements, and there are some good practice examples. There is a need to look at perhaps a more holistic approach to the fact that sometimes this is not just about the employer and the organisation. There are obviously the social pressures as well, the wider issues around accessible transport and the social services aspect, all of which go together. It is not just at the door of the employers in terms of needing to continue to address. There are

also some good examples and perhaps those are the ones that need to be publicised more, rather than the negative side of this.

Mr Willman: Small businesses do not usually have application forms. They will look at the CV and conduct an interview. Some of those questions may not come up, therefore they would employ the right person who came through the door. Others would take a more social view because most small businesses are part of the local community and would employ someone in a way to try to help them back from where they are. There is an example in East Sussex where a chap stopped his normal business and set up a trust where he is employing people mainly with drug and alcohol problems to do decorating and building work and farm work and has actually decorated the local estate which was plagued with graffiti. There is no graffiti there now because the people who live there did the work and took pride in it and they are all changing and looking for jobs now.

Ms Scott-Parker: Just thinking about this survey, the CIPD also produced a survey saying that there was a lot of good practice around. Maybe it just depends what survey you look at. If you asked someone, "Would you hire a problem drug user?" they would probably say no. If you said, "Would you hire George who can do this and he has this kind of support; he is ready, keen and can show all these skills?" you might say yes. It is very different when you shift the employer to this person in the right place with the right skills, from asking questions about deviant groups that they have never met.

Q139 Harry Cohen: That begs the question should people with disabilities, who are hard to place in jobs, come with a dowry from the Jobcentre Plus people or the DWP that would encourage them to be employed? Do you think that would work? Is that something that would be worth doing?

Ms Scott-Parker: There are two kinds of dowries. One would be the perception that, "If I hire you I get a bribe." Do you remember the wage subsidy thing? It never really worked because the message seemed to be, "This person is not going to contribute to your business, at least for a long time, so we will give you a kind of bribe." I think the evidence shows that does not work. The delayed gratification model, the American system—I am Canadian; did I say that?—where they tried to say, "If you have to spend money on this individual as an accommodation, you will get a tax break next year" certainly does not work. All the research shows that. The manager making the decision does not care if the Financial Director gets the money back in 12 months' time. Some have suggested that if Jobcentre Plus sends me a candidate with a history of mental health problems and I decide to take him on but I am worried that, while he looks fine now, he might take sick time in the future, if there is an insurance policy that says if there are any extra costs that accrue to me because of that person, on the off chance—not many do—of taking extended sickness, then I can pay for the temp I have to bring in to cover. That kind of insurance policy we thought might make sense because Jobcentre Plus is saying the person is job-ready, if the person is keen, he is fine now. It is just a kind of insurance policy like when you buy a good car.

Mr Willman: The evidence shows that disabled people take less time off work because they are more loyal. That sort of policy which is suggested would be a good idea but an up-front payment, no.

Ms Williams: There may be a danger that it makes a false connection often, which is "employing a disabled candidate is going to cost me". Actually of course, as we all know, in terms of things like reasonable adjustments, it is often not about the up-front costs; it is about just being more flexible in terms of practices. It maybe pushes you into making that connection which needs some careful handling in terms of the message it could send.

Q140 Chairman: Is there not a similarity there, in psychological terms, with the Government offering guarantees on payments by suppliers to a company? By offering it, there is an implication that somebody is not going to pay you.

Ms Williams: If you introduce a model like that, you can do it on an individual basis after an assessment has been made, but to link it automatically with some sort of payment arrangement and a dowry presents an assumption that it is always going to cost. That is what would be a concern.

Q141 Harry Cohen: We have heard, I think from one of the organisations that represented people with HIV AIDS, but others as well, who have said that there should be a ban on pre-recruitment questionnaires that ask on health and disability issues. How do you feel about that?

Ms Scott-Parker: We have advised our members that it is a waste of time and effort and money to ask questions about what is wrong with you at the pre-recruitment stage in terms of medical questionnaires for a long time. One of our member banks did some research and found they were spending all this money asking doctors if the guy was okay, and it did not predict anything. They could not predict absenteeism in the future or anything, so they just stopped. That was a long time ago. We would agree completely. What we would want to retain is the ability for the employer to say, "Help me to understand how you would do this job. Help me to visualise someone with your impairment doing that job, something I have never seen."

Mr Willman: I think they should be got rid of. My day job is helping disabled people get back to work, and we have put in applications from the same person with a tick saying they have not got a disability and they have got the interview, and then the same person has ticked it and they have not. That was with similar companies and, in one case, the same company three months apart.

Q142 Harry Cohen: If we recommend a ban and the Government implements it, the CBI will not object?

Ms Williams: No, not at all. I was waiting to go last on behalf of the CBI. I think there is an issue about the timing of when such a questionnaire becomes relevant. Clearly, at an earlier point in the process, as

Susan says, around adjustments for the interview and selection process, a more limited inquiry is relevant but, from an employer's perspective, there does come a point, in addition to the disability provisions of course but general health and safety requirements, the duty of care that an employer owes, to be satisfied that this candidate is suitable for the job. Obviously the questionnaire needs to be tailored for the role and the responsibility and the duties, but to ban them outright creates a potential difficulty for organisations because there will come a point where that assessment needs to be made. Otherwise, they and the individual would carry risks.

Q143 Harry Cohen: On the point about inaccessible technology and the barriers that come from that, perhaps you could give us some examples. Even more importantly, do you think this should be addressed in the new Act and how?
Ms Scott-Parker: In terms of how it is operating at the moment, online recruitment is notoriously inaccessible. We did some research about three or four years ago, at which point 85% of all the online sites that we looked at were inaccessible. It was preventing 1.3 million people from applying. It is not just the site itself. You then get in and they send you to psychometric test sites online, which are also inaccessible, or they want to email you in terms of making an appointment even for a very low paid job, but you do not have a computer, so you are in your library trying to apply for a job. Or application forms that do not allow you to go back and make a correction to the spelling of the word you just put in and you have dyslexia or English as a second language. There are a lot of problems in there. I guess one of the tests I have for the new legislation is that it would enable individuals and maybe groups—and it would give blind people not being able to apply *en masse* for this job—some redress in law. It has to somehow be drafted in such a way that it is clearly addressed. I do not know if that means putting it on the face of the Bill but there needs to be guidance on how to make that happen. The other area we are concerned with is a broader issue but it is about the use of disability incompetent suppliers. When you outsource your IT in particular for this question, not requiring your IT supplier to take into account that you have disabled employees or will and should have disabled customers. The classic is a police force that had two or three blind people working on the 999 calls. They brought in a new system and suddenly these people were knocked out of work. Disability incompetent IT suppliers are a big problem. How you get at this aspect of procurement I am not sure. I am kind of leaping to the procurement thing but, for us, the key issue of recruitment is not so much "do you share my values and how many people have you been able to persuade who have a disability to declare it", because you will never get accurate stats on how many disabled people work for you. The question is, if you are using suppliers who have a direct effect on your ability to make adjustments—say, IT, recruitment, occupational health and facilities management in particular, those four—they directly affect whether or not you can make the adjustment in time, efficiently etc. If you do not use disability competent suppliers, you are in big trouble. To be frank, I do not care if your facilities management outfit says it can persuade 1 or 2% of their people to declare they have a disability. I want them to be able to prove that they can manage the process which efficiently delivers adjustments for your employees when you want them.

Q144 Harry Cohen: Would it be heavy handed to say that there should perhaps be a duty to take into account disabled employees you already have when you make a procurement?
Ms Scott-Parker: I do not know what the implications of that would be legally, but we would be very keen to get the message out that this online recruitment stuff is often discriminatory. I do not know how to tackle it, I am afraid.

Q145 Harry Cohen: Let me pick up on the other point you made in your evidence which is about the tribunal system, which you describe as currently not fit for purpose as regards recruitment. Can you elaborate a bit more on that and what you think is necessary to make it fit for purpose?
Ms Scott-Parker: I am just a little confused because my notes said that we were actually talking about equality tribunals to do with goods and services. I do not know if that is our error. These cases are always difficult to prove for anybody, but I think perhaps that was a mistake in terms of our evidence if we did that. Our concern was getting goods, facilities and services in there.

Q146 Harry Cohen: Far fewer cases do go to employment tribunals over these recruitment issues and people feeling that they have been unfairly treated than, for example, in work cases.
Ms Scott-Parker: That is true.

Q147 Harry Cohen: Is there a problem there that needs to be addressed?
Ms Williams: As Susan said, it is much more difficult across any of the strands of discrimination to establish discrimination at the recruitment stage compared to the employment stage. The reality is, with recruitment situations, obviously there is a candidate that does not know the business and the organisation as well. That sort of evidence makes it harder, but of course we are also ultimately talking about assessments and judgments in any recruitment decision. That needs to be factored in. I have not seen any evidence that breaks down the disability cases into recruitment cases that are won, lost or withdrawn, but if those statistics are right then I suspect that that is a large reason behind any difficulties that are faced.
Ms Scott-Parker: You cannot prove it. How do you prove that the reason you did not get through was that you have a disability? People being people, they are just going to move on and try somewhere else.

Q148 Tom Levitt: Can we go on to equality in goods, facilities and services? Susan, you said that part three of the DDA often lacks credibility, due mainly to its enforcement mechanism being in the county courts. How could we do it better?

Ms Scott-Parker: Our basic premise is that this legislation as a whole has to be credible in the eyes of both disabled people and employers. That is our aim in order to make it really useful. Disabled people tell us it does not have credibility because it is too risky to go through; it is too burdensome and they do not even understand how it will work and all those reasons that I am sure you know. Our members are saying that some of us invest a lot in getting it right for customers and then we watch organisations that are doing very badly and there is no sanction at all. We hear organisations say it is cheaper to keep a fighting fund and pay off a few disgruntled, disabled customers than to invest in making the changes that the law is trying to drive. I would like to see the new Bill draw much more attention to disabled people as consumers with consumer rights. They face issues that no other groups do when you look across the patch. One of our proposals—and the members certainly have endorsed this in a round of consultations—was that we would have an employment tribunal turned into an employment and quality tribunal intervention system, a place that really understands how discrimination works for disabled customers as well as employees. The court systems just do not seem to be the right place for it. We are not wedded to that if a better idea comes through, but unless that legislation protecting disabled customers is shown to have teeth in terms of how disabled people view it, unless we get more cases coming through which clarify what is really expected from the service provider from a business point of view and the public sector of course, the interplay between that and the duty and how that is going to weigh up, this piece of law is a wasted opportunity.

Q149 Tom Levitt: I think the Government accepts that the system is not perfect, which is why they have talked about having a panel of properly trained judges to look after equality issues within the crown court. Can I ask the other two organisations? You have the Government suggestion of more qualified, trained judges. You have the Forum's suggestion of tribunals. Is there a third way or do you want to opt for one of those?

Mr Willman: We quite like the tribunals because they should be learned people knowing the position of disabled people. Also, hopefully, they take the same role as the DRC and take appropriate action so that reasonableness for the smaller business is different from the reasonableness for the bigger business. To accept that the corner shop, as was mentioned earlier, if they have someone who is agoraphobic down the road, they phone up or drop round with the groceries to help, they do not just ignore them. That is a different service but it is not necessarily seen all the time when somebody else complains.

Ms Williams: There is either a third way or it is a need to focus on the tribunal in the county court. Generally, in terms of the current legislation and service providers, unless there is clear understanding of those provisions—and that may be something that we need more learning, education and sharing about—it may be part and parcel because we have not had the same body of case law as we have with employment cases. What is attractive on the surface in terms of employment tribunals? We all know they are already under-resourced, as they are. They do make great use of the training and experience of course in the employment tribunals. That is what we need to learn and bring across to the county courts. The same approach that is taken in the tribunals is to train very carefully panel members and judges, to make sure they have a body of experience first on straightforward cases and then are specifically designated, trained and acquire expertise on discrimination. That needs to read across to the county court so that they get more of that expertise and in depth training themselves. That will be far better than perhaps what might become a confusing remit in terms of expanding the remit of the employment tribunal service beyond the employment field. I can see the attraction in terms of them being easily accessible but I would have those concerns. I think the answer must lie in improving the expertise, training and experience in the judiciary itself.

Q150 Tom Levitt: I am not sure whether that was a categorical vote for a tribunal or a change of issue but certainly an overwhelming majority of the three of you is for the tribunal. There is a draft EU Directive that would prohibit discrimination in education, health care, social security and the supply of goods and services. Audrey, do you think the Equality Bill should incorporate the draft Directive provisions within it?

Ms Williams: I think that would be extremely ambitious to achieve. At the moment it is still a draft Directive. It has a very long lead in period in terms of transposition into implementation. I think we would be well advised to step back from the Equality Bill with that piece of legislation and amending proposal. As currently drafted—of course it may change—the specific provisions around goods, services and disability have an even longer lead in time in recognition that some of the issues, particularly around anticipatory changes and indirect discrimination, if they are brought in, will take an awful lot of very careful legislating, understanding and communicating to service providers. To try and do that in a 12 month window, whilst changing all the other legislation through the Single Equality Bill, I think would cause business significant concern.

Q151 Tom Levitt: Do the other two of you go along with that?

Mr Willman: I would because I am not familiar with it!

Ms Scott-Parker: We would like to see it drafted in such a way that there are no big surprises when the EU thing does come through. It should be drafted with an understanding of the potential impact of this thing when it does come in.

Q152 John Howell: Is public sector procurement a leader for securing equality outcomes? Is it just a tick box exercise? Does it favour just large companies?
Mr Willman: Yes, it does. Small businesses are discriminated against very heavily in the procurement process because the public sector workers do not understand the smaller units of the micro-business. You do not have policies because it is not a written procedure. We have actually tendered for contracts and the DWP is the one which has been most vicious about our equality policy. We have a policy that we treat everybody equally according to their needs; you adapt to the person, but that was not sufficient, you have to have a full policy, but that was the general ethos behind it. They criticised us as being awkward because we did not have a reporting structure with departmental meetings regarding it. There are 3.1 people in my business and we actually work closely together and if anybody discriminated about anybody coming through our door, they would not be in the business any more.

Q153 John Howell: How do we change that situation?
Mr Willman: It comes down to what I think is the crux of this problem. It is education, especially with disabled people. Most people do not discriminate purposely against somebody who is disabled, their actions are through fear and ignorance. Instead of always looking at the employers, it is looking at educating people within companies, within the community at large. You see some absolutely stupid things with people in the street discriminating against a disabled person just through sheer ignorance, by going up and talking to the guide dog or having a conversation at the person in a wheelchair or wondering why somebody is behaving a bit strangely because they are autistic. We need to educate people. Those people have a lot to offer and many of the people who have those disabilities have gone on to achieve a lot.

Q154 John Howell: I have a question on that but I will just ask the other two to pick up on the procurement bit first.
Ms Williams: From the CBI's perspective, we are supportive of it in the public sector—we will no doubt come on to the private sector in a moment—as a lever to encourage change. Certainly we are on record as saying that it needs to be focused on the outcomes and the results rather than the process. Yes, there is probably a need to address the tick box culture in the sense of, "Do you have these policies and processes in place?" which seems to be the current stance, as opposed to a more measured, focused approach on what you are actually doing in practice as an organisation. Linked to that in terms of the procurement piece is how is it measured and assessed in the decision making procurement process, because that is the point at which I think at present it is not really joined up in the decision making process. The checks are there but the balancing at the end is not really clearly assessed. How much is that a factor compared to less value as an outcome?
Ms Scott-Parker: I would like to see a more sophisticated approach, I think. I see four distinctly different categories of activity under this. One is how does Government put its money in by way of social enterprise—organisations that employ people primarily with disabilities or other disadvantaged groups. There is a lot of inconsistency there. Secondly, on the equality front, how do you determine whether or not your supplier does share your values? Having a lot of bureaucratic systems in place ain't it, so I think I am just echoing what you are saying. You will never get accurate statistics on the numbers of disabled people you have employed, so asking people as part of the process clearly built a whole system on very meaningless data. Third, I mentioned earlier requiring the suppliers to prove they are disability-competent would I think drive change in a much more powerful way. Prove to us that the services you deliver enable people with disabilities. A classic example is when you get procurement of paperless payroll systems, so everyone in an organisation is told that now you are going to get your money straight into your bank account and your pay slips come up on your screen; except that blind or partially sighted people cannot read the PDF and you get a rule that says no employee can read another's pay slip. If all your suppliers were asked to demonstrate the services they delivered were disability-competent, I think we would get much further than asking if they share my values. The fourth one we have not talked about is disabled entrepreneurs. I have a classic story of a colleague who cannot respond to all kinds of bids or requests, if you like, because by the time he translates the document from his screen into what he, as a blind entrepreneur, can use he has missed the deadline. Never mind whether or not he can get into the chain in the first place. So there are four completely different components to public sector procurement.

Q155 John Howell: Let us move on to the private sector bit. As a summary, you talked earlier about getting messages out. I think that is what you were leading to. Getting messages out, fine, but what about a private sector duty? Workable or not?
Ms Williams: Too early.
Ms Scott-Parker: For me, it is too early in the sense that we still do not have the evidence in the public sector. Which bits of it really drive change? Is it the combination of leadership that is needed behind it, the reports back from the Secretaries of State, is that really focusing their attention—we are just hanging fire. We certainly have some members who feel that their systems are sophisticated enough. They would accept it. We have others saying, "But does it work?" Fundamentally, that is the question.
Ms Williams: I agree with that. It is too early. The equality review has said there are still some changes needed. It is a little bit too bureaucratic and process

laden. If it can be effective, we need to make sure and be confident it works in the public sector before committing the private sector to the same requirements. Because of the additional bureaucracy and the financial and administrative limitations, if it were ever introduced, it perhaps could factor those into account for the private sector. The final piece would be, how do you enforce it? What is the process? It is fine to have the duty in place but there is another mechanism and a series of questions to be asked about how you make it enforceable. Who takes that responsibility for the private sector if it is outside of the pure procurement process? At the moment there are lots of examples of our members who are going beyond the current statutory requirements as a way of promoting and taking on good practice, not because of the duty but because that is their approach to these issues.

Q156 John Howell: You spoke there about making it work first in the public sector. Do the three of you have ideas about how that should be best developed and enforced?

Mr Willman: I think disability awareness training should be raised as a profile. People do not know how to behave with a person with a disability. There is a whole range. One set of behaviour is not appropriate in other circumstances. That is what annoys me when we go for public sector contracts. We have all been trained in disability awareness and have worked with disabled people for a long time. We are asked that question by an organisation and they say you cannot do it, we are not satisfied with your policy, but none of their people have been trained and they are expecting us to do things that are not correct.

Ms Scott-Parker: I would like to look for some simple measures. I would like a snapshot that says how many people were offered work trials by various government departments last month and, in a year's time, how many have been offered work trials. Unless we are seeing evidence of specific types of flexibility in the system, we know that certain individuals who ask for this, whether it is people with learning disabilities, will really only get into jobs if they are offered extended interviews and work trials. If they are not happening in the public sector, the duty is not delivering. It is finding ways of looking for evidence that do not involve us in academic studies that last for years that tell me it was not working three years ago.

John Howell: I think we would all agree on that. Thank you.

Q157 Chairman: Can I ask all three of you if you have any view on the default retirement age, whether it should be abolished or kept?

Ms Williams: From the CBI's perspective, we are very firmly of the view that it should remain. As introduced, it is now working very effectively. We have done a number of studies but in particular the 2008 CBI/Pertemps study that demonstrates that it was originally introduced to encourage changes in attitudes and cultures and that is what it is achieving. Our analyses show that almost a third of employees were able to postpone their retirement and four fifths of the requests to extend beyond the retirement ages have been granted. It is increasing year on year. It was 22% in the first year and 72% previously. The other issue for business around default retirement age is that it encourages a dialogue which links into the ability for a business to plan, particularly in the current economic climate, around the manpower levels, the training and labour that they need. For example, if you do not have the confidence that this is the right timing and the legislation enables you to start a discussion about an employee's plans, you could be looking at redundancies, for example, and have to ignore the fact that there may be a number of people retiring in the next six to 12 months and end up having to make more redundancies and you then lose further skills later in the day when people do retire. To leave businesses with having to take the risk of raising what would be a sensitive and potentially an age discriminatory issue about your plans for retirement without the confidence of having the default model behind I think would cause very real concern. It is working well and it enables businesses to plan confidently. Indeed, it encourages individuals to plan as well in terms of that dialogue.

Ms Scott-Parker: All I would add to that is we just hope that the employer becomes so adept at making adjustments, many of which might be age related, that we do not make assumptions about what people can do just because they cannot see their screen any more.

Mr Willman: Most of our members do not have a default policy. They just carry on working.

Q158 Chairman: Until they drop!

Mr Willman: Yes. When somebody becomes a risk obviously they discuss it with them but it is usually on a friendly basis and does not go anywhere near a court. We do have a problem with our own employees wanting to apply for further service and they discuss their futures. If they are not successful, they usually become members and start their own businesses!

Chairman: Can I thank you very, very much. We do appreciate the time that you have given to us. There are a couple of other questions we have on the Single Equality Act if we can write to you about them because in four minutes we are going to have to vote and we do not want to keep you here while we go and do that.[5] Thank you very much.

[5] *See* Evs 226; 230; 232

Monday 9 February 2009

Members present

Mr Terry Rooney, in the Chair

Miss Anne Begg	Mrs Joan Humble
Harry Cohen	Tom Levitt
Michael Jabez Foster	Greg Mulholland
Mr Oliver Heald	John Penrose
John Howell	

Witnesses: **Kitty Ussher MP**, Parliamentary Under-Secretary of State, Department for Work and Pensions, **Maria Eagle MP**, Parliamentary Secretary, Government Equalities Office, **Ms Rebecca Sudworth,** Deputy Director, Disability and Work Division, DWP, and **Ms Melanie Field,** Deputy Director, Discrimination Law Team, GEO, gave evidence.

Q159 Chairman: Good afternoon everybody. Welcome to this final evidence session in our Equality Bill inquiry. Welcome to our Ministers, especially Kitty, as it is her first time before the Committee. Congratulations on your appointment and thank you, Ministry of Justice, for stepping in under particular circumstances.
Maria Eagle: I am sort of Government Equalities Office as well.

Q160 Chairman: In the submission the Department says that the employment rate for disabled people has increased over the last seven years. Notwithstanding that, it has not increased at all for learning disabilities, deaf, blind, HIV. Have you any particular comments on that and what the Department is doing about those particularly disadvantaged, disabled groups?
Kitty Ussher: First of all, thanks for the opportunity to be here. Apologies that I am not the Minister for Disabled People. Jonathan Shaw is at the Special Olympics in Idaho which he says is all work and no pleasure, so I am pretending to be Jonathan. I will do my very best. I have with me Rebecca Sudworth, who is one of our deputy directors and the head of disability and work in DWP in case she knows more than I do on some questions. You are right. Although the employment rate of disabled people has increased quite substantially by nine percentage points in the last ten years and the gap between that and the overall employment rate in the country has narrowed from 35% to 26% over that period for disabled people across the board, two points immediately follow. Any gap is obviously unacceptable and we must continue to narrow it further. Also, within that there is, as you have mentioned, a wide variation in employment rates for different impairment types. I am not sure I have the figures for HIV but I know that the employment rate of people with learning difficulties is particularly low and for those with mental health problems. A recognition of that is the first step towards doing something about it. Certainly in terms of mental health, this is something that we are currently producing a new policy on. We hope to be able to publish something in the next couple of months. As a whole, I think our analysis would be 'much done; much more to do'. We want to make sure that the programmes we do have on offer—and we have quite a handful of support available for people in different circumstances, trying to go into work and helping them to do that across the broad spectrum of disability—work as a package, so that people know where to go and that it is flexible enough to deal with the particular issues that people have. Doubling the Access to Work budget, which we may come onto later, is very much part of that and having a real recognition that perhaps people with fluctuating conditions, that may or may not include people with HIV, depending on what particular circumstances each individual is facing at a particular time, needs to be part of the support package that we provide rather than traditional support around physical adaptations and so on.

Q161 Chairman: Is there any particular strategy in the pipeline or being planned for, say, people with learning disability and learning difficulties?
Kitty Ussher: Absolutely. There is various support that we can offer. First of all, everybody has access to a disability adviser, whether or not they are on benefits, who will be able to provide very clear signposting and support for the particular type of work that they may want to go into. If their particular disability is one that makes it harder for them to apply for jobs in a traditional way for example, they will be able to be supported through that process. The DWP as an employer offers a guaranteed interview to people who have a recognised disability so that they do not have to go through the hassle factor of online applications and that type of thing in the sector that they are interested in. All recognised disabilities have access to a wide portfolio of support and we do not differentiate.

Q162 Chairman: I understand that but those programmes have been around for the last seven or eight years with access to all those things you have talked about and it has not made any difference. Is there any different strategy being thought about or put forward? It is still down at around a 20% employment rate.
Kitty Ussher: We have announced changes. We have announced that some of the specialist disability programmes such as Work Step, Work Preparation,

the Job Introduction Scheme, some of the residential courses that we do, will be brought together from next year into a more coherent, modular programme of support so that we can better identify it from the client's point of view rather than from the provider's point of view.

Ms Sudworth: I would echo what the Minister has said. The Committee will be aware that we are reforming our programmes for the people who have the most severe and complex disability related barriers to work. Within that these are the programmes where we have a large proportion for example of people with a learning disability. We believe that in improving those programmes we are going to substantially support people with a learning disability to gain employment. We work very closely with a range of representative organisations and in the design of those reforms and we will make sure that we understand what works and that our model is flexible enough to take into account what works.

Q163 Chairman: This growth has been, particularly in recent years, in the employment rate overall for people with disabilities. How much is that related to the then growing economy and how much to changes in legislation, particularly discrimination?

Kitty Ussher: Because it is a narrowing the gap indicator—the gap between the rate for disabled people and the overall employment rate in this country has narrowed from 36% to 25% in the ten years to 2008—by definition, there must be something even better going on for that group than there is for the overall workforce. We always analyse what works and what does not work and that will lead to changes where required. I think the New Deal for disabled people and the change to a kind of proactive way of supporting people into the workplace rather than some of the more passive examples of policy making that we have seen in previous years has had a positive impact. We have a long way to go. In particular, although there is no evidence of this to date, we need to make sure that disabled people are not more vulnerable than others when the economy goes the other way.

Maria Eagle: It is probably difficult to quantify precisely what impact the changes in legislation have had. Looking now as opposed to five or six years ago, I think there has been a culture change out there in the world of employment. There is more awareness of the valuable nature of employees who have disabilities. There is much more awareness than there was amongst employers that disabled people can work and do a good job. That is partly due to culture change, partly due to legislative change. Do not underestimate the duty to promote equality for disabled people in the public sector. That forces us as employers to look at what we do and how we do it. One of the reasons why DWP is focusing much more on the individualised needs of those hardest to help like disabled people, like those with learning disability and with mental ill health, is in part because of the duty we have imposed on them to promote equality of opportunity. I do not suppose you would be able yet, because it is early days, to precisely quantify what impact that has had in percentage terms, but I have no doubt looking at the landscape now and looking at it a few years ago when I was the Minister for Disabled People that it has improved. Culture change and leading by example has something to do with that.

Kitty Ussher: In so far as it is a PSA target, there is the normal Cabinet Office led evaluation to find out what the real correlation is between what we are doing and the outcomes.

Q164 Chairman: I am glad you mentioned that because I was going to come on to the PSA target. It says, ". . . to increase the employment rate of disabled people and significantly reduce the difference between their employment rate and the overall rate." Lawyers have argued for ever about what "significant" means. Is there an internal working target, a percentage that you are looking to? "Significantly" can mean almost anything.

Ms Sudworth: One percentage point.

Q165 Chairman: To reduce the difference by 1%?

Ms Sudworth: As an indicator of significant progress.

Q166 Chairman: That is significant?

Ms Sudworth: No. Obviously our ultimate goal is to eliminate that gap completely but, in order to understand how we are making progress, we are looking at the rate of change.

Q167 Chairman: We are looking at a 1% change over the CSR period?

Ms Sudworth: I am sorry. I could not tell you from memory.

Chairman: We will follow that up.[1]

Q168 Greg Mulholland: I think the idea of a single Equality Bill is something that has huge support. It is clearly the right way to go and yet the concern is that what you are proposing is not a single Equality Bill because of the needs of certain groups, much to the disappointment and concern of those groups. Can I ask you specifically why, particularly with the rights regarding employment, are older people being excluded from the single Equality Bill? I know the government has made a commitment to look at the retirement age in 2011 but why on earth are you not doing that now so that we then have a genuine single Equality Bill of employment that includes older people?

Maria Eagle: We are not going to be excluding older people. They will be included in the legislation in respect of employment and in goods, facilities and services. What you might have been hearing is concern arising out of the intention that we have made clear, that we are going to phase in the protection in respect of goods, facilities and services. Certainly age will be included as it relates to older people. We do believe that age discrimination needs to be prohibited. I think there are practical issues, particularly in respect of things like social care and financial services, where we have to try and work out

[1] *See* Ev 231

what is justified, where the exceptions ought to be in the provision of goods, facilities and services and what is not justified. There will be more consultation going on this year in respect of that but I can make it clear that we are intending to include that in the legislation. We have said that we will be phasing it in over a period of time and I think that is the right approach. There are some differences in the way in which services are provided to older people that are justified. For example, we would not want to outlaw the Freedom Pass, the bus pass that gives older people free travel on buses. We would not want to remove the capacity for us to say what the right start for the voting age would be. It is just a matter of how we do it. It is partly because age has not been tackled before that we are just coming up against the big policy issues now, which we need to resolve as a society over time.

Q169 Greg Mulholland: You said the government is absolutely committed to tackling this in legislation, but not to do it as part of the single Equality Bill? Is that what you are saying?
Maria Eagle: We will be putting it into primary legislation. That is the intention. It may be that it will be phased in using secondary legislation over a period of time thereafter in respect of how it deals with goods, facilities and services for example.

Q170 Greg Mulholland: Will the compulsory retirement age be included?
Maria Eagle: The default retirement age is being looked at by DWP, which has the policy lead in age. As you have already said, they are looking at that. They are reviewing whether or not that can be dealt with in 2011 over a period of time. We are looking to bring age into line with the other strands using this piece of legislation. It just may be that we have to phase it differently.

Q171 Greg Mulholland: Is it possible that it could be included in the single Equality Bill? Are you ruling that out or not? Obviously the discussions are happening. Is it possible or is it definitely not going to be?
Maria Eagle: In terms of the default retirement age?

Q172 Greg Mulholland: Yes.
Maria Eagle: That is being looked at in 2011, as you have said. We are making sure that the legislation enables provision in this respect, but we are not planning on dealing with the default retirement age ahead of the review.
Kitty Ussher: There is no policy decision imminent on age.

Q173 Greg Mulholland: Can I ask you specifically to deal with the concern raised by older people's groups, Age Concern and Help the Aged, that 2011 is too late? They are saying, "Why are you not getting on and doing it now?" It sends out a very negative message about the role that older people play in the workplace.
Maria Eagle: This is on the default retirement age?

Q174 Greg Mulholland: Yes.
Kitty Ussher: This is something that DWP is looking at with BERR. I am completely aware of what Help the Aged have said and I think it is a very useful contribution to the debate. We will be working very closely with them. We have made it clear that there will be a review of the default retirement age in 2011. There is not a consensus across the whole of society, so we are sticking to that timetable and we will make an announcement in due course.

Q175 Greg Mulholland: Is there no way it can be brought forward into the single Equality Bill?
Kitty Ussher: That is not our intention because it was looked at relatively recently but we will review it in 2011. As Maria has said, it will be possible for us to take the power to be able to act appropriately when the policy decision is made.

Q176 Greg Mulholland: The second group that particularly stands out is carers. Going back to 2005, the Parliamentary Scrutiny Committee on the Disability Discrimination Act (DDA) recommended that the law should prohibit direct discrimination and harassment against people who are associated with a disabled person or are perceived to be disabled. Particularly following the ruling in the *Coleman* case, why are you not bringing forward genuine protection for carers and seeming to say that it is acceptable to have what we have now, which is this rather confusing patchwork of rights under disability and age discrimination? Why are you not just saying what carers themselves and Carers UK say, which is, "Give us genuine and clear protection from discrimination as carers"? The government is clear on saying how important carers are to society.
Maria Eagle: *Coleman* obviously does mean that we have to do something. It is important to remember that there is already protection against discrimination by association in respect of some of the strands: race, sexual orientation, religion and belief in employment and goods, facilities and services provision. Part of what this legislation is going to do is to harmonise and equalise protection between the strands. We are looking very carefully at the judgment of the court in *Coleman*. We intend to try and sort it out one way or another in this piece of legislation. We have not yet come to a final conclusion about precisely how we intend to do that. I do not know whether or not your view is that, by dealing with association and perception in respect of disability, we deal with carers, or whether or not you would prefer a separate strand. My view looking at it is that, if we deal with association and perception, that pretty much handles the point that you are raising. We are not quite there yet but we are intending to deal with *Coleman* one way or another in the legislation.

Q177 Greg Mulholland: Do you not accept the point that carers themselves are making? It is the voice of carers that we have heard. They simply do not feel that, without specific reference to carers and

discrimination against carers—as you have said, some things are covered and some things may not be. Is not the only sensible way to proceed to clearly bring this in so that it is absolutely explicit?
Maria Eagle: By adding a strand you mean?

Q178 Greg Mulholland: Yes.
Maria Eagle: One way of doing it would be to add a strand. Another way of doing it might be to deal with association and perception arising out of *Coleman* by making sure that association is covered across the strands. That is part of the thinking that we are looking at. We are certainly not committed to extending the strands. Part of what we are trying to do with the Equality Bill is bring all the strands together, rather than creating lots of new ones. We are trying to simplify, consolidate and harmonise the law as well as strengthening and extending it to a degree. We are not seeking to think up lots more strands. If we can deal with the issue by dealing with association and perception, then I think that is a perfectly pragmatic way of doing it.

Q179 Greg Mulholland: One area where I think people generally feel that the current situation does not deal with exactly what you are saying is when it comes to multiple discrimination, if someone has a disability but is also discriminated against for another reason, be it sexual orientation or race. At the moment obviously you can only treat discrimination as if it was one type of discrimination. We all know that is not the case and this happens. Is the government going to tackle this? Is the government committed to tackling multiple discrimination? One of the concerns we have had is that you are backing off from that because of the cost that it might involve.
Maria Eagle: It is nothing to do with any costs. We are certainly looking at it. There is a very difficult policy issue here. We all know of cases and people will tell us in our advice surgeries that they felt they were discriminated against across a number of grounds. At present, as you rightly said, the way the law works is, if you are taking an individual case, you have to pick one. Pick your best one, whatever it is, and the one you think you have most evidence for. We are looking at ways in which we can deal with that by enabling claims for multiple discrimination. It is easy to say. It is not so easy to come up with the best way of doing that. We are looking very carefully at this. I would not accept that we are backing away from it. However, it is a very difficult, thorny issue in policy terms. Are you adding anything in practical terms? What does it mean? Are we saying that you should have to pick all the strands?

Q180 Greg Mulholland: I am not saying anything. You are the Minister asking me questions.
Maria Eagle: I am not asking questions. They are rhetorical policy issues that I am raising. I am not asking you to answer them but they are quite thorny. We are looking very carefully at it but it is not totally resolved yet.

Q181 Greg Mulholland: That sounds positive, so there is a commitment to try to resolve this and it is not, as has been suggested in evidence to us, a cost concern that would make you less likely to do so?
Maria Eagle: No, there is no cost concern. There is an issue of precisely how it would work practically and what it would add.

Q182 Mr Heald: It seems to me that, if you were to try and sort out *Coleman* by simply making what *Coleman* decided the law in the Equality Act, you would still leave open the question of what happens with age discrimination by association and just discrimination against carers more generally, would you not? What you would do if you just implemented *Coleman* and put it into the Bill would be to just cover disability discrimination by association. Do you see any problems with that? The carer of a child who is ill might well want to have some reasonable adjustments made by the employer just as much as the carer of a disabled person.
Maria Eagle: One of the things we would certainly be looking at in bringing in association and perception on the basis of *Coleman* would be to do it across the strands. In putting all the strands together, we are not seeking to have any unnecessary distinctions between them. One of the things the Bill is seeking to do is to simplify and make it easier for those upon whom these obligations are going to be placed to understand what they are. In policy terms, that would make us want to avoid distinctions which are unnecessary. One of the things we would be looking at would be whether or not we could do association and perception across the strands where it does not already exist.

Q183 Mr Heald: It would not help all carers though, would it? It would just help those who are caring for a person who can claim the protection of disability or age or one of the strands.
Maria Eagle: I would be quite interested to hear examples of who would be left out in such a circumstance.

Q184 Mr Heald: A mother at work whose child was ill.
Maria Eagle: It would depend on the circumstances that she was facing. I think it would cover an awful lot.

Q185 Harry Cohen: I want to ask about equality issues in relation to recruitment. We have had evidence and recommendations, one from the Disability Rights Task Force backed up by the Equality and Human Rights Commission, the National AIDS Trust, the Terrence Higgins Trust and employers' groups as well, saying that there should be a ban on pre-recruitment questions on health and disability. That could help discrimination in employment. Where does the government stand on that?
Kitty Ussher: It is against the law to discriminate against disabled people and that applies whether or not there is a pre-employment questionnaire. It is sometimes very important for monitoring purposes

precisely to make sure that people are not informally discriminating. There is also a practical purpose. Employers need to make sure that they are able to sufficiently support applicants during the job application process as well. At the moment we are not completely convinced by those arguments but again, if there is evidence of it being used illegally, we should prosecute.

Maria Eagle: You need to remember that you cannot use the answers that you get to discriminate. The answers that you get in respect of pre-employment questionnaires are supposed to assist you in making sure that you can make reasonable adjustments if it is a disabled person. You are not allowed to then use the questionnaire to discriminate. You do hear different views about this. Some people think that you should not ask. If you have an employer who is thinking of discriminating anyway, a pre-employment questionnaire can be bad. If you have somebody who is committed to an employment plan, then a pre-employment questionnaire can only be good because they are going to use it to make the relevant adjustments and make sure that they can evaluate properly. It depends very much on the culture that is out there. It would be illegal to use such questionnaires to discriminate. That is quite clear.

Q186 Harry Cohen: But it is done. Those organisations I referred to said that this is quite a frequent thing, these sorts of questions. An example was given which I want to put to you from the man who gave evidence from the National AIDS Trust. He said that applicants put on the form that they are HIV and they get rejections again and again. What are they to do? If they were not to put it on the form and subsequently got the job, they could be in trouble later on, could they? What is your recommendation for someone with HIV when they are filling in an application form?

Maria Eagle: I think it depends upon an individual's approach to how they are going to do this. It is certainly not compulsory to reveal that you are a disabled person. Somebody with HIV does fall within the DDA definition of disability. I do not think you can be faulted for not revealing a disability. If disability requires adjustments to make sure that you can do the job, then you need to be able to say that. I am sure that people would take a different approach to this. Either approach would do but one thing is for certain. If there is any evidence that that individual is discriminated against on the grounds of their status, that is illegal. They should take action and would be supported in taking action, I am sure, by their trade union or they could do it themselves.

Q187 Harry Cohen: I am still a little bit concerned because the employer may well decide to ask that question in relation to not just HIV but any disability and say, "Have you a history of mental illness? Have you a disability?" at a very early stage. The person concerned may be the best person for the job in all other regards. I think that amounts to discrimination.

Maria Eagle: Employers have to be very careful about quite how they ask questions like that. If they do it in a way that suggests they are not going to give you the job if you answer, I think they are on thin ice.

Kitty Ussher: The lobby groups that you mentioned were doing a very good job here should be taking legal action.

Q188 Harry Cohen: Many countries have banned this pre-medical question. Have you looked at what they have done in France, Belgium, the United States and the Netherlands?

Kitty Ussher: We keep every policy under review and we obviously have the evidence internationally. We think they serve a useful purpose and, as we have both said, it is illegal to discriminate on the basis of disability. Those cases should be taken through the legal system if there is evidence.

Q189 Harry Cohen: If you are putting the emphasis on the legal system and the tribunal system, one of the things that needs to be looked at, I would have thought is, rather than an individual who feels he has been discriminated against taking action through those processes, would it not be reasonable for representative actions on behalf of the people in those circumstances? Tribunals at the moment cannot hear representative actions. Will you be looking at this as something to put in the Act, that representative actions could be taken? If this is the line you are taking and it should be done through existing law, the policy should be strengthened in that way, should it not?

Maria Eagle: We are looking at whether or not the Equality Bill can bring in representative actions. It would be more suitable for some kinds of cases than others of course. If you have an individual who feels that they have been discriminated against on the grounds of their disability in a particular employment with a particular employer, that might extend only to one person. That might not be the best way of dealing with representative actions. If you feel there is any discrimination on the basis of gender pay, which is or something which some people do feel, that might be more suitable for this kind of thing. We are looking at whether or not we can have representative actions and we are looking at how best we might be able to achieve that, simply because I think we do recognise that with an individual right to claim discrimination you are putting a big emphasis on the individual to go through the legal system. It is not an easy thing to do. It can be extremely stressful. It can be costly and there is no guarantee of success. It can take years. It can take longer than one might wish. Therefore, the emphasis on the individual having to claim that right of redress is tough for some individuals to cope with. That having been said, the entire purpose of the public sector duties is about trying to design discrimination out of the way in which we provide services and in which we employ in the public sector across a wider range, certainly in the public sector and then lead by example. That is the effort we have tried to take forward so far to deal with the wider

implication of this. Representative actions are another way of handling that in a more collective way and we are looking at whether we can do that.

Q190 Harry Cohen: I welcome that answer on representative actions. Tribunals can look at individual cases and make comments in relation to an individual case but they cannot, officially anyway, in relation to employers' recruitment processes. Again, is that not something that would be worthwhile in the Act to give tribunals this wider power to make recommendations in relation to employers' processes where they think they are not right?

Maria Eagle: Yes. It is something we are looking at whether we can do in the legislation. There are clearly circumstances where it might prove very useful. There are other circumstances where it may not make much difference but it is something we are looking to see whether or not we can achieve in the Bill.

Kitty Ussher: We need to send a very clear message that, if an employer is considering not appointing the best candidate because of fears of the implications of disability, there is support out there, well funded government support. Not only are they possibly breaking the law; they are also missing a trick for their own business.

Q191 Harry Cohen: I am not doing too badly at the moment. We had some evidence from the Employers' Forum on Disability and they were scathing about online recruitment processes. There was a report three or four years ago that found well over a million people could not access these properly. They gave the example of someone sitting in a library or even a Jobcentre, trying to make an application and then they get all sorts of other things back. They could not even do corrections and they really were quite scathing and did not favour online applications only. Will the government have a look at that in relation to the Act of Parliament and also in terms of its own employment practices to make sure that it does not put out jobs in government which are online only?

Maria Eagle: In terms of recruitment processes, I think it is a constant battle for employers—certainly the public sector should be leading on this—to make sure that they do not inadvertently discriminate and prevent access on the basis of new technology. I think that is what Susan Scott-Parker was saying was going on. To the extent that providing access to job applications is a function of a public service provider or is a service—however you look at it, it is probably a function I would have thought—it is already illegal to discriminate against disabled people on the basis of their disability. Although *Malcolm* means well, how you deal with that is in the air a little bit at the moment. There is a real issue about awareness and understanding here for the public sector. To the extent that we as the public sector, as employers, are saying we only recruit online, we have to make sure that we make proper adjustments for those who find it difficult one way and another to deal with us online. Otherwise, there could be some indirect discrimination there. This is a big awareness and culture issue, as much as us having to change the law. I think the law is already in the right place. A number of years ago I heard Susan Scott-Parker talk about this. There is an issue about access via new technology. We have to make sure that in moving to newer technology and different ways of doing things we do not exclude. We always seem to think that new technology equates to progress. Silent films going to sound based movies excluded deaf people from the cinema. Everybody thought it was a great technological improvement. Actually, it excluded people who had been able to enjoy films like anybody else until that time. We have to be very aware that technological progress does not equate to improving access. We have to make sure that we take these things into account when providing those facilities.

Kitty Ussher: In terms of the DWP's contribution, we obviously provide support for people walking into a Jobcentre or ringing them up, whatever is the most appropriate way for them, through the disability employment advisers. For those who, with a bit of help, will be able to apply online, we provide precisely that training. That is being rolled out now in the current economic circumstance for everybody, whether they have a recorded disability or not. It may be of particular use to some people who find that particularly hard. We have found over time that, precisely following on from Maria's point that we need to have a culture change out there and increased awareness, initiatives like our local employer partnerships between Jobcentre Plus and employers who have vacancies in semi-formal networks like that can often break down all these barriers very easily. If there is a particular candidate that we know is on JSA that will be suitable for a particular job, we can sort it out by acting as the mediator. That is happening all the way up and down the country, every single minute of every single day, to advise the employer about how they can make this job work for this type of candidate. Having guaranteed interviews for certain types of people, predominantly those who are disabled, will make sure that all those barriers are removed because they know they are going to have the opportunity to do the face to face conversation, and that happens.

Q192 Harry Cohen: I hear what you say and I heard, Maria, what you said earlier about the legislation being in the right place. Why cannot you prohibit these online applications only in the Act if there is a danger of there being a discrimination aspect? Why can you not put that in the private sector as well?

Maria Eagle: I do not think that is the right way of dealing with this. What you have highlighted is one instance of inadvertent, probably indirect, discrimination against disabled people in respect of how they access something that people who are not disabled find it easier to access. We could make the Bill a list of things that we do not want to happen and outlaw on the face of the Bill. I do not think that is necessarily a very sensible way of doing it. What we say—and this is more or less where the law

currently is—is that one is not allowed to discriminate against disabled people in the provision of goods, facilities and services in the performance of a public function. I think that is the right way because that will catch all such examples of discrimination. There is a role here for the EHRC obviously which has an enforcement power if it is convinced for example by Susan Scott-Parker's evidence about the mass exclusion that she sees of disabled people from recruitment here. That is something which I expect it would take an interest in and perhaps think about using some of its enforcement powers to look at more closely. I think that is an appropriate way. In a piece of legislation where we are trying to consolidate, simplify and harmonise whilst strengthening the current anti-discrimination law, one would not want to start listing examples of what we want to get rid of because it is not a sensible way of doing Bills.

Q193 Miss Begg: Can I tease out what you mean by representative actions? We have heard that it is impossible to take discrimination cases in recruitment. You mentioned the difficulty of it. I am wondering, when you talk about representative actions, whether you have in mind the sort of thing which Scope did originally and more recently Leonard Cheshire, when they sent out two identical applications but in one they declared a disability. You did not have to be a real person but you had a real employer. I cannot remember the exact number of employers that did not give an interview to the person who declared the disability. Would you take action on that kind of evidence when employers have shown that they will discriminate without having a real person behind the application?
Maria Eagle: There would be a range of possibilities here. Representative actions could relate to a number of things. The more obvious cases are where for example a number of, say, women say that they have been discriminated against and refused promotion on the basis of the fact that their employer is just discriminatory and where there is evidence across the firm, when the statistics are collected, that women do not get on, as it were, and there is no real explanation for that. That might be a case where a representative action could do some good. The kind of scenario that you have outlined there may come into mind. We have to decide precisely where the parameters ought to be. There are different places to draw the line. Are we saying that, if one person can show that there is discrimination, all the people who fit into that group ought to pile into the one case? There are various ways in which you might do it.

Q194 Miss Begg: It is a very easy way to catch employers out. Would you do that kind of speculative work or would the EHRC do that kind of speculative work and then proceed to prosecute the employers that fall down on it?
Maria Eagle: It would be suing them rather than prosecuting them. For representative actions to be useful in any instance, there has to be either a local trade union or a group of people who have got together and seen that there is a more widespread problem than just one person in the firm. Yes, it could be a trade union that does it. It could be the Commission that looks at it if it comes across an example. The mischief that we are trying to deal with is that, at present of course, you have to take however many cases it is and they all have to queue up in the tribunal.

Q195 Miss Begg: Equal pay?
Maria Eagle: Yes. Equal pay springs to mind.

Q196 Miss Begg: I suppose what I am describing is not then representative action. It is just an attempt to catch the employer out. We talked about pre-recruitment questions on health and disability. That is why so many disabled people are terrified of declaring their disability because they have seen reports when it has been done and anonymised. They are frightened. At the same time, if you have a disability—if you are deaf or in a wheelchair—that needs adjustments even at interview stage. If you do not declare, you are already discriminated against at interview stage. Is there some exemplar of a questionnaire that teases out where someone has to declare in order to get a fair interview but, if there do not need to be any adjustments at interview stage? If you have HIV or a mental health problem, there probably do not need to be adjustments. Therefore, they are not going to find themselves further down the line where the employer takes them to court because they failed to disclose a pre-existing condition.
Maria Eagle: I think that is a pragmatic approach. I am not at all against self-declaration. For disabled people who have experience of being discriminated against in the labour market, have low levels of labour market participation that are historical, one can fully understand why they do not want to write on the application that they send in, "I have a disability." It is quite clear that, where for example somebody, say, has a hearing impairment and needs a loop or BSL interpretation to deal with the interview, they are clearly going to have to declare that. I am not one of those people who thinks that there should be any pressure put on disabled people to declare their disability. Once they get into the workplace and feel more comfortable that perhaps there is some support, they may feel more able to declare a disability. That is in part the experience of the public sector, by the way. I think that would be the experience of any employer where reasonable adjustments are made and where Access to Work is well known and used. As disabled people find themselves in a more supportive environment, you get more people declaring their disabilities because they feel more confident to do so. I think any pre-employment questionnaires that ask about disabilities or health conditions ought to do so in a way that is neutral. You should not be asking, "Have you got a particular condition?" You should be asking whether or not there is anything that the employer needs to know about to facilitate access, rather than saying, "Do you have HIV?" or, "Do you have a particular condition?" There are ways of

doing it in good practice which the Commission and others can promote. If it is done in that way, it can be a very positive, supportive and useful thing.
Chairman: We all know that disabled people suffer a disadvantage in education, particularly in schools. If you apply to do the PGCE, to become a teacher, they only accept online applications. They will not accept any other. There are no exceptions. It is online only. I do not ask you for an answer now. I would ask you to take that away and have a think about it because I think that is a really serious issue.

Q197 Mrs Humble: I would like to know quite what right or entitlement somebody with disability has to request support under the Access to Work programme. The government has doubled the budget. We know from the evidence that has been presented to us that there are still far too few employers and indeed employees who know about it, so we have been discussing with people who have given evidence to us about the need to make sure that more employers and employees know about the Access to Work programme. What happens if everybody applies and the budget is exceeded? Is this doubling of the budget a capped budget? Can everybody who applies get something, some sort of support? How is the system supposed to work?
Kitty Ussher: Quite simply, by doubling the budget, it will be open to far more people. It is a DEL budget rather than an AME budget so, yes, it is theoretically possible that somebody could apply and be told that they should wait until the new financial year or something like that. In practice, what will happen is that our staff will be working very hard to try and solve whatever problem it is. Each individual case will be different obviously but the basic message is that we want to help far more people. It is not a legal entitlement; it is support.

Q198 Mrs Humble: It is not a legal entitlement but support is there. Somebody can apply for the support but they do not have a legal entitlement to it and what we do not know is whether or not the budget is capped. If they are unfortunate to apply towards the end of the financial year and the money has all gone, they might not get it.
Kitty Ussher: It is capped. It is DEL funding rather than AME funding. The doubling means that we think the annual capacity will obviously double from 24,000 people to 48,000 people. As each new financial year comes round, there will be more money available, up to £138million by 2013/14. There are other ways that we are trying to improve capacity in the system. For example, we are working with some very large employers to have a kind of block access scheme. Royal Mail is quite a good example, where they will pay a little bit more per person than in a normal, bog standard scheme, thereby freeing up more resources for other people.[2]

Q199 Mrs Humble: For example, the Federation of Small Businesses has told us that the group who really ought to know more about it are small businesses. They describe it as the best kept secret. If you then get all of these small businesses aware of it and they are taking on more people with disabilities, how are you going to cope with that?
Kitty Ussher: We want to provide as much access to as many people as possible. This is the settlement that we currently have up to 2013/14, which is good news for people out there. It will dramatically increase the number of people who can be supported and absolutely our focus has to be to make sure that these normal employers in normal parts of the country, day in, day out, know about it so that they can have access to it.

Q200 Tom Levitt: The trend in Access to Work cases is that you are not going to get a doubling of cases at all. What has been happening is that there has been movement away from low cost, one-off payments towards high cost, ongoing personal support payments from Access to Work. That means you are not necessarily going to get more but more expensive, more ongoing payments from it, rather than more payments.
Maria Eagle: It used to do a lot of reasonable adjustments which I think employers now, both in the public and the private sector, are more up for doing themselves. In that sense, you do get a move away to what would be unreasonable adjustments which do tend to be more expensive.
Kitty Ussher: Many adaptations are taking place anyway as the legal framework is getting tighter. The first question we are asked is, "What are you doing to support people with mental health and fluctuating conditions?" This is exactly one of the things that we are doing. You are absolutely right to say, "Why not more money? Why not put even more into it?" What I am saying is we have doubled it and we are making sure that in Jobcentre Plus and all other fora it is not the best kept secret and that we can fund the most needy projects. There is also a question about efficient allocation of resources. We want to really make sure that we have a huge number of applications so that we can target it most effectively and have the most effect on people's lives. We are violently agreeing about the need to publicise it and that is what we are doing. We will make sure that every single front line member of staff that we employ when they are working through local employment partnerships and with individual people who are looking to get into work knows that the support is available, so that it can be prioritised as effectively as possible.

Q201 Mrs Humble: There is still a real issue about having a capped budget. I would welcome any further information you can give us about the demands on that budget and whether in fact, year on year, you are finding that the demands on that budget are reaching your cap. Can you give us any information that you might have about unmet need within the budget? Tom Levitt's question was a very important one.[3] The Department could find itself with an increasing number of requests for one-off,

[2] *See* Ev 231

[3] *See* Ev 232

physical adaptations, reasonable adjustments, whilst at the same time people are needing the sort of ongoing support that we are talking about. Apropos the ongoing support, the Department had a pilot project that started in November 2008 in two areas of London, looking at how the Access to Work programme can help people with mental health problems and fluctuating conditions. Last November is not a very long time ago but have you had any feedback from those pilots? How can the Access to Work programme help people with mental health problems and be expected to help them, and indeed those with fluctuating conditions?

Kitty Ussher: On the specific issue of the London pilot, it has only been up and running a few weeks. As of 7 January, which is the most recent data that I have, it has made good progress. We have been working in conjunction with MIND. It is up and running. We have a dedicated Access to Work adviser in place. We have agreements with MIND on the reporting mechanism and there is a good partnership working there. We have one support worker in place and we have another one expected to start very soon, if they have not started already. We have done all the marketing. So far, as of 7 January, we have four customers identified. So far, they are all employed with two returning from sick absence. It is very early days but it is really exciting and we will be evaluating it very closely.

Q202 Mrs Humble: Can I go back to an earlier remark about expecting employers to do more themselves without calling upon Access to Work funding? Do you see Access to Work as being limited to making reasonable adjustments within the DDA or do you see it as a catalyst to engage with employers to go beyond their statutory duty and be much more responsive to the needs of people with disability full stop?

Kitty Ussher: They need to do the DDA anyway, because it is a legislative requirement. The point I was making is that the fact that they are doing that anyway may mean we can focus Access to Work in the additional areas. It is there to solve the particular access problems of real human beings. It will vary, depending on individual circumstances and the type of work. We pay 80% of the cost through Jobcentre Plus between £300 and £10,000. That is a huge range and that indicates the variety of the services that will be offered. There are lots of different subsections within that and different apportionment of costs in between them, but of course it will vary hugely.

Q203 Mrs Humble: The pilots in London with regard to mental health appear to be a response to making Access to Work more flexible to individuals' needs. Are you looking at any other ways of improving the scheme?

Kitty Ussher: We think we need to get the marketing right. We need to work through every single channel of communication with employers and also the individuals as well so that, whilst there may not be a legal entitlement, we are empowering people to take advantage of what is on offer. We have also doubled the budget. There are various ideas of improving access. I admit we need to focus on the small companies and we are also improving access through large organisations as well by working on a pan-company basis in a kind of block way.

Ms Sudworth: The Committee is probably aware that in the recent White Paper we announced some pilots on the new right to control for disabled people and we want to look at how we can make that more flexible and more responsive to the needs of the individual.

Q204 Mrs Humble: Will the in control pilots also allow the individual to move equipment with them? Again, some of the representations we have had have shown that adaptations, reasonable adjustments in the workplace, are for that particular employer but, if an individual wants to move around, they cannot take that piece of specialist equipment with them. If you are moving along the line of individual budgets and the in control pilots, will that then enable people to pay for it themselves if they are given individual budgets and therefore then take the equipment with them to a new employer?

Ms Sudworth: We have not yet designed the detail of how Access to Work is going to work with right to control, but that could very well be an example of how the right to control could make the system more flexible. There are some circumstances in which the individual can take support with them, particularly if they are self-employed or a freelance worker.

Q205 Mrs Humble: If somebody is an employee rather than a freelance worker, they cannot do it?

Kitty Ussher: Currently not. However, we are looking at how the right to control works with Access to Work and I think it is a very valid point.

Q206 Miss Begg: In terms of the public sector, the aim of government is to say that across the public sector they should not have access to Access to Work, if that is the right phrase, because they should be paying that money themselves or they should be putting in the reasonable adjustments themselves. Some of the evidence we have heard is that people are quite frightened of that. They think general withdrawal of Access to Work from the whole of the public sector would have catastrophic consequences for many disabled workers. That is what they said. I know that Access to Work has already been withdrawn from central government departments. There is research into that. It has been completed but not yet published. Are you able to share with us today exactly what the results of that experiment were?

Kitty Ussher: No, because we have not decided. We are still looking at it. You are right to say that, in terms of the current situation, it is only Whitehall—ie, ministerial, so-called—departments that have had the services taken out of the Access to Work budget and will be provided through mainstream funding. This was a key recommendation of the *Life Chances Report* that the Prime Minister's unit published in 2005. It was quite well received at that time. At the moment, if you are in the broader public

sector, if you are in the Armed Forces, if you are a nurse or something like that, you still have full access to Access to Work.

Q207 Miss Begg: You might not have the full results of that research but you must have a sense of whether new recruits into central government bodies have had the same amount of help put in place as they would have done had they qualified for Access to Work.
Kitty Ussher: I can exclusively reveal that emerging findings from the evaluation which has not yet been published are that the same types of in work support that were provided under Access to Work are still being provided through government departments routinely. In fact, in some circumstances, the support extends beyond what was previously available under Access to Work. You can speculate as to why—I do not know—but perhaps it is because the employer understands the subtleties of what is needed for individual people.

Q208 Miss Begg: Have they used the Access to Work infrastructure—in other words, in order to do the assessments—or have the different departments adopted their own way of doing assessments or have they depended on individual, disabled people saying what it is they need rather than being assessed?
Ms Sudworth: I am not sure of the detail of that but they do still have access to the assessment and the Access to Work support from the teams in Jobcentre Plus. Although they are required to fund Access to Work support now themselves, they still have access to the full range of support in setting it up should they need it.

Q209 Miss Begg: In a lot of disabled people's cases, they will know exactly what it is they need and with others they have no idea what is out there so they do not know. How easy is it for a disabled person coming into a central government department to say, "This is what I need" and are there any examples where the department has said, "We do not think you need that" or, "That is too expensive"?
Kitty Ussher: I do not have specific examples but this will obviously be in the evaluation report which we will publish as soon as we can. I do know, in terms of our own department, that in the course of the last couple of years every single member of staff had a compulsory diversity awareness session. This is now very much core in terms of people's line management responsibilities. We very much hope that it will be extremely easy for people to have precisely that type of conversation and our equality impact assessments are obviously conducted for every single decision.
Ms Sudworth: In the case that we all hope never happens where one of those departments says, "That is too expensive" and where perhaps a decision is taken by a particular manager, Jobcentre Plus are still able to fund that, but I can tell you that no such requests have been received. We do not have any examples of that.

Q210 Miss Begg: Even in the face of the various departmental constraints and financial constraints about budgets getting tighter? None of that is having any impact?
Ms Sudworth: We have had no requests to fund centrally because the department has refused.
Kitty Ussher: We got a gold standard from the Employers' Forum on Disability in 2007, achieving the highest mark out of any government department. We want all government departments to be equally high for the work in this area.

Q211 Miss Begg: That is okay for central government departments because they are big but a lot of the public sector departments can be quite small. Is it fair to put that same burden that central government should be able to absorb onto the public sector?
Kitty Ussher: You make a very fair point but we have not made that decision. We are still in the process of evaluating so far.

Q212 John Howell: I want to pick up on the public sector duties element. What do you think they have achieved?
Maria Eagle: I think they promote culture change. I think they can make a difference in terms of helping us as the public sector to lead in designing out discrimination, thus making it less likely over a period of time that individuals have to pursue their rights individually after they have been discriminated against through tribunal cases or court cases. That is what they are aiming to do. They do it by requiring that the public sector organisation has to give due regard to the need to eliminate unlawful discrimination, harassment, victimisation, advance equality of opportunity and advance good relations. That is the general duty. There is then a capacity to have specific duties on public sector organisations that deal with specific strands to take forward the advancement of equality across the public sector. I think what that does is that as the public sector provides services to all of us it gets rid of unfairness and institutional discrimination and unthinking discrimination across the provision of services so that over a period of time it can make a real difference to the way in which our society works, make it fairer and enable us as a society to get the best out of all of our people and make sure that everybody has a chance to live good lives, to work where they want to and can, and to do the best that they can. That is what they do.

Q213 John Howell: You have used the phrase "culture change" on a number of occasions this afternoon in relation to the public sector. First of all, culture change programmes are notoriously slow to implement and, secondly, they need to be structured. I am not aware that there is a structured culture change programme in relation to the public sector for this area and a lot of the feedback that we have had has said that the duties are more tick-box exercises and certainly do not equate to what I have experienced as culture change programmes.

Maria Eagle: Of the existing public sector duties across the three strands so far to promote equality, two of them are very recent, only coming in in 2005 and 2006, disability and gender. The race duty is older. They have all had slightly different approaches. In the past particularly, I think the race duty has been a bit too much of a tick-box. Certainly when I was looking at this as Minister for Disabled People for the disability equality duty, which I had something to do with designing, we were looking to try and get away from tick-box paper arrangements. With the new legislation we are looking to get away from tick-box paper arrangements to a process which will promote this kind of culture change. I accept what you say, that culture change can be slow. I think that attitudes in society towards equality across the range of the current strands that we are considering over the past 10, 20, 30 years have changed out of all recognition. I think that 10, 15, 20 years ago the idea that disabled people could work and could be equal in society, should be in mainstream schools, would not have been generally accepted in the way in which it now is, and I think that if we look back 20 or 30 years we have come a tremendous way. That is culture change promoted in part by legislative change, in part because younger people are changing their ideas about the way in which society works, the way in which it should work, the way fairness works. In some parts we as parliamentarians are well into catch-up with that change. In other parts we have led it by our legislative nudges and pointers, and I think that culture change is a combination of those things. The public sector duties and the new single public sector duty, if we can get it right, will be about outcomes, it will be about fairness, it will be about designing out discrimination against all of the groups who have suffered it in the past, and it will be about us choosing to make our society better for all of the people who live in it. That is how much we are talking about here. It is a big, important part of what we are seeking to do in government.

Q214 John Howell: I accept that there are societal changes that are taking place, but I do not see any link at all in what you are doing between those societal changes and the individual culture change programmes that are going to be necessary within individual public sector organisations to embed the sorts of things that we want to see there. One of the questions that I have put to all of those that I have been able to ask the question to in these sessions is, "Do you really think that people in the public sector generally understand the difference between outcomes and outputs?".

Maria Eagle: I think there are increasing levels of understanding. It is fair to say that there are some bureaucracies involved in Whitehall and other bits of the public sector. It is easy to turn an aspiration into a process that ends up with bits of paper and ticks in boxes. Those of us who are trying to develop and push policy, ministers and parliamentarians, can counteract that, and certainly I always try to do so as a minister. We want to see outcomes. I think increasingly—and it varies from department to department—we can see changes which I think are in part due to what we have been doing. There is always an issue about working out quite how much it is due to that and how much it is due to general changing attitudes in society, but we could probably dispute that without any real clear evidence for some time.

Q215 John Howell: I think there is some clear evidence when it comes out in terms of reinforcement of parts of it. If you look at some of the enforcement duties, local government has been mentioned and it has been measured in terms of its equality duties. In order to reach an acceptable stage there you have had to follow the process to change outcomes, so there has been no link in terms of enforcement on that. My next question is around the enforcement level because it is fine to have this osmosis process of culture change that you seem to have been describing but there needs to be some enforcement from it and it would be nice to have an idea of how you see that developing.

Maria Eagle: We have the EHRC which has the capacity to take enforcement action where it sees fit. It has a range of powers to do that. It can provide individual assistance in court or tribunal cases. It can have inquiries and look at whether or not there is a general failing, and it has just announced a couple of inquiries into financial services and into the construction industry. It has the power to serve notices on organisations that it feels are not meeting obligations, so there is a range of powers that the Commission has. Individuals, of course, have the power to take their own court or tribunal case in respect of their own individual circumstances, as we have discussed. In the Bill that we are bringing forward we are, as we said earlier, looking at a wider range of measures which will enable representative actions, which will enable tribunals to make recommendations, all of which extend the capacity of enforcement bodies to make a difference. I think the public sector duties in respect of this have a part to play. You sound a little cynical about their effectiveness and that is your view. I think that they can play a key part in facilitating and speeding up the kind of culture change upon which we are already embarked in society. Which is the chicken and which is the egg in terms of whether society started changing before the public sector duties or vice versa we can dispute, but I think all of this points to improvements and change in the way in which we as a society deal with these issues.

Q216 John Howell: In relation to the Commission, their view, as I seem to recall it when we were questioning them, was that they did not have the resources to be able to deal with the enforcement of the new equality duty in the future, and they saw the inevitability of additional inspectorates, additional regulatory bodies that would come in. They did acknowledge that that was beyond what the Government was envisaging but their view was that it was going to require a considerable amount more regulation and enforcement than you are giving them resources for.

Maria Eagle: I do not necessarily accept that. Obviously, they have their views but they have £70 million a year and 500-plus staff. You can do quite a lot of enforcement with that in my view. We have to have the correct balance between encouragement, promoting change in a positive way, and bashing people over the head with a big stick when they have got things wrong. I do not think we should definitely always focus on the latter. I think people are more likely to move when encouraged than when forced. It is for the Commission to decide when it wishes to use its enforcement powers. It is extremely independent, but I do think it has significant resources. I know that there are some discussions between themselves and the inspectorates about whether or not the inspectorates and various bits of the public sector should be inspecting against equality, and I know that there are discussions and meetings going on between the Commission and those inspectorates, but most of the inspectorates are a lot smaller than the Commission and have fewer resources. To the extent that they can work together, fine, but the obligation is with the Commission.

Q217 John Howell: I heard you use the phrase several times today "leading by example", and it comes out specifically in what you were just saying there from what I understood of what you see as the biggest positive means for enforcement, leading by example. Can you give me an example of where that leading by example has really worked already and the change it has made?

Maria Eagle: It is difficult to say where some of the improvements that we see in our society have come from. I think there is a positive move forward in respect, for example, of the employment of disabled people. I know that there are some groups of disabled people where there has not been much of a change but there has been a bigger improvement than I think we would have had without the legislation. We have been talking about Access to Work. The idea that Whitehall departments pay for their own Access to Work out of their mainstream budgets as opposed to expecting the DWP to pay out of its DEL cash-limited budget for Access to Work actually puts more resources into supporting disabled people in the public sector workplace than would otherwise be there. I think that those organisations that do this right get a happier, more content, better workforce that does a better job. That is what I mean by leading by example. I think we can show other employers in the private sector some very good examples of putting our equality money where our mouth is. I think there are some private sector firms that can show that too, and I think the more that we can highlight these things the more we are likely to encourage others to do something similar.

Q218 John Howell: There has been some concern that by lumping all of this into one Act you will lose the distinctiveness of the disability equality duty that we have. Do you have a comment on that?

Maria Eagle: Yes. I know that there has been some concern from all the strands about (a) putting the Commissions together, and (b) having a single piece of legislation. What I can say is that we are not intending to have any regression from the current protection that there is for disabled people in the new legislation. We are not intending to have any regression in respect of anybody's rights in the new piece of legislation. By having across all of the strands one piece of legislation putting together nine major pieces of legislation that have developed over the past 30-odd years, consolidating over 100 pieces of secondary legislation into one place, we will make it easier for those upon whom these obligations are being placed to understand what it is they have to do to meet the requirements of the law, to make it easier for them to do their duty, and that is the purpose of this legislation, as well as strengthening and extending the coverage in some areas. In respect of disability, we will not resile from current protection and I can give an absolute assurance about that.

Q219 Mr Heald: I imagine from what you say that you do not think it would be workable to have a similar duty to the private sector, but we have had evidence that there is quite a bit of discrimination still, particularly in small businesses but in the private sector generally, and suggestions have been made that it should be possible to do a bit better. The Citizens Advice Bureaus, for example, have suggested more promotion of good practice, but that perhaps market regulators should have more of a role and that in regulating markets they could look not just at purely commercial aspects but also at equality and fairness. Is this something you have looked at and what is your take on how to tackle the private sector?

Maria Eagle: We do want to lead by example; I think that is number one. In respect of transparency, the new legislation will require transparency across a whole range of equality areas in the public sector. There is also public procurement, through which we spend approximately £175 billion a year in procuring goods, facilities, services from the private sector as well as the public sector, so we are looking at the extent to which we can use that purchasing power to promote good practice. I think transparency on things like gender pay gaps and other things like the number of disabled people employed, plus the power of public procurement, does provide us with some pretty powerful levers to try and promote good practice in the private sector. Can I say, by the way, that there is some very good practice in the private sector. It is not true to say that all the good is in the public sector. We can learn from each other. There is also some poor practice, I am sure, across the strands in both sectors. What we are looking to do is promote the positive and the good wherever we see it, and that is sometimes in the public sector and it is sometimes in the private sector.

Q220 Mr Heald: So there are no plans to change the role of the market regulators?

Maria Eagle: We do not have any plans to do that.

Q221 Mr Heald: How are you going to promote best practice? What are you going to do?
Maria Eagle: I think transparency and use of our purchasing power through public procurement will be a powerful lever, as I have said. One of the roles of the Commission is to spread around good practice information and advice, *et cetera*. Much of the private sector does want to do the right thing and will look for advice, and it is to the Commission that it should look, and I think all of us in the work that we do, certainly DWP, for example, in Jobcentre Plus, have extensive contact with employers in the private sector, always ready to help with advice and assistance about how best to deal with equality based issues that come up. I think there are very many ways in which we can do that.

Q222 Mr Heald: Will your private and voluntary sector contractors to whom work has been outsourced be subject to the public sector equality duty and, if so, in what way?
Maria Eagle: To the extent that they are carrying out public functions they will in the same way as the public sector.

Q223 Mr Heald: So in terms of recruiting their staff they will have to take account of the need to eliminate unlawful discrimination and harassment and promote equality and so on?
Maria Eagle: To the extent that they are carrying out public functions they will be subject to the same duties as the public sector.

Q224 Mr Heald: Can you tell us what the results were of the Ethnic Minority Employment Task Force race equality procurement pilot in terms of securing equality outcomes?
Maria Eagle: I cannot tell you, Mr Heald, off the top of my head but I am happy to provide a note.
Kitty Ussher: I am sure we can do that.[4]

Q225 Tom Levitt: Looking at goods, facilities and services, we have been told that it "is not difficult to see on any high street the number of service providers who have failed to comply with the reasonable adjustment duty", and an example that has been cited—in fact, I cited it myself earlier—is of induction loops. Lots of shops have them. Precious few have them where they are accessible, where they are working and where their staff know how to use them. How do you think we can address what appears to be in many cases just a token gesture towards largely ineffective reasonable adjustment?
Maria Eagle: First of all, there is the legal duty that people have, so those who do not comply may be carted off to the court by customers who cannot access their services. The Commission had a successful case in respect of a bank recently that saw, thus far, I think, the biggest damages payment made. I think such cases do indicate to those who provide services that they need to bear in mind their legal obligations. The business case for doing so is tremendously important, to keep getting that across, because, of course, many customers have disability or need hearing loops or whatever. Beyond that it is just about making it clear that this must be done.

Q226 Tom Levitt: Maria, specifically to you, the EU Directive is in train to prohibit discrimination in education, health care and social security as well as the supply of goods and services. To what extent will that be incorporated in the Equality Bill?
Maria Eagle: It is being negotiated at present. It is at an early-ish stage, I think it is fair to say, of negotiation. The Government Equalities Office is the responsible department that does some of the negotiating in respect of that. Obviously, we do try to influence it not to be so different from what we already have that it will be a major change, but until the negotiations are complete we are not going to know precisely how it is going to come out. Of course, much of our domestic law and the law we are proposing in the Equality Bill will already be in line with it. To the extent that it is not we will have to look at that as and when the negotiations in respect of it are completed and it is adopted. We hope it will not be too different from what we already see.

Q227 Tom Levitt: So are things like social care likely to be included in the new EU Directive?
Maria Eagle: Obviously, we are looking at social care in respect of age discrimination over a period of time in goods, facilities and services. I cannot tell you precisely where the negotiations currently are because these things are always in flux until they finally settle into the agreement at the end. The negotiations are ongoing is all I can really say, and obviously we are involved in them.

Q228 Tom Levitt: As far as enforcement of Part III of the DDA is concerned, we have been told by many that the fact that it takes place in the county court is seen as unsatisfactory and not very credible by many of the groups that have sent us evidence. How could we address that? Is the county court the right place for it?
Maria Eagle: It is a tough one. There are about 100 cases a year at present on goods, facilities and services in the county court, and probably the majority of them would be dealt with by way of the small claims procedure which has some of the protections of the tribunal in the sense that costs are not payable if you lose. Therefore, there is not necessarily an enormous difference there from a typical tribunal, although it is quite clear that in some circumstances there could be. For example, if the likely damages are such that it is not in the small claims court then you do start running into the usual costs. Were you to look at moving them back to the tribunals it would present some difficulties in terms of the implications for jurisdiction. We are not currently planning on doing that, although we would always keep these matters under review. I do not think there is an enormous difference between the small claims in the county court and the tribunal, and, of course, the tribunals, which were designed

[4] *See* Ev 232

originally to be simple and clear and cost-free, have not exactly turned out to be such. Some of the most complicated law I ever had to deal with as a lawyer came at me in the tribunals rather than in the courts, and so I think the tribunals have moved away from the original conception that they had as being quasi-judicial administrative tribunals. They can be very complicated and cases there can be at least as complex. Just look at some of the equal pay cases that have been in the tribunals for years. I do not think there is an easy answer to this.
Tom Levitt: The lawyer on my left is muttering agreement to all of that.

Q229 Chairman: There are too many lawyers in this room!
Maria Eagle: So shall I leave?

Q230 Tom Levitt: Finally, I think the suggestion the Government has made that there should be a specially trained cohort of judges to deal with discrimination cases has been welcomed, but, as you said yourself, Maria, with only 100 cases a year, having better judges is not going to increase the number that come through. 100 surely does not reflect the scale of the problem.
Maria Eagle: I would be surprised if it did reflect the scale of the problem but it is early days in some ways. Those numbers may increase. We have to wait and see whether they do.

Q231 Tom Levitt: But four years we have had this.
Maria Eagle: Yes, but nonetheless it is early days. It still could go up. We have to wait and see. We do not precisely know what is going to happen in that regard. If I put my Ministry of Justice hat on for a moment, we are planning that all judges have some module with the Judicial Studies Board to make sure that all judges over the next three years have training in discrimination law, which I think will be helpful. If and when judges do come across such cases they will have had some training, and I think that has got to be a good thing. It will be good for judges in any event to keep themselves up to date.
Tom Levitt: Absolutely.

Q232 John Penrose: I just have a couple of mop-up questions about what we will and will not gain from a single Equality Act. Forgive me if you have answered this already but I did not catch what you said if you did answer it. In the model for disability will you be going for the medical model or the social model?
Maria Eagle: The current definition in the Disability Discrimination Act is a kind of hybrid between the two, which sometimes can be seen as not satisfying either camp. We are not planning on changing to a total social model. We are going to make some changes. For example, we are going to remove the capacities bit from the current DDA definition which should make it easier for people to show that they meet the definition, although we are not changing the definition in the DDA completely. Many people still argue that it is based on a medical model but it is a kind of hybrid. No, we are not moving totally to a social model.

Q233 John Penrose: So people who are making a claim for disability discrimination will still have to prove that they are disabled?
Maria Eagle: They will have to show that they fit within the definition if it is disputed by their opponent whether or not they fit within the definition, yes. It will be slightly easier for them to do it, but yes, that will still be there.

Q234 John Penrose: Why have you decided to stick with that because we have had an awful lot of evidence so far criticising that approach quite strongly and saying it is the only kind of discrimination where you have to prove that and it is a technique beloved of lawyers to try and trip people up by putting them to proof first in the hope that they can make it much harder for claimants to be successful?
Maria Eagle: Lawyers will always find a trip, however you define things, so we cannot worry too much about that.

Q235 John Penrose: You said it, not me!
Maria Eagle: I said it, yes. I will be hearing from the Law Society in the morning. There are a couple of reasons. One is that the DDA definition is relatively well known in our law and understood by those who have to deal with it in the courts, and there is some merit in not changing it unless there is a really good reason to change it, number one, but also it is fair to say that it is not easy to define disability but we have always been trying to have a balance between the fact that we think conditions to fit in have to be long term and they have to have a substantial effect on the capacity of an individual to carry out their day-to-day tasks. We do not want to allow into the definition things like temporary broken arms, and so that is why we want to retain it substantially as it is, although, as I say, in a slightly less complex way because we are removing the capacities. The experience of legislation which has started out with a much wider definition, for example, the American Disabilities Act started out almost saying, "If you think you are in, you are in. You define it", in other words, self-definition, is that it has been narrowed and narrowed by the courts in America until it had to be extended again last year by Congress because it had become too narrow. I do not think there is an easy answer to how we define disability for legislative purposes. I am of the opinion that the definition we have has worked better than some people who would criticise it might acknowledge, for understandable reasons, because it is not a social model definition, so I really do understand why people criticise it, but pragmatically it has worked pretty well, and therefore with our system in the courts of precedent, you change the way you define something and the courts assume you want to change it perhaps much more when they are

interpreting it than you might wish them to think. There are very good pragmatic reasons for leaving it substantially as it is.

Q236 John Penrose: I am sure we will be hearing more from people who may agree or disagree with you on that. Perhaps I can move on to ask you about the impact of the new Bill on different sizes of organisations and whether or not you are planning to hold large organisations to the same standards as small organisations when it comes to discrimination cases. Are there going to be any exemptions for small organisations or are you going to hold large organisations to higher standards in terms of what you expect them to know when making reasonable adjustments compared to small organisations?
Maria Eagle: That is already built into the law in the concept of reasonableness. What is reasonable for BT might be more extensive than what is reasonable for the little shop round the corner. Inherent in that entire concept has always been a very pragmatic way of dealing with adjustments that takes into account, without having to put lists in the Bill or in the legislation, such things as the size, turnover or available resourcing of the organisation itself. I think the concept of reasonable adjustment works very well. Reasonableness is a concept that the courts understand well and means something different to a very small organisation with little money as opposed to a very large organisation with billions of pounds.

Q237 John Penrose: Can I put to you the other side of that equation, which is that if you are somebody who is trying to work out whether or not an adjustment you are being asked for is reasonable it means that you are always aiming it at a moving target because if you are a middle-sized organisation you have great difficulty in working out and trying to second-guess what the court will say, whereas if there were a straightforward, universal standard and you knew how much it was and you knew what it was and it was based on the person in front of you and their particular requirements rather than the size and complexity of your own organisation it would be a great deal more certain and a great deal easier and a great deal more straightforward for everybody concerned?
Maria Eagle: To a degree I understand that point of view but if you are a small employer faced with a person in front of you who has certain needs and you are being asked to make a reasonable adjustment and it is expensive and it means that practically speaking for you you cannot do it without it destroying your profit for the year, then that would not seem so reasonable for you. The law has always been a balance between the needs of the individual in respect of whatever adjustment is appropriate and the reasonable capacity of the organisation, whether it is providing adjustments for goods, facilities or services, or whether it is in employment, the capacity that they have to provide that in pragmatic, realistic terms. I think that works pretty well. I accept that that means that you have got a bit of a moving target if you are the employer or the organisation that is expected to provide that, but I think it is well understood by the court. I think the advice that the Disability Rights Commission and now the EHRC can give, based on good practice, is relatively clear, and it works. I think you would have more problems if you made it a specified standard because those who perhaps are struggling small businesses trying to make their way and become larger would have a disproportionately higher requirement on them than the multinational corporations that have already made their billions. I do not think that would work in practical terms.

Q238 John Penrose: Let me have one more go and then we will move on. I think equating large organisations with ones that can afford it in the current economic climate is not necessarily right. If you are working for a car company or a construction company which may be quite large but may also be making whopping losses, they may be less able to make some of these adjustments even though they are big than a small but jolly profitable company that is in a different sector.
Maria Eagle: Indeed, but the great pragmatic benefit of a concept of reasonable adjustment is that that takes those things into account. The judge or the tribunal chairman, whoever is making the decision about whether it was reasonable or not to do or not to do what was not done, does that weighing in his mind when he is looking at it.

Q239 John Penrose: If I am someone who is applying for a job at Ford this year, does that mean that I am less likely to get an adjustment this year than two years ago because this year it might be unreasonable whereas two years ago it might have been reasonable?
Maria Eagle: The concept of reasonable adjustment does indeed involve that kind of balancing by the decision-maker and it is there because it is meant to be a pragmatic way of making sure that the needs of both sides are balanced. Rather than try and set out a standard in law or even in secondary legislation that would be much less flexible, the great benefit of the law, as it currently is, is that it does allow on the basis of a well-known concept in law, reasonableness, those sorts of calculations to be made.

Q240 John Penrose: Can I ask a similar question, finally, about whether or not you plan to apply the same standards to both public and private sector organisations, and, if I can move you on, also to third sector organisations? I think you have already answered about the public sector equality duty. Do you plan to apply similar standards or different levels of standards to, first, private sector organisations, and, secondly, third sector organisations?
Maria Eagle: In terms of what is not the public sector duty? In terms of adjustments?

Q241 John Penrose: Either in terms of adjustments or in terms of the standards they have to adhere to when providing goods and services. Are you going to

treat private and third sector organisations identically, differently, at a lower or a higher standard compared to the public sector?
Maria Eagle: In the provision of goods, facilities and services, yes, the standards would be the same.

Q242 John Penrose: For third sector as well as for—
Maria Eagle: For everybody who is providing them.

Q243 Chairman: You touched earlier on the *Malcolm* case and seemed happy to glide by it but can I bring you back to it? How are the Government going to respond to that judgment?
Maria Eagle: We are considering it in detail at present but you have basically got a range of possible ways forward. I am a great believer in disability-related reasons. I went through this when I was Minister for Disabled People dealing with policy developments for 2005 legislation, and we considered whether we should be bringing in indirect discrimination or whether we should stick to disability-related reasons. We decided at that time to stick to disability-related reasons. That has effectively become much less useful to disabled people following *Malcolm*, so we now have to decide, and I cannot tell you today precisely how we are going to do this but this is what is in our mind: do we stick with disability-related reasons, do we get rid of disability-related reasons and introduce a concept more known in European law of indirect discrimination which applies slightly oddly, I think, in the disability field, or do we try and cover all the bases and do both? DWP has conducted a consultation in respect of that and I think there are very decided views from some of what I might call the disability lobby, and we are currently in the process, with our colleagues in DWP who are the policy owners, of deciding quite how to take that forward. Those are the sorts of considerations. Do we just do indirect discrimination? Do we do indirect discrimination plus a modified version of disability-related reasons or what? We will be having to fix *Malcolm* in the legislation in the Bill, and so we will be coming forward with a way through that.

Q244 Chairman: Finally, and I am sure we touched on this earlier, the *Coleman* judgment essentially said that the Directive had been incorrectly implemented into British law. Yes?
Maria Eagle: It said we should be covering association, yes, did it not?

Q245 Chairman: So is that the intention? I assume you have very little choice because it is a judgment you have got, but is that where we are heading?
Maria Eagle: I think that is where we are heading.

Q246 Chairman: Thank you very much. I hope you enjoyed it.
Kitty Ussher: Very much.
Maria Eagle: Thank you.

Written evidence

1. Memorandum submitted by Ecas Ltd

Summary

— Ecas, a long-established disability charity, experienced difficulty establishing local Council compliance with the disability equality duty (DED).

— A primary means of complying with the DED is to undertake 'equality impact assessments' of key policies and budget decisions. We believe the Council is failing to undertake these assessments, or otherwise have "due regard" for disability.

— The only means of privately enforcing the DED is judicial review—even after instructing senior counsel, we have found this to be unworkable in practice.

— Apart from the prohibitively high legal costs involved, we found that the Council refused to release information about its equality impact assessment.

— To obtain evidence, we were forced to resort to the freedom of information appeal process—because this is a very lengthy process, by the time the evidence is available, enforcement via judicial review is time barred.

— The new Equality Act should remedy this by providing:

  — (a) a specific duty, on the part of public authorities, to publish full information about initial screening and equality impact assessments undertaken;

  — (b) further specific duties allowing the public and organisations to be provided with documentary evidence that decision-makers (eg councillors) were informed of the predicted impact of their decision within a specified timescale (eg 10 working days) of the request being received; and

  — (c) stronger mechanisms to require and enable the EHRC to enforce compliance with public authority equality schemes.

Introduction

1. Ecas is an Edinburgh-based charity, founded in 1902 to further the interests of disabled people. Ecas has a long pedigree of providing both services for clients and actively campaigning on a number of different issues which impact on the lives of disabled individuals and groups. Ecas continuously liaise, and work in partnership, with local government, although we are independently funded. Part of this partnership working involves ongoing consultation on various policy issues affecting disabled people—consultation which assists officials in part fulfilment of the statutory requirements of the DED.

Factual Information

2. Earlier this year, our local council, City of Edinburgh Council, took the decision to cut the funding for an equality forum, on which we were represented, and which was listed as the Council's "primary consultation mechanism" with disabled people. It was common ground that this budget cut would make the forum unworkable and that it would cease to exist. We were concerned that this budget decision had been taken without statutory due regard for the impact on disabled people, in breach of the DED. The decision also ran contrary to the Council's Multi Equality Scheme which, to date, lists a defunct body as its primary consultation mechanism. As part of our campaign to reverse this budget decision, we considered petitioning for judicial review, as the only means available to us for privately enforcing the DED (having first approached the Equality and Human Rights Commission—which stated it had insufficient resources to assist, and could not, in any event, enforce compliance with the Scheme).

3. In order to proceed with this action, we needed to be able to examine the extent to which council officers might have complied with the DED by undertaking any, or any adequate, impact assessment. However, this evidence was not forthcoming and, while it would likely have been released once legal proceedings had started, having taken advice from both junior and senior counsel, we were reluctant to litigate without first being able to establish the facts. We therefore turned to the freedom of information legislation and made a request for all relevant information about council officers' impact assessment of the budget cut decision. This request was refused and the result of our appeal to the Scottish Information Commissioner is pending. While we await the release of this information, some eight months have passed since the decision in question was taken. This means that, on grounds of time limitation, we would no longer be in a position to bring judicial review proceedings to enforce the DED.

4. Ecas' experiences, therefore, of attempting to hold a public authority to account in relation to the DED, have resulted in frustration. Without adequate means to obtain information with which to ascertain compliance with the DED, the private enforcement mechanism of judicial review is extremely limited and virtually unworkable. Enforcement by the Commission is ineffective as it cannot enforce a council policy

committee to comply with an equality scheme. It is perhaps no surprise, therefore, that almost two years after its coming into effect there is only one reported case to date where this aspect of the legislation has been successfully enforced: *R (on the application of Chavda and others) v Harrow London Borough Council* [2007] EWHC 3064 (Admin).

5. I would be delighted to provide further details to the Committee about Ecas' experiences in utilising the current disability discrimination legislation, and how we feel these might help inform the proposals for the Equality Bill.

Recommendations

6. The DED under the current provisions is extremely difficult to enforce for private individuals and organisations. The new Equality Act should remedy this by providing:

- (a) a specific duty, on the part of public authorities, to publish full information about initial screening and equality impact assessments undertaken;
- (b) further specific duties allowing the public and organisations to be provided with documentary evidence that decision-makers (eg councillors) were informed of the predicted impact of their decision within a specified timescale (eg 10 working days) of the request being received; and
- (c) stronger mechanisms to require and enable the EHRC to enforce compliance with public authority equality schemes.

November 2008

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2. Memorandum submitted by Mencap

Summary of Consultation Response to Equality in Employment

- The number of people with a learning disability in paid employment is very low compared to the number of disabled people as a whole who are in employment.
- The DWP's current welfare reform agenda will further exclude people with a learning disability from the labour market.
- The Equality Bill provides the opportunity for a duty on public bodies to monitor disability equality by category of disability, thus ensuring that those furthest from the labour market, such as people with a learning disability will not be left behind by the equality agenda.

Consultation Response to Equality in Employment

How effective has DWP been in achieving equality in employment?

1. Alarmingly, the number of people with a learning disability in employment has not increased at all since the Government came to power in 1997.

2. People with a learning disability remain the most excluded group of disabled people from the UK work force, with an estimated employment rate of 17%[1] compared with 49% of disabled people as a whole and 74% for the working-age population as a whole.

3. None of the existing employment programmes deliver for people with a learning disability. This is despite the fact that 65% of people with a learning disability would like to work[2] and there is much evidence to show that people with a learning disability make highly valued employees when given the right support.

How would DWP have to change to achieve greater equality in employment?

4. Mencap has deep concerns about the Government's current welfare reform agenda which is set to further exclude people with a learning disability from the labour market. Specialist supported employment agencies working specifically with people with a learning disability often struggle to get long-term funding and Mencap has growing concerns about the DWP's commissioning strategy in terms of the contracting out of welfare-to-work employment provision. These new, larger contracting arrangements will mean specialist niche providers are squeezed out of the tendering process and, as a consequence, people with a learning disability will not receive the specialist support they need to move into work.

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[1] *People with a learning disabilities in England*, Eric Emerson and Chris Hatton, Centre for Disability Research, May 2008.
[2] *Adults with learning difficulties In England*, Eric Emerson, Lancaster University 2005.

5. Mencap is also concerned that a focus on payment by results is likely to disadvantage people with a learning disability who may take longer to move into work and who may be more expensive to support. A report by the Social Market Foundation[3] supports Mencap's concerns and identify "serious implications" for those hardest to help who may take longer to move into work:

> The uniform payment to contractors for each job outcome achieved has serious implications for harder-to-help jobseekers, who will require more support at greater cost. Under the proposed uniform payment structure, those furthest from the labour market will inevitably not be offered services appropriate to their needs—they will be "parked". This will occur because the design of the payment system sets the profit motive of contractors in tension with the aim to help all clients. This need not be the case and its effects are in the interests of neither the jobseeker nor the taxpayer.

6. Mencap believes that the DWP should also focus on engaging with employers about working with people with a learning disability as stigma and prejudice about people with a learning disability is still widespread and remains one of the biggest barriers to employment for this group.

How can the Equality Bill open up opportunities in employment, particularly for disabled people, carers and pensioners?

7. The Government have signalled their intent that the Equality Bill will aim to increase the number of people with a disability in employment by asking public bodies to collect and publish data on the number of their employees who have a disability:

Framework for a Fairer Future—The Equality Bill, June 2008, Government Document

> We know that across the country as a whole…if you are disabled you are two and a half times more likely to be out of work. But we do not know what the picture is by workplace. Transparency will highlight areas where we need to make progress.
>
> We will:
>
> — ensure public sector employers publish clear information about their progress on important equality issues.
>
> …We are doing further work before putting forward proposals for exactly what information public bodies should be required to publish.

The Equality Bill—Government response to the Consultation, July 2008, Government Document

> We want public bodies to report on important equality areas. We are doing further work before putting forward proposals for exactly what information public bodies should be required to publish, and we will consult on this later. These could include, for example:
>
> — gender pay;
>
> — ethnic minority employment; and
>
> — disability employment.
>
> This transparency will enable us to see progress year by year within a public authority and to:
>
> — see which authorities are making progress and learn lessons from them;
>
> — identify which authorities are falling behind; and
>
> — allow comparisons between similar authorities.

8. Mencap is concerned that unless these new proposals for increased disability equality monitoring by public authorities under the Equality Bill include the duty to monitor and publish disability by category, those furthest from the labour market, such as people with a learning disability will be left behind by the equality agenda.

9. Indeed the scale of unemployment for people with a learning disability may be hidden under any general improvements in the rate of employment for disabled people. Thus people with a learning disability will be denied the independence and equality of opportunity which employment can provide.

10. Mencap recommends that the Equality Bill either contains a stipulation that public authorities record disability by category and that the Equality and Human Rights Commission should publish guidance on what these categories might be or that it contains an explicit breakdown of these categories of disability within the Bill.

[3] *The Flexible New Deal—Making it work*, Ian Mulheirn and Verena Menne, Social Market Foundation, September 2008.

11. Mencap does not believe that making an individual's response to whether they have a disability mandatory would be a proportionate means of achieving disability equality. People with a disability have their right to privacy respected and must retain the right not to disclose their disability. Mencap therefore believes that it is crucial that public authorities should also be given guidance on how to explain the importance of disclosing a disability.

November 2008

3. Memorandum submitted by National AIDS Trust

Summary of Recommendations

Recommendation: The Equality Bill should prohibit the use of pre-employment questionnaires before the offer of a job has been made to protect disabled people from discrimination and make discrimination easier to prove.

Recommendation: The Equality Bill should introduce a clear prohibition of indirect discrimination into disability law to provide proper protection for disabled people in employment.

Recommendation: The Equality Bill should provide explicit statutory protection against harassment on the grounds of disability in the provision of goods, facilities and services.

Recommendation: The Government should ensure the EU directive in goods, facilities and services includes a social model of disability.

Recommendation: A social model of disability should be introduced in all relevant UK legislation.

Recommendation: The Equality Bill must provide protection on the grounds of association and perception for disabled people. This protection should extend to goods, facilities and services.

Recommendation: The EHRC should be ready to respond to the introduction of an Equality Duty, with resources available for public authority professionals working in diversity and equality, to ensure the needs of disabled people, particularly those living with HIV, are not overlooked in the single Duty.

Recommendation: Privacy measures should be introduced into the tribunal process to encourage people living with stigmatised conditions, such as HIV, to take discrimination cases to tribunal.

Recommendation: Representative actions in discrimination cases should be introduced to remove the burden of bringing a claim from the individual.

Recommendation: The Government needs to take greater steps to ensure employers are more aware of their responsibilities under the DDA 2005 as well as the benefits of employing disabled people, including people living with HIV.

Recommendation: There should be a statutory right to Access to Work for people with support needs that can be met via the scheme, with a robust, accessible and transparent appeal and review procedure.

Recommendation: People with fluctuating conditions should retain an entitlement to Access to Work after entering employment. This would mean that, once qualified for Access to Work, clients whose support needs reduce, such that they do not need Access to Work support for a period, can reactivate the support on request if their support needs increase at a later point.

Recommendation: Employers (particularly small and medium) should be able to receive support from Access to Work to compensate them for when people with fluctuating conditions need periods away from work (eg when people living with HIV are adjusting to changes in their treatment regimes).

Recommendation: The Equality Bill should amend the law so that people can bring a claim that someone has treated them unfairly on more then one characteristic (eg race and disability).

Introduction

1. NAT (National AIDS Trust) is the UK's leading independent policy and campaigning charity on HIV. NAT develops policies and campaigns to halt the spread of HIV and improve the quality of life of people affected by HIV, both in the UK and internationally.

2. NAT welcomes the chance to submit evidence to the Work and Pensions Committee's Equality Bill inquiry.

3. The inquiry has a broad scope; NAT has focused its response on areas with particular relevance to people living with HIV.

Equality in Employment

4. The inquiry asks how effective DWP has been in achieving equality in employment. Research from a recent study of people living with HIV in London found that only 47% of people living with HIV were in employment.[4] Barriers to employment for people living with HIV include concerns about stigma and discrimination, concerns about working when living with a fluctuating condition and concerns about the need to take time off for medical appointments.

5. The inquiry goes on to ask how the Equality Bill could improve employment opportunities for disabled people. NAT would like the Government to use the Bill to prohibit the use of pre-employment health questionnaires before the offer of a job has been made. Sadly people living with HIV still face discrimination; employers often do not understand that today someone living with HIV can live a long and active life and have a fulfilling and busy career. The lack of understanding about the advancement of treatment means that many employers will discriminate against an HIV-positive person, even if they are the best candidate for the job. If employers were only permitted to ask people to fill out a health questionnaire after the offer of a job had been made, this would guard against this discrimination and make discrimination easier to prove.

> Recommendation: The Equality Bill should prohibit the use of pre-employment questionnaires before the offer of a job has been made to protect disabled people from discrimination and make discrimination easier to prove.

6. The inquiry looks at how the Government can use the Equality Bill to respond to the implications of the *Malcolm* case. NAT is very concerned about the impact of this judgment, which has effectively narrowed the scope of Disability Related Discrimination (DRD). DRD, like direct discrimination, now focuses on whether a disabled person has been treated differently from a non-disabled person (for a reason related to their disability). The previous interpretation of DRD in effect asked a completely different question: has the disabled person received unfavourable treatment for a reason related to their disability? NAT welcomes the Government's intention to use the Equality Bill to deal with the consequences of the *Malcolm* judgement.

> Recommendation: The Equality Bill should introduce a clear prohibition of indirect discrimination into disability law to provide proper protection for disabled people in employment.

Equality in Goods, Facilities and Services

7. The Equality Bill presents an opportunity to provide explicit statutory protection against harassment on the grounds of disability in the provision of goods, facilities and services, education in schools, disposal or management of premises or exercise of public functions (protection in the workplace already exists).

8. The Government notes in *The Equality Bill—Government response to the Consultation* that it is considering the implications of the *Coleman* judgment for the definition of disability harassment before considering whether to extend protection against harassment outside work in respect of disability.

> Recommendation: The Equality Bill should provide explicit statutory protection against harassment on the grounds of disability in the provision of goods, facilities and services.

9. NAT welcomes the draft EU directive in goods, facilities and services. The Committee will be aware that in the UK we are in the fortunate position of benefiting from the Disability Discrimination Act 2005 (DDA 2005) which provides welcome protection for people living with HIV. The new EU directive provides the opportunity not only to ensure that people living with HIV across the EU can access similar rights, but also to ensure UK citizens living with HIV have genuine freedom to live and work in any EU member state.

10. HIV discrimination is a social phenomenon which rarely relates to visible symptoms, particularly with the widespread accessibility of treatment, but rather is a stigmatising response to the fact of infection itself. We are now calling for the EU to recognise this social model of disability in the equality directive.[5]

> Recommendation: The Government should ensure the EU directive in goods, facilities and services includes a social model of disability.

11. In line with this, NAT is calling for the introduction of a social model of disability in all relevant UK legislation.

> Recommendation: A social model of disability should be introduced in all relevant UK legislation.

12. The inquiry asks whether discrimination by association and perception should be extended to cover goods, facilities and services.

13. NAT is particularly concerned about discrimination by perception as HIV positive status cannot be "seen" and this profoundly affects how stigma and discrimination are experienced.

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[4] Elford J, Ibrahim F, Bukutu C, Anderson J, *Social and economic hardship among people living with HIV in London, HIV medicine* 2008; 9:616–624

[5] NAT is calling on the Government to make the following amendments in the form of additional recital to the Preamble to the Directive: *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers, whether attitudinal or environmental, may hinder their full and effective participation in society on an equal basis with others. And: Persons with disabilities, even in the absence of environmental barriers, may experience attitudinal barriers alone, such as stigma, prejudice, stereotyping or discriminatory treatment, which interacting with their impairments hinder their full and effective participation in society on an equal basis with others, for example in the case of asymptomatic HIV infection.*

14. Discrimination by association can also take place in the context of HIV; one case of discrimination by "association" that came to our attention was a nurse who was asked to change responsibilities at work and no longer engage in invasive procedures because her spouse was living with HIV.

15. NAT is waiting to see how the Government responds to the *Coleman* judgment. We hope this will ensure that discrimination by association and perception is included in the Equality Bill. If not NAT will be lobbying to ensure that the Equality Bill ensures that UK's disability discrimination law provides protection on the grounds of association and perception. We would like to see this protection extend to goods, facilities and services.

> Recommendation: The Equality Bill must provide protection on the grounds of association and perception for disabled people. This protection should extend to goods, facilities and services.

The Public Sector Equality Duty

16. NAT supports the establishment of a single Equality Duty. It seems more appropriate to a single Equality Act and a single Equality and Human Rights Commission. In addition it can more readily and flexibly address the fact of multiple discrimination faced by so many in our society, in particular people living with HIV (many of whom are also gay and / or black African).

17. NAT also supports the extension of the single Equality Duty to other grounds. In particular, the discrimination and inequality faced by gay men in education and health systems has a direct impact on the ability of gay men to avoid HIV infection and, for those who are HIV positive, to enjoy and access services in a supportive environment.

18. NAT's main concerns are that the broadening out of the Duty may mean that the needs of people living with HIV are overlooked. NAT's research reveals that even with the current Disability Equality Duty, the needs of people living with HIV are not always considered. Some recent research carried out by NAT revealed that:

- Of the 26 Schemes considered where NAT had hoped that the relevant public bodies would have included HIV in their Scheme, only 15 did so.
- In the Single Equality Schemes reviewed during this research, there were even fewer references to HIV than in Disability Equality Schemes (DESs).
- Almost three quarters of organisations surveyed did not consider any statistics or profiles about people living with HIV in their area, and less than a third sought guidance about how to include the needs of people living with HIV in their DESs.
- 65% of Schemes and Action Plans do not make specific reference to HIV (even within their definition of disability).
- Government Department Schemes that were commended by the Disability Rights Commission have not substantively addressed the needs and concerns of people living with HIV.

19. This is a particular concern because many people living with HIV in the UK are already from disadvantaged groups and HIV, as a stigmatised condition, leads to discrimination of a distinct and complex nature making it even more important that their needs are not overlooked.[6]

20. These findings show that steps must be taken to ensure that public authorities consider the different needs of individuals covered by a Scheme, including people living with HIV.

> Recommendation: The EHRC should be ready to respond to the introduction of an Equality Duty, with resources available for public authority professionals working in diversity and equality, to ensure the needs of disabled people, particularly those living with HIV, are not overlooked in the single Duty.

Private Sector Commitment and Support, Guidance, Advice and Information for Employers

21. NAT welcomes any steps to ensure that private sector employers take more account of the equality needs of their workforce and customers. For this reason NAT welcomes the emphasis in the Equality Bill on using public sector procurement to improve the practice on equality issues in the private sector.

22. The Government also announced its plans to develop, in partnership with the EHRC, an equality kite mark. This will recognise employers who are transparent about reporting their progress on equality. NAT recognises that the development of this kite mark, to praise employers who have taken steps to employ

[6] Figures released from the Health Protection Agency reveal that HIV is disproportionately affecting men who have sex with men and black Africans, groups that already face discrimination. 2,700 gay and bisexual men were newly diagnosed with HIV in 2006, the highest number ever. Across the UK 1 in 20 gay and bisexual men are now living with HIV. Black Africans accounted for almost half of all new diagnoses in 2006 and black Caribbeans accounted for 3.2%. Source: Health Protection Agency (2007) *Testing Times,* www.hpa.org.uk/infections/topics_az/hiv_sti/publications/ AnnualReport/2007/ HIVSTIs_AR2007.pdf.

disabled staff, including people living with HIV, as a positive step. However, we are concerned that this is a voluntary scheme, and therefore those employers who have the worst record on equality issues will not need to take any further steps.

23. Currently employment tribunals can only make recommendations that directly benefit the person who has been discriminated against. As around 70% of employees involved in discrimination cases leave the organisation, this ties the hands of tribunals. The Equality Bill will allow employment tribunals to make wider recommendations in discrimination cases.

24. NAT welcomes this measure which should encourage better employment practices. This will maximise the impact of the individual discrimination case and enable employers to comply with the law and avoid future claims.

25. NAT would like to highlight the importance of considering tribunal complainant's privacy and confidentiality in any proceedings. Introducing measures to protect the privacy of claimants living with HIV and other stigmatised conditions during the tribunal process will encourage people to take discrimination cases to tribunal. This will send out the important message that discriminating against people living with HIV is unacceptable.

> Recommendation: Privacy measures should be introduced into the tribunal process to encourage people living with stigmatised conditions, such as HIV, to take discrimination cases to tribunal.

26. The Government is considering introducing representative actions in discrimination cases. Currently individuals who have been discriminated against have to shoulder the burden of bringing a claim. Representative actions would enable bodies such as trade unions or the EHRC to take cases to court on behalf of a group of individuals. However, although the Government is exploring this further, it has recently announced this will not be included in the Equality Bill.

> Recommendation: Representative actions in discrimination cases should be introduced to remove the burden of bringing a claim from the individual.

27. NAT was disappointed that the proposed benefits reforms in the recent Green Paper, *No one written off: reforming welfare to reward responsibility,* put the onus for returning to work solely on people accessing the benefits system, rather than also on employers. The Government needs to take greater steps to ensure employers are aware of the benefits of employing disabled people, including people living with HIV.

28. The need for this is illustrated by the Chartered Institute of Personnel and Development (CIPD) findings from 2003 that discovered that more than 60% of employers said they disregarded applications from people with drug or alcohol problems, a criminal record, a history of mental health problems or incapacity. More than half of respondents said nothing would persuade them to recruit from these "core jobless" groups.[7]

29. Further research reveals that one in ten employers has withdrawn a job offer because the applicant had lied or misrepresented their health situation on the health-screening questionnaire. 7% of employers have dismissed an employee while in employment for the same reason. Withdrawn job offers or dismissal on these grounds is twice as common in large organisations.[8] This is particularly relevant to people living with HIV as people's experience of stigma and discrimination mean that some are unwilling to disclose their status on health-screen questionnaires.

30. Given this evidence, it is clear the Government need to take further steps to educate employers about their responsibilities under the DDA 2005. Employers need to be informed about conditions such as HIV, both in terms of what they need to do to be a supportive employer and also the understanding that just because someone has HIV does not mean they cannot bring a great deal to the workforce.

> Recommendation: The Government needs to take greater steps to ensure employers are more aware of their responsibilities under the DDA 2005 as well as the benefits of employing disabled people, including people living with HIV.

31. The inquiry looks at recent developments in the Access to Work Scheme. NAT welcomes the Government's recognition in *No one written off* of the need to specifically consider fluctuating conditions.

32. As noted in our response to the Green Paper, there needs to be greater flexibility within the scheme, with the introduction of support for people with fluctuating conditions in times of poor health.

33. NAT would welcome consideration of financial assistance being made available to small and medium sized employers to help support people recently diagnosed with a fluctuating condition through a period of disability leave. This leave could be statutory, subsidised by Government, and could work in the same way as maternity and paternity leave. This would enable employees and employers, to assess an individual's condition and how this affects their role, and consider how best to facilitate a return to work.

> Recommendation: There should be a statutory right to Access to Work for people with support needs that can be met via the scheme with a robust, accessible and transparent appeal and review procedure.

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[7] CIPD (October 2005) *Labour Market Outlook: Survey Report Summer/Autumn 2005*
[8] CIPD *Labour Market Outlook: quarterly survey report—Autumn 2007*

Recommendation: People with fluctuating conditions should retain an entitlement to Access to Work after entering employment. This would mean that, once qualified for Access to Work, clients whose support needs reduce, such that they do not need Access to Work support for a period, can reactivate the support on request if their support needs increase at a later point.

Recommendation: Employers (particularly small and medium) should be able to receive support from Access to Work to compensate them for when people with fluctuating conditions need periods away from work (eg when people living with HIV are adjusting to changes in their treatment regimes).

Single Equality Act

34. NAT welcomes the new single Equality Bill. As outlined above, people can often be discriminated against for more than one reason, not solely because they are disabled.

35. HIV in the UK disproportionately affects two groups which experience inequality and discrimination—gay and bisexual men, and black Africans—and amongst black Africans women are disproportionately affected. It is often hard to disentangle HIV discrimination from the homophobia, racism, anti-immigration prejudice and sexism which so many people living with HIV also experience and which fuel HIV stigma. The single Equality Act presents an opportunity to recognise this and see disability in a broader discrimination context.

36. As the law stands people can only bring a claim against someone that has treated them unfairly because of one particular characteristic, but as set out above, there are examples where people are discriminated against for a number of reasons.

37. NAT welcomes the Government's commitment to look at the question of bringing claims involving multiple discrimination. However, we note that it discusses the need to explore "what the costs and benefits would be". NAT is concerned that the Government may step back from these measures due to concerns about cost. We will encourage the Government to use the opportunity that the Equality Bill presents to take this area of work forward, as many people living with HIV are subject to multiple discrimination.

Recommendation: The Equality Bill should amend the law so that people can bring a claim that someone has treated them unfairly on more then one characteristic (eg race and disability).

November 2008

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4. Memorandum submitted by Michael Connolly, School of Law, University of Surrey

Executive Summary

This response addresses the following questions in Work and Pensions Committee's Press Notice of 22 October 2008, concerning the implementation of the EU Directive on discrimination in the area goods and services:

- What is the draft EU Directive in Goods, Facilities and Services (GFS) proposing and what are the implications for transposition of a new EU Directive for UK law?
- How should the Equality Bill respond to the decision in the *Malcolm* case in respect of disability rights in employment?
- What are the implications of the *Malcolm* case and how should the Equality Bill take these into account?
- Does the Equality Bill incorporate the provisions of the draft directive?
- Should discrimination by association extend to GFS?

This submission concludes:

- The standard of justification must be made stricter, to accord with EU law.
- The *Malcolm* decision should be reversed, to comply with EU law.
- The limited conditions of justification in the field of Premises must be replaced with a general but stricter defence to accommodate the reversal of *Malcolm*.
- "Association" disability and age discrimination and "Perceived" disability and age discrimination should be introduced, to comply with EU law.
- The phrase "solely because" in the definition of direct discrimination, used in the Explanatory Memorandum of the Directive on GFS, should not be transposed.
- The victimisation provisions require redrafting, to incorporate an objective justification defence.

This submission reports on technical difficulties and inconsistencies in the current law, and how they may be remedied and/or avoided when transposing the Directive on GFS. It focuses on discrimination the grounds of disability and age.

The Standard Justification of Disability-related Discrimination

1. The draft Directive in GFS proposes the standard definition of objective justification, which demands a "legitimate aim and the means of achieving that aim are appropriate and necessary". This formula is rooted in the EC legal doctrine of proportionality. It is used at EC and domestic levels for most grounds of discrimination (such as race, sex, religion, and sexual orientation), except for disability.

2. *The current standard*. The Disability Discrimination Act 1995 provides that disability-related less favourable treatment may be justified if "the reason for it is both material to the circumstances of the particular case and substantial" (Parts covering Employment and Education)[9] or, it is reasonable for the defendant to hold an opinion that one of the justifying conditions is satisfied, (Goods, facilities and services, and Premises).[10]

3. These formulas appear less strict than the standard formula. This was confirmed by the Court of Appeal, which has held that under the employment part of the Disability Discrimination Act 1995, employers need only show that they acted within a band of reasonable responses open to the reasonable employer.[11] This contrasts with the standard formula which requires a defendant to find the least discriminatory method of achieving the aim.

4. The practical difficulty with the "reasonableness" standard is that the employer, or supplier of goods or services, or landlord, as the case may be, will be judged by the standards of the industry, which in all likelihood, is tainted with the prejudice (often sub-conscious) that discrimination law designed to combat. As such, the reasonableness test ceases to be fully objective.

5. *The current standard does not comply with EU law*. This standard falls short of the existing Employment Equality Directive although this applies only where there is no duty to make reasonable adjustments.[12] It also falls short of the proposed Directive on GFS. Both Directives demand the more exacting standard, that there is a "legitimate aim and the means of achieving that aim are appropriate and necessary". It is unlikely that the current position could withstand a challenge.

6. *Proposed solution*. Delete sections 3A(3) (Employment), 28B(7) (Education), 20(3) (GFS) and s 24(2) (Premises). Amend the current versions of disability-related discrimination by replacing the word "justified" with the italicised words:

> [A] person discriminates against a disabled person if—(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and (b) he cannot show that the treatment in question is *objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*.

The Malcolm Case

7. The House of Lords in *Malcolm* made two decisions on the meaning of disability-related discrimination in the Disability Discrimination Act 1995.

8. The first concerned the comparator used for identifying if the treatment was "less favourable". The House held (4–1) that the comparator should be a person in the same circumstances as the claimant, save for the disability.

9. Second, the House decided that for the treatment to be "related" to the claimant's disability, the defendant must have known, or ought to have known, of the disability at the time of the treatment.

10. This submission proposes that both these decisions should be reversed.

Facts and Decision

11. Malcolm was a tenant of the council and diagnosed with schizophrenia. He exercised his right to buy his flat, but just before completion, he sub-let the flat and moved out. Consequently, the council gave him notice to quit in accordance with the Housing Act 1985. Had Malcolm waited until completion, the sub-letting would have been permissible. Malcolm claimed the eviction amounted to disability-related discrimination.

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[9] DDA 1995, respectively, ss 3A(3), s 28B(7).
[10] DDA 1995, respectively, ss; s 20(3), s 24(2).
[11] *Jones v Post Office* [2001] ICR 805 (CA), see paras 25–26, 37–38, and 39–41.
[12] Council Directive 2000/78/EC, article 2 (2)(b).

12. The House of Lords affirmed the county court decision for the council and held that the eviction was not related to Malcolm's schizophrenia and in any case, he was not treated less favourably than any person who sub-let his flat.

The Legal Context

13. The Disability Discrimination Act 1995 is divided into areas of activities it covers. These include: Employment; Goods, facilities and services; Premises (sale and letting); and Education. The definitions of discrimination are broadly, but not precisely, the same across these activities. There are three principal forms of discrimination defined: direct discrimination; disability-related-discrimination; and a failure to make reasonable adjustments. To understand the implications of *Malcolm*, one must understand direct discrimination and disability-related discrimination.

Direct discrimination

14. Direct discrimination is facially discriminatory treatment. In the context of disability, care must be taken not to confuse a person's disability and the consequences of that disability. For instance, an employer may refuse to hire a woman with epilepsy because he believes that she cannot drive safely. The refusal to hire was on the ground of her driving capability, and not on the ground of her disability, and so would not amount to direct discrimination (although it might amount to disability-related discrimination). By contrast, an example of direct discrimination would be a refusal of access by the employer's sports and social club simply on the basis that the club does not allow disabled members, and without any consideration of whether the employee might benefit from membership, and even though they could access the club with a reasonable adjustment.[13]

15. Direct discrimination provides no general defence of "objective justification" or "excuse" for the treatment.[14] At present, direct discrimination is outlawed only in the Employment part of the Disability Discrimination Act 1995, although it should be introduced in the other parts of the Act to accord with the Directive on GFS.

Disability-related discrimination

16. Disability-related discrimination is the functional equivalent of indirect discrimination used for other grounds (such as race or sex). It does carry an objective justification defence. The *Malcolm* decision centred on disability-related discrimination. It is defined as follows:

> [A] person discriminates against a disabled person if—(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and (b) he cannot show that the treatment in question is justified.

17. For a *prima facie* case under (a), there are two elements. The treatment must be for a reason related to the victim's disability, and that treatment must be less favourable.

The Two Issues in Malcolm

18. Two points emerged from the House of Lords' judgment. First, with whom is the "victim" compared to, see if he was treated less favourably? Second, can the defendant be liable even if he did not know of the "victim's" disability at the time of acting? Although this case concerned the "Premises" part of the Disability Discrimination Act 1995, the decision affects other parts of that Act, (ie Employment, Goods, facilities, and services, and Education) which carry similarly-worded definitions of disability-related discrimination.

Issue one—The comparison

19. *The Law before Malcolm.* Identifying if the treatment was "less favourable" inevitably involves a comparison with how another was, or would have been, treated in the same circumstances. Until *Malcolm,* the established meaning of disability-related discrimination was set out by the Employment Appeal Tribunal in *Clark v Novacold*.[15] The reason for the less favourable treatment need only be related to the disability. Thus if a cafe has a "no dogs" rule, the reason for refusing entry to a blind man with his guide dog relates to his disability.[16] Similarly, a customer who is told to leave the restaurant because she has difficulty eating

[13] Explanatory Notes to the pre-consultation draft Disability Discrimination Act (Amendment) Regulations 2003 (now SI 2003/1673), para 32.
[14] The exception is direct age discrimination. Other grounds also carry "genuine occupational requirement", or "genuine occupational qualification" exceptions.
[15] [1999] ICR 951, at 964–966.
[16] Minister of State for Social Security and Disabled People, 253 HC Official Report (6th series) col 150, 24 Jan 1995).

as a result of her disability is so treated for a reason related to her disability. And a worker dismissed for long-term absence caused by a back-injury is dismissed for a reason related to his disability. In these examples the comparator is a person without the disability and without the "reason", ie without a dog, or without an eating difficulty, or without the long-term absence.

20. *The Malcolm "narrow" comparator.* The House of Lords disapproved of *Novacold* and held that the correct comparator was a person in the same circumstances as the claimant save for the disability. Hence, the treatment of Malcolm should be compared to how the council would have treated a tenant without a disability who had sub-let. Accordingly, in the examples cited in the paragraph above the blind customer with a guide dog should be compared with a sighted customer with a dog; a customer with eating difficulties should be compared a person without a disability but with eating difficulties; and a worker long-term absent should be compared to a worker without a disability who was long-term absent. This was a "more natural" or "common sense" comparison.[17]

Reasons in favour of the Malcolm comparator

21. The House of Lords said that the "wide" interpretation from *Novacold* would mean that Malcolm's treatment would be compared with a tenant who had not sub-let. It would also mean that a worker off sick for a long period because of his disability would be compared to a non-disabled worker not off sick. Of course, the council would not evict this tenant nor would the employer dismiss this worker. As such, this test "would always be met"[18] and is therefore "pointless".[19]

22. At a practical level, what underpinned the speeches was a concern for the limited housing stock and waiting lists, and the difficult position of Lewisham council, who might well have faced judicial review had it not evicted a tenant who was sub-letting.[20] Moreover, there was concern for the position of landlords, public or private, who may never be able to evict a disabled tenant, who, for instance, permanently sub-let, or never paid any rent.[21] The Law Lords were afraid, as Lord Neuberger put it, of giving disability-related discrimination "extraordinarily far-reaching scope".[22]

Reasons against the Malcolm narrow comparator

23. *The Novacold wide comparison is not pointless.* Designating the *Novacold* wide comparison "pointless" lacks imagination. For example, using the wide interpretation, the comparator could be a tenant who is being evicted, along with the claimant, because the council wish to refurbish their block of flats, or perhaps demolish it because it has been condemned unsafe. An "eviction" could be part of re-housing programme. Similarly, the comparator worker may be dismissed, not because of his long-term absence, but because the whole workforce (or a section of it), including the claimant, is being made redundant. In either case, this comparison reveals the treatment was not related to the claimant's disability. As such, this wider comparison will not "always be met" and is not pointless. The House of Lords' view also overlooks the utility of the objective justification defence, which (depending on the activity), permits defendants to justify their treatment for reason unrelated to the claimant's disability (see further below, para 38).

24. *The Malcolm narrow comparator leaves a gap in the law's coverage.* Direct discrimination is not generally justifiable. The effect of the *Malcolm* judgment is to reduce disability-related discrimination (which does carry a justification defence) to something with less scope than direct discrimination, rendering the sections providing for disability-related discrimination redundant, and leaving a large gap in the law's coverage.[23]

25. *The Malcolm narrow comparator was not intended by Parliament.* The legislative history supports the wider interpretation.[24] When introducing the sections on disability-related discrimination, the Government explained that a job applicant who could not type because of arthritis should now be compared with a job applicant who could type, rather than an applicant without a disability who could not type. Such a case should turn on justification, not the comparison.[25]

26. Subsequent amendments were made to the employment provisions (to implement the Employment Equality Directive),[26] on the basis that *Novacold* was correct. The Government introduced a specific definition of direct discrimination which was not justifiable to run alongside disability-related discrimination, which is justifiable (respectively ss 3A(5), 3A(1), Disability Discrimination Act 1995).[27] As

[17] [2008] UKHL 43, [15] (Lord Bingham); [30]–[31] (Lord Scott). Baroness Hale dissented on this point, [79]–[80].
[18] *Ibid*, [14] (Lord Bingham), [112] (Lord Brown). In her dissent, Baroness Hale acknowledged this conclusion, [71].
[19] *Ibid*, Lords Scott [32]–[33], and Neuberger [151].
[20] *Ibid*, [8], [9] & [90].
[21] *Ibid* [8], [9], [29], [90], [102], [158].
[22] *Ibid*, [119].
[23] Acknowledged by Lord Brown, [2008] UKHL 43, para 114. Lord Neuberger acknowledged that the narrow construction was "unattractively restrictive" (ibid para 119) and "very limited" (ibid para 141).
[24] Baroness Hale explained this in her dissent on this issue: [2008] UKHL 43 [78]–[80].
[25] Minister of State, Department for Education and Employment, Lord Henley, Hansard (HL), 18 July 1995, col 120.
[26] Council Directive 2000/78/EC.
[27] Inserted by Disability Discrimination Act 1995 (Amendment) Regulations 2003, SI 2003/1673.

the *Malcolm* narrow construction effectively reduces disability-related discrimination to direct discrimination,[28] it must be incorrect, otherwise the section providing disability-related discrimination would be redundant.

27. *The narrow comparator does not accord with EU Directives*. The Draft Directive on GFS requires that indirect discrimination be outlawed. This follows the format of the Employment Equality Directive[29] covering *inter alia* disability and age. Accordingly, the effective elimination of a strand of indirect discrimination legislation by the *Malcolm* decision is contrary to the Employment Equality Directive, and would breach the proposed Directive on GFS, should the decision be allowed to stand.[30]

28. *The Real Problem in Malcolm*. The practical concerns expressed by the Law Lords (see above para 22) miss the true problem, which is the limited justification defence for premises (and services). In the field of premises, disability-related discrimination justification is limited to an exhaustive list of specific conditions, such as to avoid endangering the health or safety of any person, or that the person with a disability is incapable of entering into an enforceable agreement.[31] None of these conditions covers sub-letting or the non-payment of rent. Thus, if for a reason related to his disability a tenant permanently sub-lets, or fails to pay any rent, he could never be evicted. This contrasts with the employment and education parts (but not the part on Goods, facilities and services), where the grounds of justification are unrestricted and amenable to a whole range of circumstances. As Baroness Hale explained, "It may well be that Parliament had not understood that the narrow scope for justification in relation to services and premises would give rise to the problems we face in this case" and which may interfere with a landlord's property rights under the European Convention on Human Rights (1st protocol, art 1).[32]

29. The solution would appear to be to expand the objective justification defence, either by adding specific conditions relating to sub-letting and non-payment of rent, or providing a more general but stricter objective justification defence according to EU law (see above para 6). This latter option has the benefit of enabling courts to decide yet-unimagined cases according to the circumstances, and avoid a repeat of these very difficulties thrown up by the *Malcolm* case, which would be exacerbated once the Directive on GFS comes into force, as the non-regression principle[33] will prevent the introduction of extra defences. Either option would permit the restoration of the *Novacold* wide comparator without exposing landlords to impermissible sub-letting or long-term non-payment of rent. The Disability Discrimination Act 1995 would no longer have the extra-ordinarily wide effect feared by the Lords in *Malcolm*. For the reasons given, a general objective justification defence should be introduced.

30. The obvious problem here is the non-regression principle carried in discrimination directives.[34] A Directive cannot be used as a reason to reduce the level of protection against discrimination. A wider justification defence would do this. The solution, it would seem, is to modify this defence as a matter of urgency, so it is unrelated to the implementation of the Directive on GFS. Alternatively, it is conceivable to argue that the restoration of the *Novacold* wide comparator in tandem with a wider objective justification defence is not reducing the protection from the law according to *Malcolm*. A change could be validated also by the need to accord with the UK's obligations under the European Convention on Human Rights (see para 28 above).

31. *Conclusion*. The *Malcolm* narrow comparator reduces the scope of disability-related discrimination to less than that of direct discrimination. The *Novacold* wide comparator dismissed by the House of Lords is not pointless. Its narrow replacement leaves a large gap in the Disability Discrimination Act's coverage, contrary to the intent of Parliament, and EU law. The real problem in the *Malcolm* case is inadequate defences for landlords. Once that is resolved, none of the dangers envisaged by the *Novacold* wide comparison would materialise.

Issue two—the defendant's knowledge of the disability

32. *The House of Lords' decision*. According to the *Malcolm* decision, for the treatment to be "related" to the claimant's disability, the defendant must have known, or ought to have known, of the disability at the time of the treatment.[35] The reasons given were related to damages and the justification defence. These reasons are addressed below after some general observations.

33. *A requirement of knowledge of the disability is contrary to EU law.* Disability-related discrimination is the UK's functional equivalent of indirect discrimination. The notion that the defendant must have had knowledge of the disability when acting is at odds with the concept of indirect discrimination. This is all more

[28] Acknowledged in the *Malcolm* judgment itself by Lord Brown, [2008] UKHL 43, [114]. Lord Neuberger acknowledged that the narrow construction was "unattractively restrictive" (ibid [119]) and "very limited" (ibid [141]).
[29] Council Directive 2000/78/EC.
[30] Although *Malcolm* concerned the Premises Part of the DDA 1995, the decision applied to all Parts of the Act: [2008] UKHL 43, paras 14, 28, 80, 112, 158.
[2008] UKHL 43, §§ 14, 28, 80, 112, 158.
[31] DDA 1995, s 24(3).
[32] [2008] UKHL 43, respectively [80] and [102].
[33] Commission (EC) "Proposal for a council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation" COM(2008) 426 final, Draft Directive, article 6(2).
[34] See eg *ibid*.
[35] See, [2008] UKHL 43, Lords Bingham [18], Scott [29], Neuberger [63], and Baroness Hale [86].

so when demanding, as Lord Scott alone did, that the disability motivated the treatment. The Commission's proposal for the Directive on GFS makes clear that this is wrong. When defining indirect discrimination, it states: "The author of the rule or practice may have no idea of the practical consequences, and intention to discriminate is therefore not relevant."[36]

34. *A requirement of knowledge of the disability is contrary to principle*. The concept of indirect discrimination is concerned with the impact of facially neutral conduct,[37] rather than the state of mind of the defendant. The notion that an employer can unlawfully discriminate unknowingly is well established. Most typically, seemingly neutral entrance exams can reveal an adverse impact on a particular protected group.[38] Other instances of "unknowing" discrimination include an employer's age limit of 17–27, which adversely affected women who were less likely to be in the job market because of family responsibilities;[39] an employer's selection criterion, "management training and supervisory experience", which adversely affected women, who were less likely to have such experience because of an interrupted career caused by family responsibilities;[40] and a "no beards" policy which adversely affected orthodox Sikh men.[41] In none of these cases was it suggested that for liability the employer should have been aware of the discriminatory impact of its practice.

35. *The requirement of knowledge reduces the reach to less than direct discrimination*. It is possible for a person to directly discriminate without knowledge of the victim's disability. For instance, the employer may advertise internally for a promotion, stating that the post is not suitable for anyone with a history of mental illness, and exclude, unknowingly, a member of staff with a history of schizophrenia.[42] This principle holds at EC level, where it has been held that public statements by a director that he would not employ immigrants could amount to direct racial discrimination, even though the employer was unaware of the racial origin of the complainant.[43] Further, it is possible for an employer to directly discriminate using discriminatory factors of which it is unaware. An unprejudiced manager's decision may be affected, or tainted, by a report made by a prejudiced supervisor. So for instance, a manager who is unaware that a worker's absenteeism was due to her disability, may be influenced to dismiss her by unfavourable opinions delivered by prejudiced colleagues who were aware of her disability. This is direct discrimination because the reason for the treatment is the victim's disability: the basis of the prejudiced opinions was disability, rather than absenteeism.[44] This has been established in the United States as "Cat's Paw" theory.[45] The theory is that the prejudiced subordinate has influence over the decision-maker and so "poisons the well"[46] from which that decision-maker draws his knowledge.

36. *Knowledge of the disability and damages*. Lords Scott, Bingham, and Neuberger related their opinion to the availability of damages:[47]

> "… it would require very clear words before a statute could render a person liable for damages for discrimination against a disabled person, owing to an act which was not inherently discriminatory carried out at a time when the person had no reason to know of the disability which could render the act discriminatory."[48]

37. This implies that the Lords are looking for fault liability. The use of the phrase "inherently discriminatory" augments this. The history of Britain's discrimination legislation points to a different conclusion. Both the Sex Discrimination Act 1975 and Race Relations Act 1976 originally provided that for indirect discrimination no damages shall be awarded where it was unintentional.[49] However, it became clear that this restriction did not comply with EC law when the European Court of Justice held that a Member State may not make an award of compensation in a sex discrimination case dependent on showing fault on the part of the employer.[50] Consequently, the damages restriction was dropped and cannot apply to any case falling under Equal Treatment (sex), Race, or Framework (sexual orientation, religion or belief, age,

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[36] Commission (EC) proposal (see n 25), Explanatory memorandum, para 5, article 2.

[37] "Indirect discrimination is more complex [than direct discrimination] in that a rule or practice which seems neutral in fact has a particularly disadvantageous impact upon a person or a group of persons having a specific characteristic." Commission (EC) proposal (see n 25), Explanatory Memorandum, para 5, article 2.

[38] A good example can be seen in the US case, *Bushey v New York State Civil Service Commission* 733 F 2d 220 (2nd Cir 1984): A written examination was used for the post of Captain in the State prisons. Of the 243 whites taking the test, 119 passed (45%). Of the 32 non-whites, eight passed (25%). As the passing rate for non-whites was approximately 50% that of whites, a *prima facie* case was made out. Similarly in *Firefighters Institute v St Louis* 616 F 2d 350 (8th Cir 1980), cert denied sub nom *St Louis v United States* 452 US 938 (1981), 16.7% of whites passed a test in comparison to 7.1% of blacks. The black pass rate was 42.5% that of whites. As this fell well short of the "80% rule" the test was held to be discriminatory. In neither case was it suggested that the employer intended to discriminate.

[39] *Price v Civil Service Commission* [1978] ICR 27 EAT.

[40] *Falkirk Council v Whyte* [1997] IRLR 560 EAT.

[41] *Panesar v Nestle Co Ltd* [1980] ICR 144 CA.

[42] *Code of Practice Employment and Occupation* (2004), London: TSO (ISBN 0 11 703419 3), para 4.11.

[43] *Feryn* Case C-54/07 (2008) ECJ, judgment 10 July 2008.

[44] Suggested by Elias, J in *Williams v YKK* EAT/0408/01, para 32.

[45] See *Shager v Upjohn* 913 F 2d 398 (7th Cir 1990); see also *Russell v McKinney Hosp* 235 3 F 3d 219, at 227 (5th Cir 2000); *Griffin v Washington Convention Centre* 142 F 3d 1308, at 1312 (DC Cir 1998); *Burlington Ind v Ellerth* 524 US 742, at 762 (Sup Ct 1998); *Poland v Chertoff* 494 F 3d 1174 (9th Cir 2007).

[46] *Sarate v Loop Transfer Inc* US Dist LEXIS 13170, at 12 (ND Ill 1997)

[47] [2008] UKHL 43, respectively [28], [18], [162].

[48] *Ibid per* Lord Neuberger [162].

[49] SDA 1975, s 66(3); RRA 1976, s 57(3); see *eg Orphanos v QMC* [1985] AC 761, HL.

[50] *Draehmpaehl v Urania Immobilien Service ohg* Case C-180/95 [1997] IRLR 538.

and disability) Directives.[51] The formula now used in the discrimination legislation (including the Disability Discrimination Act 1995) is that damages may be awarded when a court or tribunal considers it "just and equitable".[52] The formula makes no distinction between employment (covered by the Employment Equality Directive) and other activities (due to covered by the Directive on GFS) and so apparently has the same meaning for all areas covered. As such, it must be read to comply with the Directive, and this means that damages cannot be dependant upon fault.

38. *Knowledge of the claimant's disability and justification*. Lord Bingham and Baroness Hale considered that as disability-related discrimination carries a justification defence, knowledge must be an element, otherwise the defendant would be in no position to justify the challenged treatment.[53] This overlooks the basic tenets of indirect discrimination theory. By its nature, objective justification must not be based on the protected ground,[54] otherwise it would amount to direct discrimination (which cannot be justified, see paras 14–15 above). And so, if the defendant's justification must be based on reasons other than the protected ground, it cannot be said that he must be aware of the protected ground in order to make out his objective justification defence. In any of the requirements above (at para 34), it is perfectly possible that the employer had a justifiable reason for its challenged practice without being aware of the adverse impact on the protected group. In the context of disability discrimination in housing, a landlord without knowledge of his tenants' mental illness could justify evicting them for causing a nuisance to their neighbours, even though their behaviour was caused by the mental illness.[55] The landlord's reason stands to be judged whether or not he knew of the disability.

39. *Conclusion*. The demand for knowledge or fault-based liability is at odds with EU law and the principle of indirect discrimination. It reduces the scope of disability-related discrimination to less than direct discrimination, where it is established that it is possible to discriminate without knowledge of the victim's disability.

40. *Proposed solution*. To resolve both parts of the *Malcolm* decision, draft the definition of disability-related discrimination as before, (here shown with the proposed modification of the justification defence)[56] and qualify with the italicised paragraphs below:

(i) [[A] person discriminates against a disabled person if—(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and (b) he cannot show that the treatment in question is *objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*.]

(ii) *For the purposes of paragraph (a), a comparison of the case of the disabled person should be made with that of a person without that disability and without the reason for the treatment. Otherwise, the relevant circumstances in the one case must be the same, or not materially different, from the other.*

(iii) *For the purposes of paragraph (a), a person can be deemed to have treated the disabled person less favourably even though he did not know of the disabled person's disability at the time of the treatment.*

(iv) *For the purposes of paragraph (b) a person can be deemed to have objectively justified the treatment even though he did not know of the disabled person's disability at the time of the treatment.*

Association and Perceived Discrimination

41. These two forms of discrimination have been drawn together because they both relate to the same drafting discrepancy in the legislation. The Disability Discrimination Act 1995 outlaws discrimination "on the ground of the disabled person's disability"[57] or for "a reason that relates to the disabled person's disability".[58] This is in contrast to the wider drafting of most other discrimination legislation.[59] For instance, the Race Relations Act 1976 outlaws discrimination "on racial grounds". This broader definition is not confined to the claimant's protected characteristic, and so catches two further types of discrimination: third-party discrimination (including discrimination by association) and "perceived discrimination".

42. *Third-party discrimination*. This is discrimination on the grounds of another's disability and includes "association discrimination".

[51] Respectively Council Directives 76/207/EEC, 2000/43/EC, and 2000/78/EC.
[52] DDA 1995, s 17A(2).
[53] [2008] UKHL 43, respectively [18], [86].
[54] *R v Secretary of State, ex parte Seymour-Smith* [1999] ICR 447 (ECJ) [75]; *R v Secretary of State, ex parte Equal Opportunities Commission* [1995] 1 AC 1 (HL) 30.
[55] See eg *Manchester City Council v Romano* [2005] 1 WLR 2775 CA.
[56] See para 6 above.
[57] DDA 1995, s 3A(5) (direct discrimination in employment).
[58] Disability-related discrimination in employment (DDA 1995, 3A(1)); Goods, facilities and services (s 20(1)); Premises (s 24); and education (s 28B(1)).
[59] The exceptions are age and sex.

43. *The Disability Discrimination Act 1995 is inconsistent with domestic law.* The wide drafting elsewhere makes it, for instance, unlawful (religious discrimination) for a line manager to shun a worker for associating with a Muslim. But under the narrow drafting of the Disability Discrimination Act 1995 it is not unlawful disability discrimination to shun the worker for associating with a friend with AIDS.

44. *EU law.* The Employment Equality Directive and the proposed Directive on GFS use the wider phrase "on any of the grounds referred to in Article 1".[60] The European Court of Justice, in *Attridge Law v Coleman,* held that this wider phrase prevails over UK law and includes discrimination by association.[61] The Court also stated that the wider definition should be used for harassment as well.

45. *Conclusion*. As the current definition is inconsistent with other UK discrimination statutes, and EU law, it must be amended to include third party disability discrimination and harassment.[62]

"Perceived discrimination"

46. "Perceived discrimination" arises where a person treats another less favourably because he wrongly believes the worker has a disability. For instance, a manager may shun a worker because he wrongly perceives that the worker has AIDS, or because the worker has been wrongly diagnosed as suffering from a mental illness. The wider definition (above, para 41) covers perceived discrimination.

47. *Other Jurisdictions*. The Australian Disability Discrimination Act 1992 covers disabilities that are "imputed", whilst the Americans with Disabilities Act 1990 defines disability to include being regarded as having a disability and so covers these scenarios.[63] This embraces the "social model" of disability discrimination. Congress recently reinforced this aspect of discrimination with the following amendment:

> "An individual meets the requirement of being 'regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[64]

48. Thus, perceived disability discrimination is well-established in other jurisdictions.

49. *EU law.* The definition in the Employment Equality Directive and the proposed Directive on GFS (see para 44) is wide enough to cover perceived discrimination. In *Attridge Law v Coleman*, the ECJ stated:

> "… it does not follow from those provisions of [the Employment Equality Directive] that the principle of equal treatment which it is designed to safeguard is limited to people who themselves have a disability within the meaning of the Directive. On the contrary, the purpose of the Directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the Directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1."[65]

And

> "Therefore, the fact that [the Directive] includes provisions designed to accommodate specifically the needs of disabled people does not lead to the conclusion that the principle of equal treatment enshrined in that Directive must be interpreted strictly, that is, as prohibiting only direct discrimination on grounds of disability and relating exclusively to disabled people."[66]

50. These statements suggest that the legislation should not be interpreted strictly and confined to protecting just those with a disability. It should cover all forms of disability discrimination.

51. *Conclusion*. Perceived disability discrimination is long-established in other comparable jurisdictions, with no adverse consequences. The definition in the parent Directives and the ECJ judgment in *Attridge* combine to suggest that perceived disability discrimination is covered by EU law. Thus it should be expressly introduced in the UK.

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[60] Respectively, Council Directive 2000/78/EC, article 2 (2)(a); Commission (EC) proposal (see n 25), Proposal for a Directive, para 5, article 2 (2)(a).

[61] Case C-303/06 [2008] CMLR 777, [38], [43], [50], [56].

[62] For an example of the drafting, see the Australian Disability Discrimination Act 1992, which expressly outlaws discrimination and harassment of a worker on the ground of the disability of an "associate" of that worker. See eg ss 15–18 (employment discrimination), and s 36 (harassment). This appears to include a person with a disability who has died. This is the view of the Australian Human Rights Commission. See www.hreoc.gov.au and click "Disability Rights" and "who are people with a disability".

[63] 42 USC 12102(2)(c). See Doyle, B, "*Employment rights, equal opportunities and disabled persons: the ingredients of reform*" (1993) 22 ILJ 89, p 93.

[64] ADA Amendment Act 2008, s 4(a).

[65] Case C-303/06 [2008] CMLR 777, [38].

[66] *Ibid*, [43].

Association and Perceived discrimination on the ground of age

52. The same logic applies to age discrimination, as it is one of the grounds in both the Employment Equality Directive and the proposed Directive of GFS. Thus, as a matter of consistency to comply with EU law, association and perceived discrimination on the ground of age should be introduced.

The Definition of Direct Discrimination

53. In the Explanatory memorandum, the Directive describes direct discrimination as occurring when the less favourable treatment is solely because of religion, sexual orientation, age or disability.[67] However, the actual proposed Directive uses the phrase on the ground of.[68] This is the phrase that should be transposed. The phrase solely because should be avoided, as it causes problems in mixed-motive cases, where say, a shopkeeper refuses to serve a person because she lives on a certain housing estate and she has cerebral palsy. It is arguable that no liability could arise unless the treatment was solely because of her disability, which it was not. However, it is well-established that in mixed-motive cases, so long as one of the causes was the protected ground, there can be liability.[69] The Part-Time Workers Directive used the phrase solely because,[70] which was not transposed when implemented. The conflict was resolved by the Employment Appeal Tribunal in favour of the wider phrase on the ground of.[71]

54. *Conclusion*. The phrase "solely because" in the definition of direct discrimination, used in the Explanatory Memorandum of the Directive on GFS, should not be transposed into domestic law.

Victimisation

55. As well as prohibiting discrimination and harassment, the law protects those who use the discrimination legislation, or assist others to do so, from retaliation. Accordingly, the legislation seeks to remove deterrents by creating a fourth instance of discrimination, known as victimisation.

Defence for Victimisation

56. *The problem.* The statutory formula is sparse, providing no formal defence. Yet in some cases, courts sympathetic to the employer have strained or even distorted the formula to provide what amounts to a benign motive defence (The problem is similar to that presented by the *Malcolm* case, above). The result is an incoherent body of case law. Clarification is required.

57. The statutory formula of victimisation resembles that of direct discrimination and carries no defence. The difficulty with this was illustrated in the case of *Chief Constable of West Yorkshire v Khan*.[72] Sergeant Khan brought proceedings for racial discrimination against his employer. Whilst his claim was pending, he applied for job with the Norfolk Police. His employer, the Chief Constable, acting on legal advice, refused to provide a job reference to "protect his position in the discrimination claim". It seems that the Chief Constable was minded to provide a negative reference and his lawyers feared that this could be used against him in the discrimination trial. Consequently, Khan brought a separate claim of victimisation. The House of Lords unanimously rejected this claim, holding that the Chief Constable had not acted by reason that Khan had brought proceedings, but "honestly and reasonably" by reason of "perfectly understandable advice". Otherwise, he would be placed in an "unacceptable Morton's Fork".[73]

58. This honest and reasonable "defence" encouraged some employers to pressurise discrimination claimants to settle. Hence, in *St Helens BC v Derbyshire*, the Court of Appeal, following *Khan*, found that a local authority employer did not victimise 39 equal pay claimants, when – in a blatant tactic to isolate and pressurise the claimants, it wrote to all 110 of its employees threatening redundancies should claimants persist. The House of Lords reversed, holding the local authority liable for this seemingly obvious case of victimisation, but in doing so, heaped further confusion on the statutory meaning of victimisation, by holding, unconvincingly, that as reasonable and honest conduct would not normally cause the claimant any harm, the cases should turn on the element of "any other detriment", which is there simply to ensure that the treatment was employment-related[74] (see further below paras 63–66).

59. The obvious solution it seems, is the addition of an objective justification defence, so that everyone knows by what standards the defendant's alleged retaliatory conduct can be measured. The difficulty is that, as a matter of principle, anything resembling direct discrimination (as the current victimisation formula does), should not permit a general defence.

60. Cases like *Khan* are actually a step away from direct discrimination. They bear a closer resemblance to disability-related discrimination. This is because the defendant has acted upon a reason related to the protected act (say bringing or supporting a claim). The solution then is to redraft the victimisation provisions

[67] Commission (EC) proposal (see n 25), Explanatory memorandum, para 5, article 2.
[68] Commission (EC) proposal (see n 25), Proposal for a Directive, para 5, article 2 (2)(a).
[69] *Owen & Briggs v James* [1982] ICR 618 (CA).
[70] Directive 97/81/EC, *Clause* 4.
[71] *Sharma v Manchester City Council* [2008] IRLR 336 (EAT).
[72] [2001] ICR 1065 (HL).
[73] See *ibid*, [31], [44], [59], and [80].
[74] [2007] UKHL 16. For a commentary, see Connolly, (2007) Vol 36 *Industrial Law Journal* 364.

similarly to the definitions of disability discrimination (as understood pre-*Malcolm*): direct discrimination and protected act-related discrimination (or less awkwardly, victimisation by proxy). The latter definition, victimisation by proxy, would carry the standard objective justification defence.

Time Bars and the Grievance Process in Employment Cases

61. There may be tactical reasons why a claimant launches legal action before the grievance process is complete. But one common reason will be to avoid being time-barred[75] and losing any legal remedy. For employment cases, where the employer's grievance process is likely to drag on beyond the three-month limitation period, the worker has little option but to issue proceedings. Many employers will react by suspending the grievance process. The Court of Appeal has held that this suspension does not amount to victimisation, but the reasoning is again unconvincing.[76]

62. However, at the root of this particular difficulty is the court's reluctance to exercise their discretion and extend the time limit for the claimant who has waited for the outcome of the grievance process before issuing proceedings.[77] The court's position should be reversed.[78]

"Any Other Detriment" in the Employment Sections

63. The employment parts of the UK discrimination legislation require—predictably—that the retaliation is work-related, either in the terms and conditions of work, in recruitment, access to training, or other benefits, and so on. There is a catch-all phrase, "any other detriment", should the treatment not fit neatly into one of the more clearly-defined categories.

64. The courts have had a tendency with this element to focus on the standard of harm suffered by the claimant, with liability depending on whether the claimant was financially or physically harmed.[79] This overlooks whether or not the claimant was deterred by the treatment (the main purpose of the provisions[80]), the fact that damages are available for injury to feelings.[81] It creates the anomalous situation that where, for instance, a case falls within terms of employment or access to training, benefits etc, no question of harm will arise.[82] It also restricts tribunals' from issuing a recommendation to prevent damage and/or remove the deterrent.

65. The standard of treatment should be decided under the less favourable element. As such, it has become possible for courts to hold, quiet bizarrely no doubt to layperson and lawyer alike, that a claimant has been treated less favourably, but suffered no detriment.[83]

66. *Proposed solution*. Replace the phrase any other detriment in the employment sections with other employment-related treatment.

Proposed Abolition of the Comparative Element

67. The Government has proposed abolishing the comparative element ("less favourable treatment") and replacing it with "subjected to a detriment".[84] This would bring the victimisation provisions in discrimination law into line with the growing number of victimisation provisions provided by Part V of the Employment Rights Act 1996, which cover areas such as whistle blowing, jury service, health and safety, Sunday working, family leave, and working time rights.

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[75] This does not apply to the statutory grievance process, which is due for repeal in April 2009: Employment Bill 2007. See DTI Consultation "*Success at Work. Resolving Disputes in the Workplace*" March 2007, at www.berr.gov.uk/employment/Resolving_disputes/index.html; and *Better Dispute Resolution, Review of Employment Dispute Resolution in Great Britain* by Gibbons, M (March 2007). For a summary, see Health and Safety at Work 2007, 14(9), 641–643.

[76] *Cornelius v University College Swansea* [[1987] IRLR 141 (CA). For a commentary, see Connolly, (2002) Vol 31 Industrial Law Journal 161.

[77] *Robinson v Post Office* [2000] IRLR 804 (EAT) [29]-[31] approved *Apelogun-Gabriels v Lambeth LBC* [2002] ICR 713 (CA), [16] and [24].

[78] Recommended by Browne-Wilkinson J (as he then was): *Bodha v Hampshire AHA* [1982] ICR 200 (EAT), 205F–G.

[79] See especially *St Helens BC v Derbyshire* [2007] UKHL 16, and Lord Neuberger (with whom the whole House agreed) at [68].

[80] See *Coote v Granada Case* C-185/97, [1998] ECR-I 5199, (ECJ), [24].

[81] Noted by Lord Hoffman in *Khan* [2001] ICR 1065, [53]. See RRA 1976, s 57(4); SDA 1976, s 65(4); DDA 1995, s 17A(4); Religion or Belief Regulations 2003, reg 31(3); Sexual Orientation Regulations 2003, reg 31(3); Age Regulations 2006, reg 39(3). In *Vento Chief Constable v West Yorkshire Police* [2002] ICR 318 [65] the Court of Appeal stated that this included "less serious" cases, such as an "isolated or one-off occurrence", which suggests it could include at least some *de minimis* incidents.

[82] See eg *Gill v El Vino* [1983] QB 425 (where women were refused service at the bar, but offered table service), where the less favourable treatment related to the parallel provisions for the supply of goods, facilities, or services under SDA 1975, s 29. These provisions outlaw discrimination by either *refusing* the service, or not providing it in the *like quality, manner, or terms*. The Court of Appeal allowed plaintiff's appeal and criticised the county court judge for confusing the simple question of whether the plaintiff was refused a service, with an inquiry into whether she suffered a "detriment" and thus held that a refusal to serve women at the bar, offering table service instead, was *de minimis*. The judge should have then asked a separate question as to whether the refusal was "less favourable". At 431 (Everleigh LJ), 432 (Brightman LJ), 432 (Sir Roger Ormrod).

[83] [2001] ICR 1065, [53] (Lord Hoffman).

[84] "*Discrimination Law Review. A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*", June 2007, Product Code: 07EL04410/a., §§ 1.60–1.62.

68. This proposal to abolish the comparative element is welcome, as it will dispose of many technical problems associated with comparing, but it should not be replaced with "subjected to a detriment", as this causes many of the problems associated with the phrase "any other detriment" in the employment provisions, namely, it encourages courts to look for tangible harm to the claimant, which ignores whether or not the claimant was deterred by the treatment (the main purpose of the provisions[85]) and the fact that damages are available for injury to feelings.

69. *Proposed solution*. Replace the comparative element with treats unfavourably, rather than the planned cause a detriment.

November 2008

5. Memorandum submitted by Public Interest Research Unit

1. Introduction and Summary

— The Public Interest Research Unit (PIRU) welcomes the opportunity to submit evidence to the Work and Pensions Committee's inquiry into "The Equality Bill: What steps should DWP take to achieve greater equality?". PIRU is a small UK charity which promotes democratic practice, civil rights, and social inclusion.

— In October 2008, PIRU and Rethink began a 12 month study of unlawful disability discrimination (on the part of DWP and others) against benefit claimants with mental health disabilities. The initial, unpublished, findings appear to be relevant to the Committee's Inquiry, including, in particular, in relation to—how would DWP "have to change to achieve greater equality in employment?"; "The Public Sector Equality Duty"; and "How does the Department fare in promoting equality and tackling discrimination?".

— Our initial research findings (based, in particular, upon interviews with claimants and advisors, and document analysis) indicate that a substantial number of claimants with mental health disabilities are likely to have been subject to unlawful disability discrimination on the part of DWP; Jobcentre Plus (JCP); DWP/JCP assessment, employability, and training contractors; and employers that DWP/JCP and their contractors have sent claimants to.

— It appears likely that discrimination against claimants will have occurred contrary to the following sections of the Disability Discrimination Act (DDA) 1995: 4 (Employers: discrimination and harassment) and 4A (Employers: duty to make adjustments); 14C (Practical work experience: discrimination and harassment), 14D (Practical work experience: duty to make adjustments);19 (Discrimination in relation to goods, facilities and services) read with Section 21A (Employment services); and 21B (Discrimination by public authorities).

— We only identified as likely to be unlawful those discriminatory acts which appeared (on account of not having been done in the necessary performance of an express statutory obligation) to not be exempted under section 59 DDA ("Statutory authority and national security etc"); and which still appeared to be unlawful in the light of the decision in *Malcolm* (1) (not withstanding that the decision, we would argue, did not closely reflect what Parliament intended).

— Identified types (2) of action, which may have constituted unlawful discrimination, included, for example, a claimant's Jobseeker's Allowance being suspended on the grounds that he/she had left his/her job without "just cause", when, it seems, that he/she had resigned as the result of unlawful harassment (involving, for example, ongoing derogatory remarks about his/her mental health disability); and, for example, a DWP medical contractor failing, in the case of some Incapacity Benefit claimants, to make reasonable adjustments to medical examinations.

— We suspect that the great majority of DWP/JCP staff are individually committed to not discriminating. However, the following legislative, political, and organisational factors may have contributed to the occurrence of unlawful discrimination:

  (a) DWP/JCP do not appear to have fully complied, in relation to welfare benefits, with the section 49A DDA disability equality General Duty (the General Duty). Political pressure to promote proposals (rather than always subject them to rigorous and objective assessment) may have contributed to this problem.

  (b) There appears to have been limited realisation, among DWP/JCP contractors, that they are subject to the General Duty in relation to their "functions of a public nature"; and a failure on the part of DWP/JCP to take adequate measures to ensure that their contracted out functions meet the requirements of the General Duty.

  (c) Some social security provisions, and some DWP/JCP policies and practices, are likely to have encouraged unlawful acts (without it necessarily being realised that the acts were unlawful).

[85] See *Coote v Granada Case* C-185/97, [1998] ECR-I 5199, (ECJ), [24].

— Levels of unlawful disability discrimination may be set to increase as Employment and Support Allowance is introduced; with Flexible New Deal; if the proposals in recent green papers (involving, for example, a "stronger sanctions regime") (3) are adopted without substantial changes; and if the government continues to move towards a US Style workfare regime.

— Our main recommendation for action is that distinct specific equality duties be imposed on DWP/JCP; and that these duties should include the requirement that DWP/JCP conduct an assessment of each claimant to determine what reasonable adjustments he/she is likely to require in relation to how DWP, JCP, and their contractors, carry out their functions.

2. Unlawful Discrimination Against Benefit Claimants with Mental Health Disabilities

2.1 Liability for unlawful acts

Liability as primary actors

2.1.1 Our initial research indicates that a substantial number of benefit claimants with mental health disabilities are likely to have been subject to unlawful disability discrimination on the part of: DWP and JCP; DWP/JCP contractors (including, in particular, those providing assessment, and "employability" and training, services); subcontractors; employers that claimants have been sent to (including, in particular, for job interviews, Work Trials or work experience); and employees of all of the aforementioned.

Liability for the acts of others

2.1.2 It also seems probable that DWP/JCP, and its contractors and subcontractors, will have been liable (under the DDA) for some discriminatory acts on the part of others. This might, in particular, have involved:

— an unlawful act being done by a person acting as their agent and with their authority (see section 58(2) DDA). For example, DWP/JCP may well have been liable for failures on the part of its medical contractors; and

— being vicariously liable for the discriminatory acts of their employees (see section 58 (1) DDA).

2.2 *Examples of types of action which may constitute unlawful discrimination against claimants (2)*

Unlawful discrimination against Jobseeker's Allowance (JSA) claimants

2.2.1 This may have involved, for example, the following circumstances:

(a) JSA payments being suspended on the grounds that the claimant had left his/her job without "just cause", when, in fact, the claimant had resigned on account of ongoing name calling which referred in a derogatory manner to his/her disability (and which appeared to constitute unlawful harassment within the meaning of section 3B DDA).

(b) JSA payments being suspended (or there were threats to suspend them) on the grounds that the claimant had not done enough to get a job, when the reasons for "not having done enough" related to his/her mental health disability. For example, an episode of depression left a claimant unable to carry out some of the activities specified in his/her "Jobseeker's Agreement", and JCP failed to make the reasonable adjustment of not requiring these activities to be carried out until the claimant's health had improved.

(c) JSA payments being suspended (or there were threats to suspend them) on the grounds that the claimant had not taken up, had left, or was dismissed from, training schemes, when the reason for one or more of these things having happened related to the claimant's mental health disability. For example, a claimant was dismissed from a training scheme because he/she was late on a number of mornings, and he/she was late as a result of OCD washing rituals.

Unlawful discrimination against Incapacity Benefit claimants

2.2.2 This may have involved, for example, the following circumstances:

(a) JCP failing to make reasonable adjustments in relation to some initial benefit applications. For example, JCP rejected the request for a face to face appointment from a claimant who JCP knew (or could reasonably be expected to have known) was unable to make a telephone application on account of a mental health disability.

(b) DWP medical contractors failing to make reasonable adjustments to medical examinations for some claimants. For example, the contractor refused a home examination for a claimant who, on account of health related phobias, felt unable to attend the medical examination centre.

(c) Discrimination in relation to Pathways To Work. For example, a claimant's benefit might be cut for not "participating" in a mandatory Work Focused Interview, when the "failure" to participate resulted from a mental health disability (involving, for example, an excessive fear of disclosing personal information).

3. Some Factors Contributing to Unlawful Discrimination

We suspect that the great majority of DWP/JCP staff are individually committed to not discriminating. However, a number of legislative, political, and organisational factors (some of which are suggested below) may have contributed to the occurrence of unlawful discrimination.

3.1 *Weaknesses in relation to the DDA Disability Equality Duties*

Failures on the part of DWP/JCP

3.1.1 Our initial research suggests that DWP/JCP has not, in relation to welfare benefits, complied fully with its section 49A Disability Equality General Duty (for what the equality duties require, see, in particular, the judgments in *Elias* and *Bapio*) (5). In particular, DWP/JCP does not appear to have assessed whether each of its policies was relevant to disability equality, nor to have conducted disability equality impact assessments (DEIAs) on all those which appear to have been of substantial relevance; and the DEIAs we have seen appear to have been inadequate. For example, the "screening" assessment of "Provider-led Pathways to Work" appears to conclude that there is no requirement for a full impact assessment, despite what appears to be the enormous potential for adverse impact, on claimants with disabilities, of a UK-wide scheme which enables private contractors to, in the words of the "screening" assessment, "manage and monitor compliance with the mandatory regime and assist Jobcentre Plus with the sanctions process".

3.1.2 A particular problem, with DWP/JCP's approach to the equality duties, may have been political pressure to promote proposals (rather than always subject them to a rigorous and objective assessment). In relation to this, it is worth noting the words of Lord Justice Moses in *Kaur and Shah* (at paragraph 24)—"What is important is that a racial equality impact assessment should be an integral part of the formation of a proposed policy, not justification for its adoption" (6).

Failures on the part of DWP/JCP contractors and subcontractors

3.1.3 The narrow majority decision in *YL* (7) in the House of Lords—that a private care home's local authority funded provision of care and accommodation, to an 84 year old woman with Alzheimer's disease, did not constitute a "function of a public nature"—upsets what appears to have been the purpose of section 6(3) of the Human Rights Act 1998 (and, therefore, also the purpose of the comparable section 49B DDA), and, we would argue, demands a legislative solution in the forthcoming Equality Act. Without such a solution, and with more and more public functions contracted-out (including those relating to welfare benefits), the danger appears to be that the equality duties (and then the single equality duty) will be of ever diminishing practical significance.

3.1.4 However, even the majority decision in *YL* would appear to leave little doubt that DWP/JCP assessment, employability and training contractors will, in relation to some of their functions, be public authorities within the meaning of section 49B DDA. For example, section 16 of the Welfare Reform Act (WRA) 2007 refers to "functions of the Secretary of State" being "exercised" by contractors (rather than, for example, to contractors providing services to the Secretary of State). We would also argue that one of the most compelling factors, in determining the matter, should be the degree of compulsion (including on account of the opportunities it provides for oppression and abuse of power), and that, therefore, functions assumed under section 16 WRA, which concern "imposing" various requirements (with threats of cuts to benefits), are (and need to be taken to be) "functions of a public nature".

3.1.5 It is unfortunate, therefore, that there appears to be limited realisation, among DWP/JCP contractors, that they are subject to the Disability Equality Duty. In addition, it appears that DWP/JCP may have failed to take adequate measures (in relation to awarding and managing contracts) to ensure that its contracted out functions meet the requirements of the Duty. The Momenta equality accreditation, for example, appears to set inappropriately low equality standards and to allow contractors to largely determine whether these are being met.

3.2 *Discriminatory impact of some legislation*

3.2.1 It seems probable that the provisions of some social security legislation will have tended to encourage discriminatory acts.

The role of section 59 DDA and European Community law

3.2.2 In some cases, the discriminatory acts will have been done in the exercise of a power or discretion (conferred under social security legislation), rather than in the necessary performance of an express obligation; and, therefore, section 59 DDA would not apply so as to exempt such acts from being unlawful (in line with the House of Lords judgment in *Hampson*) (8). Failure to fully appreciate the import of *Hampson* may well have encouraged some DWP/JCP officials to assume that discriminatory acts (such as in relation to cutting benefits) are lawful so long as they are done in the exercise of a statutory power (or simply in accordance with DWP/JCP rules and procedures).

3.2.3 In other cases, the discriminatory acts will have been done in the necessary performance of an express obligation, and, therefore, section 59 would appear to apply. However, we suspect that some social security provisions, entailing express obligations, are incompatible with directly effective EC Treaty provisions; and would, therefore, need to be disapplied in any legal proceedings (including those under the DDA).

Unlawful discrimination may be set to increase

3.2.4 Levels of unlawful disability discrimination could increase as Employment and Support Allowance (ESA) is introduced; with Flexible New Deal; if the proposals in recent green papers are adopted without substantial changes; and if the government continues to move towards a US Style workfare regime. In relation to Employment and Support Allowance, this is because, among other reasons:

- it will push large numbers of disabled claimants from Incapacity Benefit on to Jobseeker's Allowance, under which claimants will be at far greater risk of discrimination (including, for example, because the "actively looking for work" rules will often be difficult or impossible for those with mental health disabilities to meet);
- those remaining on ESA will be at far greater risk of discrimination than claimants had been on Incapacity Benefit, including, in particular, because of the strong element of compulsion; and
- if implemented through regulation, section 13 ("Work-related activity") of the Welfare Reform Act would arguably be a giant leap towards US style workfare. Experience from the US indicates that those on workfare suffer noxious work conditions, with "workfare discrimination" (discrimination on the job due to their welfare status) combining with other forms of discrimination (including, for example, female claimants being sexually assaulted by their supervisors) (9).

4. Some Recommendations for Change

It is envisaged that, once our research on unlawful discrimination is complete, we will put forward a wide range of recommendations. In the meantime, however, we would like to focus on just two.

4.1 *A different specific duty on DWP/JCP*

4.1.1 DWP/JCP, with life changing powers over several million benefit claimants, is subject to the same specific duties as the John Soane's Museum, which (although well worth a visit) had just three other visitors on a recent visit. We would argue, therefore, that the forthcoming Equality Act must give the Secretary of State the power (as currently exists under section 49D DDA) to impose different specific duties on different public authorities; and that specific duties should be imposed on DWP/JCP which reflects their unique circumstances.

4.1.2 We would also argue that—since our initial research indicates that the greatest potential for unlawful discrimination lies in failures to make reasonable adjustments—these specific duties should include the requirement that DWP/JCP conduct an assessment of each claimant to determine what reasonable adjustments he/she is likely to require in relation to how DWP, JCP, and their contractors, carry out their functions; that the claimant be fully involved in the assessment and its use; and that the assessment be regularly reviewed.

4.2 *Contractors and the equality duties*

The definition of public authority

4.2.1 Including for the reasons set-out at paragraphs 3.1.3–3.1.5 above, the definition of public authority should leave no doubt that DWP/JCP assessment, and "employability" and training contractors are subject (in relation to their "functions of a public nature") to the general equality duties (including, of course, any single equality duty). Further, there appears to be considerable merit in the definition provided at paragraph 151 of the Joint Committee on Human Rights' report on *The Meaning of Public Authority under the Human Rights Act* (10). However, we would note the considerable extent to which DWP/JCP "prime" contractors sub-contract training and "employability" services, and would argue that these subcontractors (in relation to relevant functions) also need to be subject to the duties.

Contractors and the Freedom of Information Act

4.2.2 A public authority duty will, of course, be much weaker if it is hard or impossible for members of the public to determine whether or not it's being met. Unfortunately, this would appear to be the current situation with DWP/JCP contractors, who are (presumably for commercial reasons) reluctant to provide information on their policies. We would argue, therefore, that government contractors (with functions of a public nature) should, through a single description (applicable to them all) in Schedule 1 to the Freedom of Information Act (FIA), be designated as public authorities for the purposes of the FIA (in relation to information of a specified description).

References

1. *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* (2008) UKHL 43.

2. While based upon interviews (with all identifying details removed), and/or scenarios which appear to be likely consequences of known policies and practices, the examples provided should be regarded as hypothetical.

3. DWP (2008). *No one written off: reforming welfare to reward responsibility—Public consultation* (para. 2.12). Cm 7363.

5. *R (Elias) v Secretary of State for Defence* (2005) EWHC 1435 (Admin); *Secretary of State for Defence v Mrs Diana Elias* (2006) EWCA Civ 1293; and *R (BAPIO Action Limited (1) and Dr Imran Yousaf (2)) v Secretary of State for the Home Department (1) and Secretary of State for Health (2)* (2007) EWHC 199 QB.

6. *R (Kaur and Shah) v London Borough of Ealing* (2008) EWHC 2062 (Admin).

7. *YL (by her litigation friend the Official Solicitor) v Birmingham City Council and others* (2007) UKHL 27.

8. *Hampson v Department of Education and Science* (1990) IRLR 302. This concerned section 41(1) Race Relations Act, which is in materially the same terms as section 59 DDA.

9. See, for example, www.womensrightsny.com.

10. Joint Committee on Human Rights (2007). *The Meaning of Public Authority under the Human Rights Act*, Ninth Report of Session 2006–07. HL Paper 77, HC 410.

November 2008

6. Memorandum submitted by Public and Commercial Services Union

Introduction and Context

1. The Public and Commercial Services Union (PCS) is the largest trade union in the Civil Service. We represent over 300,000 civil and public servants employed across the Civil Service and related areas, including over 80,000 members working in the Department for Work and Pensions (DWP). We also represent members who continue to carry out public service functions now situated in the private sector.

2. PCS has worked with the government for many years in pursuance of equality and has supported the development of equality and diversity policies.

3. We welcome the opportunity to submit evidence to the Committee's inquiry. This submission has been drafted in consultation with PCS members working in the DWP, the PCS Equality unit, and PCS members in the Equality and Human Rights Commission (EHRC) disabled staff group.

Equality in Employment

How effective has DWP been in achieving equality in employment, how would it have to change to achieve greater equality in employment?

4. As Lord Rix and Lord McKenzie of Luton point out in their contributions to the Lords debate on unemployment of Wednesday 12 November 2008[86], 11 years after the current government came to power there is still a marked difference in the numbers of disabled people, lone parents and ethnic minorities in paid employment compared with the rest of society:

> Lord Rix: My Lords, is the Minister aware that, when this Government came into office in 1997, only one adult in 10 with a learning disability was in paid employment? Unhappily, 11 years later, that figure still applies in spite of all the disability legislation that has gone through this House and the other place. Despite the looming recession, what can the Government do to encourage employers to improve on that figure, bearing in mind that there is much specialist support available to make this possible?
>
> Lord McKenzie of Luton: My Lords, the noble Lord raises an important point. If one looks at the overall employment rate and its composition, one sees that disabled people, lone parents and ethnic minorities do not reach the average rate that applies for the rest of the economy. It is certainly right to say that people with learning disabilities have not made the progress that we would wish. That emphasises to me the need to continue to reinforce and entrench those active labour market policies to make sure that we engage with employers through local employment partnerships and city strategies and encourage them to take advantage of the funding streams that are available. In these challenging times, we should not take our foot off the pedal of those important and progressive reforms.

5. The quote above suggests that more can be done to tackle the structural inequalities in the labour market which affects disabled people, lone parents and ethnic minorities. The DWP needs to set out a programme of work to challenge employer discrimination against these vulnerable and marginalised groups. This should include action to challenge stereotypes and discriminatory attitudes held by employers as well as supporting flexible working practices and the provision of childcare.

6. Those most likely to be discriminated against tend to be the first to leave the labour market and the last to return. This may serve to entrench and expand inequality in the current economic climate.

7. In a recent survey by the National Employment Panel, 83% of employers said that they believed they could violate equality legislation with impunity. The DWP could do much more to promote awareness and understanding of equality issues amongst employers and the general public. Employers need support to understand their responsibilities towards their employees and potential future employees.

8. PCS welcomes the disability legislation and specialist support that has been made available to disabled people and other minority groups, however there remains a need for improved support.

How can the Equality Bill open up opportunities in employment, particularly for disabled people, carers and pensioners?

9. Established case law on the application of the Disability Discrimination Act (DDA) was overturned by the House of Lords in June 2008 and needs to be rectified in the Equality Bill.

10. DWP needs to have the statutory support of the original intent of the DDA to help deliver the government's objective of supporting employment so that people can move from benefits to work. DWP employees with a disability will also inevitably find it more difficult to be protected against less favourable treatment and the government may increasingly see its own employees moving from work to benefits.

11. The unemployment and underemployment of disabled people will continue to exist unless the DWP takes the lead in initiating more supply side rather than demand side policies. For example, all too often the focus is on the impairment of the disabled person and responsibility they need to take to redress difficulties experienced rather than how an employer can make their environment fully accessible physically, sensory and attitudinally.

12. Greater sanctions should be applied to employers for poor practice. Whilst the EHRC has a duty for listed organisations to eliminate institutional discrimination, enforcement of this duty is less straightforward eg it still relies on a process for challenging instances of discrimination using a toolkit process prior to selective support from the Commission about which cases to support. It has proved difficult to sanction every known employer for failing to proactively remove possible instances of discrimination occurring despite the welcome shift of focus of the duty compared with the DDA reasonable adjustment provision. The employment provisions in the 1995 Disability Discrimination Act rely on an individual disabled person to challenge an instance of discrimination which is expensive and stressful.

[86] Lords *Hansard*, 12 Nov 2008, columns 656–657.

13. The role of culture is of paramount importance and the DWP should utilise the Bill's opportunities to place a greater emphasis on how employers should provide enabling rather than disabling environments, recognising the impact of obligatory expectations rather than relying on spontaneous goodwill.

How should the Equality Bill respond to the decision in the Malcolm case in respect of disability rights in employment?

14. The *Malcolm* case has had a substantial and detrimental effect on the ability of disabled employees to take action against employers for discrimination relating to their impairment/disability. A significant part of the reason for this is that the DDA sits uncomfortably between traditional discrimination issues (as understood in reference to sex, race etc) and the "social engineering" aspects of disability discrimination. There is a lack of consensus as to whether the scope of the DDA should be wide enough to encompass these "social" issues or whether they should be dealt with elsewhere. To put this into "traditional" discrimination terms, where a policy has an indirect adverse impact on disabled people currently, which might move it into the territory of indirect discrimination under any other strand of equality law, it is unclear how the issue of the "proportionate pursuit of a legitimate aim" is to be judged. Several examples are readily available:

15. *Sick pay:* where an employee has to have a substantial time off from work for reasons related to their disability, is it "fair" that they have the same rules for sick pay limits applied to them, even though this means that they are more likely than their non-disabled colleagues to therefore exhaust that entitlement to full-paid sick leave and end up with reduced income and poverty issues as a result?

16. *Return to work on reduced hours:* it is clear that a "phased return" to work is often beneficial in sustaining that return to work over a longer period of time—however, linked to the point above on sick pay, is it right that, where entitlements to sick pay have been exhausted, those undertaking such a "phased return" are classed as "sick" during hours that they are not working and therefore not paid for those hours—meaning that such phased returns are either rejected, for financial reasons rather than good health management, or curtailed for the same financial reasons?

17. *Sickness absence:* certain individuals experience periods where their impairment, or issues to do with the management of it (such as a change of drugs for someone with epilepsy), result in long or regular short periods of absence. This can particularly be an issue with the onset of impairment. Is it correct that employers have no need to take into account the disability-related aspects of this absence and can dismiss such employees under standard "capability" or "poor attendance" processes? How does such an approach assist towards the greater employment and retention of disabled workers? In relation to its own employees DWP has a very narrow definition of disability leave which we believe has resulted in less support and more dismissals than in other government departments with a broader definition.

18. The *Malcolm* case is a clear example—where someone who had sub-let their flat, ostensibly for disability related reasons, falls between the two aspects of the DDA: on the one hand, as for anyone who has breached their tenancy on sub-letting, it was clear that Mr Malcolm should have to vacate the premises in favour of Lewisham council. However, because he had undertaken the sub-letting at a time when his impairment may have influenced his abilities to reason cogently, there was an argument that it would be socially unacceptable to force him out. So the real question that needed to be asked in the *Malcolm* case was "Is the eviction of all those who sub-let contrary to their tenancy agreements a legitimate aim? And, if it is, is the eviction of Mr Malcolm a proportionate step in the pursuit of that aim?"

19. Equality in employment needs to be better secured by establishing that the appropriate comparator test under the DDA is as stated by Baroness Hale of Richmond in the House of Lords Judgement of 25 June 2008 in *London Borough of Lewisham v Malcolm*, rather than the majority opinion as put by Lord Scott[87]. The Judgement overturned the established case law however Baroness Hale asserts that:

> 72. On closer examination, however, the decision in *Clark v Novacold* makes sense. There is also good reason to conclude that it reflects the actual intention of Parliament. The object of the earlier race and sex discrimination legislation was to secure that like cases were treated alike regardless of race or sex. The treatment given to a woman was to be compared with the treatment given to a man whose circumstances were alike in every material respect except their sex. The treatment given to a black person was to be compared with the treatment given to a white person whose circumstances were alike in every material respect except their race. The DDA undoubtedly intended that a disabled person should be treated in the same way as a non-disabled person whose circumstances were alike in every other material respect. The formulation readily covers direct discrimination of that sort. If the employer, provider or landlord refuses a job, a haircut or a flat to a disabled person who is just as capable as anyone else of doing the job, sitting in the barber's chair, or paying the rent and observing the covenants in the tenancy agreement, simply because he is disabled, then "that reason" is the disability itself and would not apply to other people.
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> 73. But this might not be enough. The race and sex legislation recognise both direct discrimination of that sort, when race or sex or disability is the reason why the landlord behaves as he does, and indirect discrimination, where the landlord imposes some requirement which is ostensibly neutral

[87] Sections 42–105 of the House of Lords Judgement on the case of *London Borough of Lewisham v Malcolm,* Session 2007–08 UKHL 43.

> but has a disproportionate effect on one sex, or one race, and which cannot be justified. The DDA undoubtedly aimed to cover this sort of discrimination too. An obvious example is a ban on dogs in restaurants, which has a disproportionate effect upon blind people who rely upon guide dogs to get about. The White Paper, *Ending discrimination against disabled people*, 1995, Cm 2729, which preceded the 1995 Act, made it clear in para 4.5 that the intention was to cover such cases."[88]

20. The example of the revised position on the disabled person with a guide dog, refused entry to a restaurant which bans dogs, as explained by Lord Scott of Foscote under Part 35 of the Judgement illustrates how bad this Judgement is:

> 35. Mummery LJ referred (p.964) to the hypothetical case of the blind man with a guide dog who wished to enter a restaurant which did not permit the entry of dogs. The blind man with his dog is refused entry. Would that refusal be unlawful discrimination for the purposes of section 20(1)(a)? The problem with most hypothetical cases is that the facts are incomplete. Would the blind man without his dog have been refused entry? Almost certainly not. The problem was the dog. The dog was the reason for the refusal of entry. That reason was causally connected to the disability, but the disability would have played no part in the mind of the restaurant manager in refusing entry to the dog. The problem, I repeat, was the dog. The restaurant manager's reason for refusing entry to the dog would not, in my opinion, have related to the blind man's disability for section 24(1)(a) purposes. If that be wrong, and the manager's reason for refusal of entry would have related for section 24(1)(a) purposes to the disability, would "others" to whom that reason would not have applied have been refused entry? The "others" would, in my opinion, have been persons, whether blind or sighted would not matter, unaccompanied by dogs. They would not have been refused entry; the blind man with his guide dog would have been treated less favourably. Discrimination would have been established. Confusion regarding the blind man and his guide dog example has, I think, crept in because of the over-concentration on the refusal to admit entry to the dog. The dog is not a potential beneficiary of the 1995 Act. It is the blind man who is. If he is refused entry it is not because he is blind but because he is accompanied by a dog and is not prepared to leave his dog outside. Anyone, whether sighted or blind, who was accompanied by a dog would have been treated in the same way. The reason for the treatment would not have related to the blindness; it would have related to the dog."[89]

21. Other cases similar to the *Malcolm* case exist, particularly in the employment field—a case which PCS supported, for example: *O'Hanlon v Commissioners for Inland Revenue,* which looked at the impact of sick pay rules on disabled people. The case was appealed to Court of Appeal level. This case addressed sick pay limits and the outcome seemed to suggest that there was no obligation on employers to pay more sick pay to disabled workers than to others. But this leaves an unresolved "social" issue for disabled people—they simply cannot afford the periods of sickness if their employer is not paying them. In such circumstances, many might be tempted to remain on benefits.

22. There is also the judgment in *Royal Liverpool Childrens NHS Trust v Dunsby* relating to sickness absence. If employers are entitled to take all disability related absence into account, then their Attendance Management policies are not contrary to the DDA, despite being policies which have adverse impact on disabled people, compared to those who are not disabled.

23. There is a need for a clear debate on what society expects to be accepted or provided for disabled workers, to enable them to obtain and retain employment and then for us to go on to determine the appropriate vehicles to achieve those aims—whether it is some amendment to the provisions of the DDA or by some other effective means. In many cases, this will be a debate about who should be responsible for providing such "social" protections for disabled workers—their employers or the government.

How should the Government improve protection of carers in equality legislation, following the decision in the Coleman case?

24. It is essential, following the *Coleman* decision, for the disability aspects of the single Equality Bill to extend to cover those who are discriminated against by association with a disabled person—on the grounds of disability, as is the wording of the Directive. In the regulations enacting that Directive for discrimination on the grounds of sexual orientation and religion and belief, the wording of the regulations are sufficiently wide as to encompass such discrimination within their terms. This is not the case with the DDA, however, because of the whole approach of that Act, which limits its coverage only to those who meet the definition of disability. As discussed elsewhere, it may be better to seek to change the basis on which those protected from such discrimination are defined, such as to bring all such legislation into a format that is equally applicable to all persons (with the possible exception of the requirements for reasonable adjustments).

25. PCS believes that carers currently receiving Income Support should not be moved onto Jobseekers Allowance. Forcing them to claim JSA will mean they will have to demonstrate they are actively seeking employment. We believe the changes proposed will lead to an increase in unfair suspensions of benefit.

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[88] Sections 72–73 of the House of Lords Judgement on the case of *London Borough of Lewisham v Malcolm*, Session 2007–08 UKHL 43.

[89] Section 35 of the House of Lords Judgement on the case of *London Borough of Lewisham v Malcolm*, Session 2007–08 UKHL 43.

Equality in Goods, Facilities and Services

How can it be made easier for disabled people, carers and pensioners to bring and pursue cases in GFS?

26. The DWP business model with its focus on telephony can be a barrier for disabled people, carers and particularly pensioners. When it was established the Pension Service made a commitment to access "harder to reach customers", however it then cut Local Service staff by 25%. We believe there needs to be a mixed business model that allows pensioners to access services by telephone and face to face.

Should discrimination by association extend to GFS?

27. Yes, it must—it is easy to envisage circumstances where someone could face discrimination in the provision of GFS due not to their own but to a partner's or child's disability. It is essential that the law covers such eventualities.

The Public Sector Equality Duty

How could a Disability Equality Duty in the public sector be built upon within a Single Equality Duty? Is a Single Duty desirable?

28. PCS is not entirely convinced that a Single Duty is desirable, though we would welcome the extension of equality duty principles to age, religion and belief and sexual orientation. In our experience, when principles are combined, there is a tendency for clear rules to be watered down. The present regimes have a clear division in terms of timescale for the preparation of each Equality Scheme. We believe that this properly enables public sector bodies to address each aspect of equality fully—and there is evidence that many of those who have attempted to prepare single Schemes thus far have failed in some respect to meet all of the requirements of the various legislations. If, as we expect, there is to be a single equality duty, then current provisions in the duties must not be weakened eg the DED involvement criterion, the GED requirement for objective setting and the RED requirement to consult during impact assessment.

Will there be unintended consequences for disabled people or disability rights?

29. We firmly believe that there is a risk of developing some form of hierarchy of equality and that, if this were to occur, many of the more challenging aspects of establishing disability equality could be placed lower on the overall agenda than they might under single strand duties.

Private Sector Commitment and Support, Guidance, Advice and Information for Employers

Is an Equality Duty on the Private Sector workable?

30. Although it might require a difference of approach, based on size and scale of operations, in principle we see no reason why private sector employers are any less able than those in the public sector to develop similar approaches to equality and to document these. We wish to point out, however, that the demands of enforcing the current duties within the public sector would need to be addressed in order for a sensible enforcement arrangement to be devised that is realistically manageable eg would the CBI be likely to be willing to play a role in performance managing compliance in the private sector? Greater attention should also be given to the role of procurement and the Office of Government Commerce and Treasury.

How can the Access to Work scheme better enable people to obtain, stay and progress in work?

31. The DWP Access to Work Scheme can be considered one of the most effective initiatives run to support the employment of disabled people, however PCS has the following issues with the scheme:

27.1 *Access to the scheme:* Access to Work should be universal—it should be equally available to all employees regardless of who they may work for.

27.2 *Focus:* this relates to its scope to address "reasons" for disabled people losing their jobs or failing to be employed. At present Access to Work focuses mainly on equipment and the provision of external "support" such as interpreter services, personal assistants and home to office travel. These are no longer the sole reasons for an employer seeking to dismiss a disabled person. A key issue now, certainly within public services, is attendance with the reason often cited of the impact that such absences have on colleagues and workload. Therefore an amendment to Access to Work terms that would allow employers to claim Access to Work funding to support temporary replacement workers, or even overtime by those left to manage an increased workload, should mitigate against the effects of such absences and lead to a greater level of job retention by such disabled workers.

27.3 *Promotion:* Too few employers and disabled people are aware of its existence. It should be far more widely publicised and extra effort be applied to ensuring inclusive advertisement to those more marginalised from employment initiatives eg learning disabled people. All too often advisors employed to manage the scheme know too little about the disability from an equal rights perspective making the process a bureaucratic quagmire for disabled people.

27.4 More flexibility generally in the scope of the Access to Work scheme to respond to need is also required—including needs that have not yet been identified.

What impact has there been on disabled people's entry to and progress in employment in central government departments since the Access to Work scheme was withdrawn?

32. It is practically impossible to assess the damage which may have been caused to the employment and retention of disabled people by the removal of Access to Work funding from central Government departments. The number of newly disabled staff who have lost their jobs, when the continued availability of Access to Work might have assisted in their retention cannot be estimated. How many line managers, faced with recruitment decisions, have opted for a non-disabled person, for fear of the budgetary impact of employing a disabled person will never be known.

33. We believe that evidence has been found, by those carrying out the research into the impact of the withdrawal on those directly affected, of applications for assistance that have been refused—but we will have to await the final report of that research before we know the scope of those cases, the impact that such refusal might have had on continued career prospects, etc.

34. However, the findings of earlier research into these points cannot be disputed. The University of York researched the impact of Access to Work in 2002 (http://www.dwp.gov.uk/jad/2002/wae138rep.pdf). This research clearly pointed to the importance of independent funding in the minds of employees—the knowledge that their funding was not impacting on colleagues in any way nor that they had to "owe a debt of gratitude" to their employer for providing such funding.

What would be the impact if the withdrawal was extended across the public sector?

35. The impact would be catastrophic. Already, arising from the rumour of such potential withdrawal, there is a groundswell of opinion amongst fellow trade unions organising in the wider public services that the impacts of wider withdrawal would lead to a closing down of employment opportunities for disabled people.

36. Modelled on the Civil Service approach to withdrawal, schools and colleges would have to make decisions on allocating budget resources to support disabled employees or student needs and education; hospitals and care trusts would have to balance their obligations to patients against the costs to be met for employees; local authorities would have to choose between services to local people and support for disabled employees.

Single Equality Act

How does Disability fit in a single Equality Act?

37. The single Equality Act offers an ideal opportunity to move away from a specialist form of protectionism focussed on a limited group of individuals, defined not by the fact that they have an "impairment" but further refined by the nature, extent and duration of the limitations placed on their day-to-day functionality. It offers an opportunity to move towards an all-embracing piece of legislation which has the potential to protect anyone—in the same way that anyone can gain protection from the laws enacted to outlaw discrimination on grounds of sex, race, religion or belief, age or sexual orientation.

38. To do so requires a wider acceptance of the implications of the social model of disability—where disability is the impact of barriers placed to obstruct those with impairments. That wider implication has to be that those with impairments can live without being disabled (in the social model definition of the term) if all such barriers are removed.

Should the "social model", or "medical model" apply for disability?

39. The social model must be applied—the medical model of disability totally fails to explain the causes of and reasons for discrimination and disadvantage that disabled people face. Whilst it is recognised that for some proportion of the population a medical interpretation provides a valid picture of their condition, the efforts of the UK disability movement to achieve legislative recognition of the social dimensions of disability-discrimination based on a distinction between impairment and disability, should not be forgotten. This recognition, in the form of the 1995 Disability Discrimination Act, has provided a powerful tool for thousands of people disabled by subtle and non-subtle barriers in a society built for non-disabled people. Whilst legal gains have been made to improve the lives of many such people, significant challenges remain and more so with a projected increasingly ageing society whereby the incidence of impairment is greater.

40. Under the social model, disability is the equivalent of homophobia or racism. Disability is the societal exclusion experienced by people who have impairments. If the barriers to full participation are removed, then no-one will be disabled. In other words, people who have impairments would no longer be discriminated against on the grounds of those impairments.

41. The medical model is inherently discriminatory insofar as it sees disabled people as needing to be made more like non-disabled people so that they can fit in with "normal" society. If comparable thinking were to be applied to any other equality strand, its flaws would be immediately exposed. There would be justifiable outrage if we expected black people to be "less black" in order to gain acceptance, or gay men to "fit in" by behaving exactly like straight men. Any government that truly values diversity must shy away from an approach which expects members of any minority group to have their bodies or minds adapted to fit a supposed norm. It is not abnormal to have impairments, any more than it is abnormal to be, for example a woman, or a Muslim, or to be 78 years old.

November 2008

7. Memorandum submitted by the Trades Union Congress

Introduction

1.1 The TUC represents 58 affiliated unions with a total 6.5 million members, working in a wide range of organisations, sectors and occupations. Our affiliates regularly represent workers suffering discrimination or harassment, and they work with employers in raising awareness of equality issues and developing related policies and practice. The TUC has a long history of campaigning for equal rights and fighting discrimination both in the workplace and wider society. We have four equality committees dealing with issues related to race, women, disability, and lesbian, gay, bisexual and transgender status and there are annual delegate conferences for each of these strands.

2.1 Summary of Main Points

2.1 The TUC supports the creation of a single Equality Act as it should provide a clearer, more consistent legal framework and address some of the problems with compliance and enforcement of the discrimination law.

2.2 For disability, it will lead to a welcome harmonisation of provisions across all sections of the current DDA and for age it will significantly extend the protection from discrimination outside of the employment field. It is hoped that it will also plug the hole left in disability discrimination law by the recent House of Lords ruling in the *Malcolm* case and extend some protection to carers through measures to respond to the ECJ's ruling in the *Coleman* case.

2.3 The TUC is concerned by the suggestion that an indirect disability discrimination provision could be introduced into the Equality Bill to replace the current disability-related discrimination provision, which the House of Lords undermined in *Malcolm*. We would prefer the disability-related discrimination provision to be revised by removing the need for a comparator, as has been the case with pregnancy discrimination.

2.4 In responding to the ECJ ruling in the *Coleman* case, the Equality Bill should contain a prohibition on associative discrimination on all grounds (it currently already applies to race, sexual orientation and religion or belief and the ECJ ruled it should apply to disability). In particular, extending it to disability and age will give added protection to carers. In addition, consideration needs to be given to preventing discrimination and harassment based on perceived disability as a result of the judgment.

2.5 The creation of single public sector equality duty is welcome, but we are concerned that the existing provisions are not diluted and specific requirements such as the duty to involve disabled people in the development of equality schemes, is retained.

2.6 A positive equality duty could be applied to the private and voluntary sectors and the TUC has argued for such a duty. In the absence of a duty, it is essential to build equality considerations into public procurement to drive good equality practice into the private and voluntary sectors. In the Equality Bill, there needs to be a clear statutory requirement placed on public bodies to pay due regard equality in public procurement.

2.7 Access to Work (AtW) has the potential to assist many more disabled people gain and retain employment, with more funding and more publicity. It can be improved upon in terms of the speed of delivery and portability of the support provided. Withdrawal of AtW funding from the wider public sector could have potentially catastrophic consequences for many disabled workers.

2.8 The TUC is concerned by the proposals that disabled Employment and Support Allowance claimants will have to be available for employment and be applying for jobs or risk losing their benefits. For many, this will mean years of applying for jobs they are unlikely to get, given the ongoing discrimination against disabled people, which in turn will lead to stress, loss of self-esteem and deteriorating health.

Equality in Employment

How effective has the DWP been in achieving equality in employment, how would it have to change to achieve greater equality in employment?

3.1 The employment rates of working age disabled people have improved since the DDA was first introduced from around two-fifths to a half. But still the fact that only half of working age disabled people are in work compares badly with the approximately four-fifths of non-disabled people that are in work. The Equalities Review in 2007 found that disabled people experienced one of the highest penalties when trying to secure employment. As it said: "Not only are disabled people generally more likely to be out of work, but they are also more likely to exit work and, once out of work, they are less likely to move back into employment than non-disabled people and other groups." Disabled people are also likely to earn less and to achieve lower occupational status relative to their educational qualifications. Despite the DDA, discrimination continues to undermine disabled people's job prospects. In a CIPD survey, a third of employers admitted that they discriminated unlawfully against disabled people.

3.2 The TUC is concerned by the Government's proposals that Employment and Support Allowance claimants will have to be available for employment and apply for jobs, like unemployed people claiming JSA, with only those with the most severe impairments being exempt. For many claimants, the new regime will mean years of having to apply for jobs they know they are unlikely to get; this in turn will lead to stress, loss of self-esteem and deteriorating health conditions. On the whole, the Government is right to say that "work is good for you", or rather, that decent work is good for you—badly-paid, insecure work, with poor terms and conditions is not good for most people. In particular, the experience of repeatedly applying for jobs one fails to get is not good for anyone.

3.3 The Government is far too optimistic about the likely experience of disabled people subject to this new system. In the past, Incapacity Benefit claimants who have tried to return to employment have found that this is much more difficult for them than it is for most unemployed people. All too often, those who get jobs can only get short-lived jobs with low pay rates. The Government should re-think these proposals, as well as reforming discrimination law and improving the AtW scheme to ensure better employment opportunities for disabled people.

How can the Equality Bill open up opportunities in employment, particularly for disabled people, carers and pensioners?

3.4 By bringing together our existing discrimination laws into a single Act the Equality Bill provides a valuable opportunity to create a harmonised legal framework that makes it clearer to workers and employers what their rights and duties are; to ensure there is comprehensive protection from discrimination by removing any unjustifiable inconsistencies or exemptions; and to consider new ways for improving enforcement and compliance with the law to achieve greater equality of opportunity.

3.5 In particular for disabled people, the Equality Bill has provided an opportunity to review the inconsistencies and varying levels of protection that exist across the different parts of the current Disability Discrimination Act. When this Act was introduced in 1995 it was targeted at disability discrimination in the employment field and it has since been extended to cover goods, facilities and services, public functions and premises but with slightly different definitions and standards of defence across the sections of the Act. In addition, the original employment provisions have been amended to incorporate the provisions of the Framework Equal Treatment Directive (2000/78/EC) but these were not applied outside of employment. By developing a clearer legal framework, more consistent protection across all areas, and creating common reasonable adjustment duties, the Equality Bill has the potential to create a more inclusive society for disabled people and thereby improve access to the workplace.

3.6 As well as creating more consistent legal protection, the Equality Bill provides an opportunity to address the recent rulings in the *Malcolm* and *Coleman* cases. It is hoped that the Bill will restore the rights of disabled people to the pre-*Malcolm* position and will expand the coverage of the protection from discrimination in line with the ECJ's ruling in *Coleman*.

3.7 Carers will benefit from the Equality Bill if the law is amended to protect those who associate with disabled people, as required by the *Coleman* ruling. Other carers may also benefit if the law is amended to provide protection from associative discrimination on grounds of age.

3.8 By extending protection from age discrimination outside of employment, it is likely that further progress will be made in opening up employment opportunities for older people, as what happens in the workplace and decisions that determine access to it and promotion opportunities within it, reflect the degree of equality of opportunity that exists in wider society for older people. However, clearly one of the greatest obstacles to improving employment opportunities for older people is the continued existence of the statutory default retirement age and this is going to be retained in the Equality Bill, albeit that the Government has a commitment to review it in 2011.

3.9 The Equality Bill contains proposals to improve enforcement and compliance with discrimination law. In particular, it is intended that tribunals be given extended powers to make recommendations that employers amend their policies or practices. Potentially, with proper oversight and training of the judiciary,

such tribunal recommendations could help ensure lessons are learned from discrimination cases and actions are taken to prevent similar situations arising in the future, rather than the sole remedy for discrimination being financial compensation for past events.

3.10 On enforcement and compliance, the TUC and trade unions have argued throughout the Equality Bill process that union equality representatives should be given statutory recognition and rights to facilities time to enable them to perform their duties and attend training relevant to their role. Workplace equality representatives can: help raise awareness of equality issues in the workplace; ensure there is an employee voice in any diversity or equal opportunity initiatives the employer is undertaking; provide guidance and signpost disabled members (and others potentially facing discrimination) to appropriate assistance; and help ensure that collective policies and practices consider the needs of disabled workers and others from under-represented groups.

How should the Equality Bill respond to the decision in the Malcolm case in respect of disability rights in employment?

3.11 The Equality Bill must address the decision in *Malcolm*. The TUC believe cases are being dropped because of the restrictive interpretation the House of Lords has given to the concept of disability-related discrimination in this ruling. In one example that has been brought to our attention a trade union representative had to tell a disabled worker who she had been representing that it was now unlikely she would be able to succeed in challenging her disability-related dismissal. The member was reported to be devastated and it is not clear what other redress she now has.

3.12 The Equality Bill can respond to the decision in *Malcolm* and reinstate the concept of disability-related discrimination by removing the requirement to identify a comparator in such cases. The Sex Discrimination Act was recently amended to remove the requirement for a comparator in cases of pregnancy discrimination. It now simply provides that a woman has been discriminated against if she is treated less favourably on grounds of her pregnancy. Establishing the specific concept of pregnancy discrimination in law and removing the comparator requirement follows an absurd history of tribunals and courts trying to identify appropriate male comparators for pregnant women in order to establish sex discrimination, rather than simply focusing on what the reasons for the less favourable treatment of the pregnant woman were.

3.13 Removing the comparator requirement in cases of disability-related discrimination would focus attention on the nature of the less favourable treatment suffered by the disabled person and whether it was related to the disability, and would avoid the kind of knots the House of Lords tied itself in when trying to identify who the appropriate comparator should be for a disabled person in cases of disability-related discrimination. It would reinstate the pre-*Malcolm* position, ie that there should be recognition that a blind man escorted by a guide dog is not in the same position and should not therefore be compared to a sighted man with a dog, and a disabled person with a long-term absence due to his disability is not to be compared with a non-disabled person with a similar sickness absence record. Otherwise, as Baroness Hale said in *Malcolm*, if Parliament had intended a comparison to be made with people who were not disabled and therefore did not require any kind of accommodation for a disability, then it would not have felt the need to introduce a direct discrimination provision into the employment section of the DDA in 2004. This direct discrimination provision does rely upon a comparison between a disabled and a non-disabled person with similar capabilities or in similar circumstances, but it should be remembered direct discrimination can never be justified. By contrast, organisations can defend their treatment of a disabled person under the disability-related discrimination provisions, if there is a material and substantial reason justifying it, which further suggests that it was intended to be interpreted more broadly than direct discrimination.

3.14 It appears that Government may be considering introducing into the Equality Bill, an indirect disability discrimination provision in order to address the hole in protection left by the *Malcolm* ruling. While the TUC supports the application of indirect discrimination to disability (it applies to all other grounds), we had argued for its introduction in addition to the disability-related discrimination provisions. Indirect discrimination has a group focus, as it compares, for example, women to men and assesses whether they have been placed at a particular disadvantage because of a provision, criterion or practice that has been applied equally to them. In responding to the DLR Green Paper we thought the DDA would benefit from having this additional group-based concept as we believed it would encourage organisations to think pre-emptively about whether their premises or employment policies and practices would tend to disadvantage disabled people as a group and take some action to alleviate the disadvantage, rather than only responding to the problems of a particular disabled individual when they experience a substantial disadvantage as a result of their practices.

3.15 However, we are concerned that introducing the concept of indirect discrimination as a replacement for disability-related discrimination could be an insufficient remedy to *Malcolm*, as disabled people are far from being a homogenous group. The law must still encourage employers to respond directly to the disabilities and barriers particular individuals face. There is a danger under indirect discrimination that a disabled individual who has suffered substantial disadvantage as a result of an organisation's policies or practice is left without any challenge, because it is established, through group comparisons, that in general people with their particular disability would not have been disadvantaged by a particular provision, criterion or practice, even though in actuality that disabled person was disadvantaged.

How should the Government improve the protection of carers in equality legislation, following the decision in the Coleman case?

3.16 The Bill must make clear that discrimination and harassment on the grounds of disability covers those who associate with a disabled person if they are subject to discriminatory treatment or harassment because of that association. These "associative discrimination" provisions should also be extended to age and could therefore offer protection to carers of older people, for example. While the *Coleman* case concerned the mother of a disabled child and focused on the compatibility of UK disability discrimination law with the Framework Equal Treatment Directive, the same issues could be raised in relation to age, as the provisions of the UK age Regulations (like the DDA) only protect individuals from discrimination suffered on the ground of their age (or their disability) whereas the Directive refers more broadly to discrimination "on grounds of age".

3.17 While these amendments would be very welcome, the protection for carers would still be patchy and unclear within the Equality Bill. In addition to the protection carers could get in the future by claiming associative discrimination, at present, female carers can claim indirect sex discrimination if they are denied access to flexible working or similar measures, as it is recognised that women still make up the majority of carers in society and are likely to be disadvantaged by such a refusal. However, male carers have less back up from discrimination law when trying to access such accommodation of their caring responsibilities.

3.18 The TUC had argued in response to the DLR Green Paper that a specific "carer" ground should be introduced into the Equality Bill. Other jurisdictions include such a protection, for example, Ireland's Employment Equality Act offers protection from discrimination on the ground of family status and the Northern Ireland s.75 single equality duty includes a "person with dependents" ground. Incorporating a "carer" ground would provide more transparent and comprehensive protection for carers and could encourage a move away from our gendered perception of who should do the caring, as male carers would have the same protection as female carers.

3.19 Another aspect of legal reform that could be raised by the *Coleman* case is whether the measures in the Directive aimed at preventing discrimination "on grounds of disability" also means that those who are perceived to be disabled and are discriminated against or harassed on that basis, should be protected under the law. In the TUC's view, as we argued in our response to the DLR Green Paper, they should be. Individuals should not have to first prove that they suffer from some medical condition that meets a statutory definition of disability before they can challenge the disadvantage they have suffered on that basis. The Advocate General in *Coleman* said: "The Directive does not come into play only when the claimant is disabled herself but every time there is an instance of less favourable treatment because of disability". The ECJ noted that the prohibition on discrimination "applies not to a particular category of person but by reference to the grounds mentioned in Article 1".

Equality in Goods, Facilities and Services

How could the duties in Goods, Facilities and Services of the DDA be built on to deliver systemic change?

4.1 At present there is an anticipatory reasonable adjustment duty in goods, facilities and services provision in the DDA. The anticipatory nature of this duty is an improvement on the duty in the employment field, however it has a higher trigger point and goods and services providers have a defence for not making adjustments. The TUC welcomes the harmonisation of the trigger point for the duty downwards to the level that exists in the employment field (ie goods and services providers will have to take action where a disabled person is placed at a "substantial" disadvantage rather than where accessing goods or services is "impossible or unreasonably difficult" for them). We also welcome the removal of the defence for a failure to make a reasonable adjustment—this was something we had argued for in response to the DLR Green Paper.

4.2 The specific exemption for transport providers could be removed in the Equality Bill as it causes confusion about how the law applies to transport. Better accommodation of the needs of disabled people by transport providers would have a substantial impact on the mobility of disabled people, their participation in society and access to employment opportunities.

4.3 Much more needs to be done to raise awareness of the legal obligations the DDA has placed on goods, facilities and service providers and more needs to be done to improve enforcement and compliance with the law.

What is the draft Directive in GFS proposing and what are the implications for UK law? Is the draft EU Directive welcome? Does the Equality Bill incorporate the provisions of the draft Directive?

4.4 The draft Directive proposes extending anti-discrimination provisions on age, disability, religion or belief and sexual orientation beyond the employment field. As legislation covering GFS already exists in the UK for all these grounds, except age, action in the UK will mainly be around checking compliance of these provisions with the Directive. It is proposed in the Equality Bill that the protection from age discrimination should be extended to GFS and the Directive will require this to happen.

4.5 The Directive is welcome. The TUC supported its adoption as it provides an important levelling up of European anti-discrimination provisions (for sex and race there is already EU legislation covering GFS). EU citizens should be entitled to the same level of protection and businesses should be bound by the same common equality standards wherever they are operating in the Community.

4.6 The Equality Bill proposes that the provision of "justified" age-differentiated services will be allowed to continue (eg free bus passes for older people, young persons' railcards, priority flu jabs for over 60s, some financial services where supported by actuarial data). As currently drafted the Directive will allow this as it allows the provision of differences of treatment on grounds of age where justified by a legitimate aim and the means of delivering it are appropriate and necessary, and it says this will not preclude the fixing of ages for access to education or certain goods and services. The Equality Bill proposes to set a minimum age limit of 18 for the prohibition on age discrimination in GFS but there is no age limit in the draft Directive. On disability, the Directive requires a prohibition on indirect disability discrimination and an anticipatory reasonable accommodation duty for disabled people, which may influence what the Government proposes in response to the *Malcolm* case. However, it should be noted this would not prevent the continuation of a revised disability-related discrimination provision as well.

How can it be made easier for disabled people, carers and pensioners to bring pursue cases in GFS?

4.7 There are many reasons why very few cases alleging discrimination in goods, facilities and services provision currently find their way to court, which include the ease of access to legal representation, the lack of a lengthy or ongoing relationship with the provider (unlike in employment where there is a real interest in addressing the discrimination and seeking redress), and insufficient remedies to make bringing a case worthwhile. But probably key amongst the reasons for not bringing claims are the costs involved and the fear of being required to pay the respondent's costs if the claim is unsuccessful (this is unlikely to be the case in an employment tribunal). When claimants do make their way to court, they will usually find themselves in front of judges who are likely to have little or no experience of discrimination claims, as there are so few GFS claims that go through the civil courts, and those judges will not have been trained specifically in discrimination law.

4.8 There should be greater financial support for bringing cases, improved access to legal or specialist advice for potential claimants and more specialist training for judges. However, the proposal put forward in the DLR Green Paper that there would be a few specially trained judges sitting in a few courts around the country, to which GFS discrimination cases would be directed, is not welcome as it would reduce accessibility for disabled people, carers and pensioners.

Should discrimination by association extend to GFS?

4.9 Yes. There is no principled reason for providing for it with respect to employment but not to the other areas covered by the law. The only reason not to do so would be that EU law does not specifically require it. However, as there is a draft Directive which proposes extending EU provisions to GFS then it would make sense for it to be extended in the Bill to prevent confusion and further legislation in a few years' time.

The Public Sector Equality Duty

How could a Disability Equality Duty in the public sector be built upon within a Single Equality Duty? Is a Single Duty desirable? Will there be unintended consequences for disabled people or disability rights? Has the Disability Equality Duty been effective in promoting equality in the public sector, including local government?

5.1 Evidence suggests that important progress has been made by public bodies that have taken seriously their obligations under the existing Disability Equality Duty, although not all bodies fall within that description, which is why effective compliance and enforcement activities are essential.

5.2 The former DRC took some important early steps to promote enforcement and compliance with the Disability Equality Duty in the first year, providing helpful advice and guidance on the duty (eg for disabled people and for sectors), checking whether public bodies had produced equality schemes, writing to those that had not, and carrying out more in-depth checks of the schemes produced by central government departments, strategic health authorities and regional development agencies. This kind of activity must be continued by the EHRC and it must be provided with the resources to enable it to carry out this work. There are concerns, however, that the EHRC has not properly followed up on some of the earlier work done by the previous Commissions. The Single Duty will make even more demands on the EHRC and so it must be provided with sufficient resources to lead on this work and to form effective partnerships with other bodies to promote compliance and enforcement.

5.3 The TUC supports the creation of a Single Duty covering seven grounds (race, disability, gender, gender reassignment, sexual orientation, religion or belief, and age) as proposed in the Equality Bill. Such a Duty will ensure action is taken across all grounds and will not lead to an unjustified prioritisation of some grounds over others. It should also encourage public bodies to consider action to address discrimination on multiple grounds and improve compliance as public bodies will not have three separate sets of requirements

and timelines to comply with, as is currently the case under the existing three duties. However, we are concerned that the existing duties should not be diluted, as appeared to be suggested by the DLR Green Paper. We welcome the changes in the proposals, as set out in the White Paper, and the commitment to retain the same structure as the existing duties. But we still do not know how the new general duty will be framed. Furthermore, there has been no commitment to retain some of the specific requirements from the existing duties, in particular, with respect to disability, it is important to retain the duty on a public body to involve disabled people in what they are doing.

5.4 There are fears that the Single Duty might dilute the attention that is given to disability or that the specifics of disability discrimination might be lost sight of. However, if a Single Duty is effectively implemented with proper steps taken to (a) engage effectively with disabled people (staff, service users, local communities) and (b) it is effectively monitored and reviewed, then it need not be a weaker option. But effectively delivery under a single scheme will also require public bodies to keep in mind what usually distinguishes disability from other equality grounds: that to achieve equality of outcome, more favourable treatment is often required. It should be noted that while it is important to create a common set of standards in a Single Duty, if there are strongly reasoned arguments for having a differentiated approach or a specific requirement to meet the needs of a particular strand, such as disability, then could be accommodated within the drafting of the new Duty. A Single Duty does not have to mean a completely harmonised approach, so long as any differences between strands are based on principled reasons and are aimed at improving equality of opportunity.

How could procurement be made a more effective lever for equality outcomes? What are the good practice examples in the public, private and voluntary sectors? How can guidance on procurement improve at EU and national level to make procurement a more effective lever for equality outcomes?

5.5 The TUC believes that procurement could be more effectively used to drive good equality practice into the private and voluntary sectors, particularly in the absence of any positive equality duties on organisations in these sectors. At present, there is a lack of clarity about what public bodies should be doing on equality and procurement. As procurement is a function of a public body it is captured by the requirements of the race, disability and gender equality duties, those people responsible for procurement in public bodies often seem unaware of this obligation. Guidance from the Office of Government Commerce to procurement professionals has tended to emphasise the constraints of EU Procurement law rather than positively stating what can be achieved on equality through procurement (or mentioning EU law requirements on anti-discrimination or the requirements of the public equality duties). It is understood that the OGC and Government Equalities Office are currently working together to produce more effective and positive guidance on equality and procurement. In addition, the TUC has argued for a stronger, clearer duty on the face of the Equality Bill requiring public bodies to pay due regard to the need to promote equality and tackle unlawful discrimination through procurement.

5.6 There are examples of good practice on equality and public procurement in some parts of the UK. For example: in Northern Ireland, the NI Equality Commission and the Central Procurement Directorate have jointly published guidance on equality and procurement, with a number of good practice examples to encourage activity in this area; West Midlands Local Authorities have come together to develop the West Midlands Common Standard, which is a common set of questions that can be used at the pre-qualification stage to get contractors to demonstrate that they comply with non-discrimination requirements in employment legislation; GLA has shown leadership on socially responsible procurement by adopting a Responsible Procurement policy; Unison's local government branch in Newcastle has reached an agreement with Newcastle City Council permitting them to review tender documents and interview contract bidders about level of service and proposed terms and conditions.

The Private Sector

Is an Equality Duty in the Private Sector workable?

6.1 The TUC has called for positive equality duties to apply to the private and voluntary sectors. The reason such an approach was adopted in the public sector was a recognition that discrimination often arose from structural issues or organisational culture, relying upon individual victims to enforce discrimination legislation in a backward-looking way was insufficient to deliver change. The onus should be shifted onto the organisations themselves to take steps to prevent problems arising in the first place. The same issues and arguments can be applied to the private sector for adoption of positive equality duties. Further, among those private sector organisations that are taking steps to ensure equality of opportunity they are adopting the same kind of measures as those that are set out in the public duties to ensure good practice, ie monitoring the workforce, consulting those employees affected by inequalities, publishing action plans, and reporting on progress.

6.2 An equality duty for the private and voluntary sectors would not have to exactly mirror the requirements of the public sector. It could be phased in, for example, applying to large private sector organisations initially and just to the employment function, rather than the goods and service delivery functions. Such a duty should require organisations to report on inequalities, give explanations for reasons behind them, take actions to address them, consult with the workforce, and regularly review progress.

What can be done in the realm of light-touch regulations, guidance and advice to promote culture change in the private sector for all those subject to discrimination? What can be done to support SMEs to achieve greater equality for disabled people?

6.3 Evidence from disabled people, from unions and from surveys (such as those previously carried out by the DRC) confirm some critical facts: (a) there remains widespread ignorance of what the DDA requires, and this ignorance is greatest among SMEs; (b) there remains widespread ignorance of who is covered by the DDA, including among disabled people themselves, and this ignorance is greatest among SMEs; (c) in consequence, it is not surprising that there continues to be discrimination against disabled people among private sector employers. It seems that there has been some welcome advances in understanding and commitment among some larger private sector employers (as various surveys and reports from the Employers Forum on Disability show, for example) but the single largest impediment to the employment of disabled people remains employer discrimination, especially where the issue is mental health. The current light-touch regime has not brought about a significant increase in the employment of disabled people and there is plenty of advice available for those good practice organisations that are willing to heed it.

6.4 Improving retention of disabled employees has to become a top priority, as many disabled people lose their jobs when their condition changes and given the high unemployment rates for disabled people they will face considerable difficulties when trying to regain employment. Among the legislative steps that could be taken to promote retention is the introduction of a statutory right to "disability (rehabilitation) leave" as a reasonable adjustment on the face of the Equality Bill.

How can the Access to Work scheme better enable people to obtain, stay and progress in work?

6.5 The TUC welcomed the announced increase in the AtW budget, which was something we had campaigned for over many years. AtW has the potential to assist many more disabled people to obtain or retain work, although to achieve this much greater publicity will need to be given to the scheme than hitherto. For smaller employers—whether in the private or the public sector—the availability of AtW funds can be the difference between employing and not employing a disabled person. For disabled workers, as well as helping them to access employment, the existence of independent funding is important for their dignity, as they do not feel they have to "owe a debt of gratitude" to their employer or worry that the funding is having an impact on colleagues. AtW can be improved, however, for example, there are still issues about the speed of delivery and portability that need to be resolved if it is to achieve better adaptability to the needs of both employer and worker.

What impact has there been on disabled people's entry to and progress in employment in central government departments since the Access to Work scheme was withdrawn? What would be the impact if the withdrawal was extended across the public sector?

6.6 Evaluation of the withdrawal from central government departments is ongoing and in the absence of that information it is not possible to reach conclusions about the impact, in particular on the recruitment of new employees. However, many public sector employers are small organisations with limited budgets and a generalised withdrawal of eligibility for AtW from the public sector would have catastrophic consequences for many disabled workers. More funds do need to be targeted at the private sector, especially SMEs, from the increase in the total AtW budget, but this should not happen by removing funding from public sector organisations.

Single Equality Act

How does Disability fit in a single Equality Act?

7.1 While the achievement of disability equality may warrant a particular approach, for example, a provision governing disability-related discrimination and a reasonable adjustment duty, which differs from other grounds, disability does fit within a single Equality Act. The adoption of a single Equality Act does not require a completely harmonised approach to all the grounds. It should merely ensure that where there are differences of approach these are based on principled arguments and proper consideration of what will most effectively achieve equality of opportunity. In the case of disability equality, there must be recognition of the fact that different treatment will frequently be required to enable disabled people access to the same opportunities others have, and that there has to be consideration of the particular circumstances of the individual to ensure that any adjustments provided achieve what they are intended to.

Should the "social model" or "medical model" apply for disability?

7.2 The Government has decided to retain the "medical model" approach to disability in the single Equality Act. The TUC supports the "social model" approach. Its incorporation in the Equality Bill would have helped achieve a more significant change in culture and attitudes, shifting the focus onto the removal of barriers and the creation of a more inclusive society rather than seeing disabled people themselves as the problem.

November 2008

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8. Memorandum submitted by Local Government Employers

Local Government Employers (LGE) was created by the Local Government Association on 3 April 2006. LGE works with local authorities, regional employers and other bodies to lead and create solutions on pay, pensions and the employment contract, to ensure the provision of excellent and affordable local services. Working in consultation with, and on behalf of local authorities, regional employers and other stakeholders, LGE also represents local government employer interests on pay, pensions and employment issues. There are 410 authorities employing over two million people in England and Wales.

We have not responded to all the questions raised in the inquiry, but instead have responded to the three questions which are most relevant to local authority employers, and those questions are identified below.

1) *How should the Equality Bill respond to the decision in the Malcolm case, in respect of disability rights in employment?*

1.1 The Equality Bill should ensure that employers' duties are made clear and that any potential conflict that exists currently between the provisions of the Disability Discrimination Act 1995 ("the DDA"), as interpreted by the House of Lords, and the employment provisions of the Employment Directive are resolved. At present, there is a risk that the DDA as interpreted by the House of Lords will not comply with all of the disability provisions of the Employment Directive, which cover both direct and indirect discrimination. Whilst the House of Lord's interpretation of the DDA is sufficient to deal with direct discrimination obligation under the Employment Directive, it does not cover the indirect discrimination obligation, as its interpretation means that a claim of disability-related discrimination under section.3A(1) of the DDA will be difficult to establish.

1.2 Under section 3(A)(1), discrimination will occur where "for a reason which relates to the person's disability", the employer treats the disabled person less favourably than he "treats or would treat others to whom that reason would not apply", and that treatment cannot be justified. Taking the example of the application of a policy, for example one on working hours that through its operation treats persons with a disability less favourably because they are unable to comply with it, then even without the need for any justification defence, then using the House of Lords analysis an employer would be able to defend its actions, provided it also applied that policy to non-disabled persons.

1.3 If the UK legislation does not comply with the Employment Directive, then not only is there a risk that it is open to challenge in the ECJ, but local authorities as emanations of the state are also open to challenges in the UK on the basis that the Employment Directive has direct effect against them.

2) *How should the Government improve the protection of carers, following the decision in the Coleman case?*

2.1 The disability discrimination provisions should be amended to provide protection to carers, where they are discriminated against on the ground of their association with a disabled person. Employers are already familiar with the concept of discrimination by association on grounds of race, religion or belief or sexual orientation and, therefore, it will not be difficult for them to understand how it should apply in the case of disability discrimination.

3) *How does disability fit within a single Equality Act? Should the "social model" or "medical model" apply for disability?*

3.1 The Equality Bill proposes to repeal the definition of disability based on medical grounds which means that an employee will no longer have to define their impairment in terms of their incapacity which the Disability Discrimination Act 1995 currently requires. The DDA requirement to define the issue in terms of the impairment is in line with the medical model of disability as it regards disability as a medical condition.

3.2 Removing this definition and moving towards the social model of disability will change the focus away from people's impairments and towards removing barriers that disabled people face in every day life. The social model takes the wider view that a disabled person's ability to undertake certain activities is limited by social barriers, not by their medical condition. Under this model, disability is managed by identifying and removing or altering the disabling barriers which are within the employer's control, such as

management practices, or the way work is organised, or building design. This model does not deny the existence of impairment but rather addresses it without attaching value judgements such as "normality" and changes the focus on to what aspects of the working world can be proactively adapted and changed.

3.3 The move to a social model for disability may eventually cause a cultural shift within the UK of employing people with disabilities but would not result in major changes for councils as employers because the current legislation (in line with EU Directive requirements) that requires employers to make "reasonable adjustments" to their policies or practices or physical aspects of their premises already follows the social model of disability. By making adjustments, employers are removing barriers that, according to the social model, remove the person's disability. In addition, the Disability Discrimination Act 1995 introduced a new equality duty on public authorities in December 2006 to promote equal opportunities for the disabled. This duty requires councils to take additional steps to allow disabled employees to participate fully and equally in working life.

3.4 To meet the disability equality duty, the employing council must involve disabled employees in producing equality plans that show how any policies or practices or physical environments the employer has that negatively impact on disabled people will be proactively reviewed and amended. By performing their disability equality duty, councils proactively assess the actual, potential or likely impact of the different aspects of employment, which ensures an inclusive approach to the employment or management of employees with a range of different needs, including disabled employees, which the social model of disability aims to achieve.

3.5 The proposal to use the social model of disability within the new Equality Act would in effect roll-out the disability equality duty to all employers. This would mean all employers would have to include disabled people and disability equality into all aspects of employment from the outset, rather than merely focusing on individualised responses to specific disabled people as required under the "reasonable adjustment" obligations. The local government sector would therefore support this proposal.

3.6 Although the move to a social model of disability would encourage an inclusive and proactive approach in employing a range of people with different needs, it would not be possible for a council or any other employer to proactively anticipate the needs of every individual who may work for them or be recruited in the future. Therefore the need to have a legal definition of disability and a framework to support employers in assessing and reacting to the differing needs of their employees will surely remain. Whichever model of disability is applied, the Single Equality Bill will still need to provide legislation to instruct, monitor and enforce a standard of treatment for disabled employees.

November 2008

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9. Memorandum submitted by Disability Charities Consortium

1. We are the Disability Charities Consortium (DCC), an informal coalition of seven disability charities: Leonard Cheshire Disability, Mencap, Mind, RNIB, RNID, RADAR, and Scope. We offer information, support and advice to over ten million disabled people in the UK. The DCC comes together to work on issues of shared concern, including disability discrimination legislation. For the Equality Bill we are working with Sense and Guide Dogs, and this paper is a joint submission from our nine organisations.

2. We welcome the opportunity to comment on the effectiveness of current equality legislation, the role of DWP in achieving disability equality, and how the Equality Act can facilitate greater progress towards substantive equality for disabled people.

KEY ISSUES

- The Equality Bill provides an opportunity to make it easier to address structural disadvantage of disabled people.
- We welcome the proposal for an EC Equality Directive which should set comprehensive and enforceable minimum standards for protection of disabled people against discrimination in non-employment areas across Europe. The Government needs to anticipate the new obligations in the Equality Bill.
- The Government needs to ratify the UN Disability Convention without undue delay and without reservations or interpretative declarations.
- Our priorities for the Equality Act are:
  - A comprehensive definition of discrimination that effectively addresses inequality and structural disadvantage of disabled people.
  - Extension of protection across the scope of the Equality Act to people who experience discrimination and/or harassment because of association with a disabled person.
  - Preserve existing rights of disabled children in education.

- — Retain the key principles of the disability equality duty which includes the ability to treat a disabled person more favourably, mainstreaming and involvement of disabled people.
- — Strengthen a pro-active approach to equality and encourage transparency across the private and voluntary sector through using public procurement as a lever, as well as through measures directly aimed at the independent sector.
- — Strengthen the enforcement of the legislation by making it easier for disabled people to challenge unlawful discrimination, including multiple discrimination, and giving tribunals and courts more powers.

— Support programmes such as Access to Work are vital for the creation of a level-playing field for disabled people in employment.

— Monitoring the implementation of the Equality Act will provide information about its effectiveness and assist development of strategies and policies to achieve equality for disabled people.

The need for an Equality Bill

3. The enactment of the Disability Discrimination Act 1995 heralded a significant change for the estimated 10 million disabled people in society. It gave disabled people enforceable civil rights, which have been strengthened through the years. Alongside the DDA, the Government established the Disability Rights Commission (now Equality and Human Rights Commission), and they have been developing policies and strategies to create a level-playing field for disabled people, for instance through their Life Chances strategy, and more specifically through initiatives such as Access to Work, direct payment, and awareness raising activities.

4. However 12 years of the DDA have not been enough to address prejudice against, eliminate discrimination of, and promote equality for disabled people.

5. Currently only half of disabled people are in work compared with over four-fifths of the non-disabled population.[90] 15% of disabled 18 years olds are not in education, employment or training (NEET) compared to 8% of non-disabled 18 years olds. This figure conceals the gender divide in that 20% of males with a disability are NEET compared to less than one in eight females with a disability.[91] It is not surprising, then, that disabled people are twice as likely to live in poverty as non-disabled people. This figure does not take into account the extra costs associated with living with a disability.[92]

6. Partly this is because of the complexity of the legislation, recently significantly weakened by the *Malcolm* judgment in the House of Lords, and partly because it is difficult for disabled people to challenge discrimination. The Disability Equality Duty has been very important in that it introduced a pro-active approach to substantial equality but this has not been enough to eliminate discrimination against and exclusion of disabled people who are faced with systematic barriers to full and equal inclusion every day of their life.

7. We welcome the Equality Bill as an opportunity to:

- — streamline disability discrimination legislation;
- — ensure comprehensive rights;
- — remove disparity between strands; and
- — strengthen enforcement.

8. Anti-discrimination legislation needs to go hand-in-hand with social policy measures to enable a disabled person to live independently, have full opportunities and choices to improve their quality of life, and be respected and included as equal members of society.

The International Context

9. The need to promote equality for and to combat discrimination and harassment against disabled people is mirrored internationally: in the UN Disability Convention, the EC Employment Equality Directive, and the proposal for an EC Equality Directive outside employment.

10. The UN Disability Convention provides a framework to achieve equality for disabled people. We call upon the Government to ratify the UN Convention as well as sign and ratify the Optional protocol without undue delay and without reservations.

11. We welcome the European Commission's proposal for a Directive on discrimination outside the field of employment. We strongly believe that such a framework is needed for the EU to fulfil its commitment to protect and promote fundamental rights and to deal with disability discrimination where it has not been

[90] Disability Rights Commission (2007) *Disability Briefing* May 2007

[91] *Youth Cohort Study & Longitudinal Study of Young People in England: The activities and experiences of 16 year olds: England and Wales 2007*, Department for Education and Skills, http://www.dcsf.gov.uk/rsgateway/DB/SBU/b000795/YCS_LSYPE_Bulletin_final.pdf

[92] Guy Parckar (2008) *Disability Poverty in the UK*, Leonard Cheshire Disability

addressed. Indeed, although EC law already covers disability discrimination in the field of employment, disabled people face discrimination in other areas of life, such as education, access to goods and services, public transport, all of which directly affect their employment potential.

12. It is likely that the definitive text of the Equality Directive will be adapted after the Equality Bill has made its passage through Parliament. If the new obligations are not reflected in the Equality Bill, this will lead to amendments through regulations. This carries the risk that the aim of the Equality Bill (to simplify and harmonise anti-discrimination legislation) will be undermined. For this reason the Government needs to anticipate the EC Equality Directive in the Equality Bill, for example through extending the protection of the Equality Bill in goods, facilities, and services to people who have experienced discrimination or harassment because of association with a disabled person.

Priorities for the Equality Bill

13. Below we have outlined our priorities for the Equality Bill. They have been informed by our experiences, the Government's proposals, and recent developments in case-law.

Definition of Discrimination

14. Until recently, the Disability Discrimination Act 1995 as amended (DDA), had four broad concepts of discrimination:

- direct discrimination;
- disability-related discrimination;
- harassment; and
- failure of duty to make reasonable adjustment.

15. The concept of disability-related discrimination is unique compared to other strands in that it recognises that same treatment can work out unfairly for a disabled person because of the additional needs of that person or because society is not geared towards accommodating disabled people (universal design is still far off from being reality). It is not appropriate to compare with a non-disabled person in the same situation.

16. However, in June 2008, the House of Lords effectively reduced the definition of discrimination to three concepts and excluded disability-related discrimination. So in an example given by the House of Lords:

> A blind person with a guide dog enters a restaurant. The restaurant has a no-dogs policy, and the owner refuses to make an exception for the guide dog.
>
> *Before Malcolm:* the blind person is compared to a person without a dog. The person without a dog would not have been barred from the restaurant. Therefore less favourable treatment has taken place.
>
> *After Malcolm:* the blind person is compared to another person with a dog (not a guide dog). That person would also have been barred. Therefore no less favourable treatment has taken place (although there may still be failure of duty to make reasonable adjustment).

17. The decision has drastically diminished the rights of disabled people. As a consequence of the decision:

- disabled people have fewer remedies against unfair treatment (or none where the duty to make reasonable adjustment is restricted);
- organisations have less incentive to prevent barriers in policy development and implementation as well as in service design and delivery; and
- it will potentially marginalise human rights values of dignity and respect for the disabled person.

18. In addition, the current text of the draft EC Equality Directive requires member states to protect disabled people against indirect discrimination. On 18 November, Jonathan Shaw MP, the Minister for Disabled People, mentioned to the Joint Committee for Human Rights that the Government is considering using the introduction of indirect discrimination to challenge the *Malcolm* judgment.

19. Indirect discrimination would indeed be a powerful additional tool for combating practices which disproportionately disadvantage particular groups of people. However it relies on a like-for-like comparison between disabled people and others and is therefore not capable of resolving the gap left by *Malcolm*.

20. As Lord Brown states in the *Malcolm* judgment, the situations addressed by disability-related discrimination are highly individualised and a group comparison will often be difficult if not impossible to construct.

21. The only solution to *Malcolm* is to remove the requirement for a comparator and provide that:

> "a person discriminates against a disabled person where he carries out an act which disadvantages that person for a reason connected with their particular disability and which cannot be justified as being a proportionate means of achieving a legitimate aim".

Before this justification could apply the employer/service provider/landlord must have complied with the reasonable adjustment duty.

22. Further the Bill must make it clear that to establish disadvantageous treatment there is no need to show that the alleged discriminator knew about the individual's disability—although this issue might be relevant to the issue of justification.

23. We welcome the Government's proposals around the use of substantial disadvantage as a trigger for the duty to make a reasonable adjustment and to introduce an objective justification for disability-related discrimination (and not have one for direct discrimination, harassment or reasonable adjustment duty).

Association with a Disabled Person

24. The DDA does not protect people who experience discrimination or harassment because they are associated with a disabled person (for example, relatives, friends, carers). However, on 17 July the European Court of Justice decided that the EC Employment Equality Directive does cover these people and as a consequence the Government will now have to take steps to reflect this in national legislation.

25. We call upon the Government to use the Equality Bill to extend this protection across the full scope of disability discrimination legislation, and not to confine it to employment only.

26. There are pressing reasons for this. If the proposed EC Equality Directive is adapted, then it is likely that the ECJ will take the same approach to non-employment areas. Also there is evidence that people suffer discrimination and harassment because of association with a disabled person. While the disabled person may, in some cases, have a remedy, the other person will not (except for cases of victimisation).

27. We also ask that the Government revisits their decision not to cover "perceived disability" which is not explained in their response of July 2008.

28. It is imperative that volunteers are protected against unfair treatment especially in the light of the Government's proposals for "community service" and requirements for British Citizenship.

Education

29. When the DDA was introduced in 1995, education was a glaring omission from its scope. This was rectified in 2001 through the Special Education Needs and Disability Act (SENDA) 2001. There is evidence of a continuing need for protection of disabled children against discrimination in education. For instance, figures from 2006 show that disabled children are more likely to leave school with no qualifications (18% of disabled children compared with 4% of children who are not disabled).[93]

30. The Government has been silent about the protection of disabled children under the DDA (apart from their proposal to transfer disability discrimination school education cases in Scotland to the Additional Support Needs Tribunals for Scotland).

31. We are seeking clarification about what will happen to existing rights that specifically relate to disabled children, in the SENDA as well as in the DDA, but also the impact of the changes on, for example, admissions and exclusions. Once we have a better understanding of the plans, we would like to discuss our position with you.

Public Sector Equality Duty

32. The introduction of the Disability Equality Duty has stepped up the challenge for public authorities to eliminate discrimination and promote equality for disabled people. Not only should public authorities have due regard to the need to promote equality and to eliminate discrimination and harassment; they should also promote positive attitudes towards disabled people and encourage participation in public life. This is paramount for visibility and participation of disabled people in society and contributes to social cohesion.

33. We welcome a single public sector equality duty and we believe that it is possible as well as desirable to retain strand-specific duties, for instance the need to take into account disabled people's disabilities, even where that involves treating disabled people more favourably.

34. We have insisted that the new equality duty must be as effective (if not more) as the existing disability equality duties. We are encouraged that the Government in their response declares that the strengths of the existing general duties should be retained and built upon, however we do not see this reassurance reflected with regards to the specific duties.

[93] *Youth Cohort Study & Longitudinal Study of Young People in England: The activities and experiences of 16 year olds: England and Wales 2007*, Department for Education and Skills, http://www.dcsf.gov.uk/rsgateway/DB/SBU/b000795/YCS_LSYPE_Bulletin_final.pdf

35. We believe that there are five characteristics which contribute to the success of the Disability Equality Duty, and we urge the Government to retain these:

— mainstreaming of equality;
— proactive approach;
— transparency;
— accountability; and
— involvement of disabled people.

36. The disability equality duty extends to public authorities (and organisations carrying out public functions) only. However, inequality persists in the private and voluntary sector. Also in the light of the *Malcolm* decision, it may be easier for employers and housing providers (and perhaps others) to have discriminatory policies (regardless of whether a reasonable adjustment can or cannot be made). Hence, the need for a proactive approach to avoid barriers or to build in adjustments has become more pressing. This can be achieved in two ways:

— public procurement; and
— anticipatory duty to make adjustments across the scope of DDA.

37. A specific duty around public procurement would send out a clear and unequivocal message that public authorities can be held accountable if they have not taken steps to ensure that contracted services or publicly funded services are compliant with disability equality. This goes further than the Government's proposals which outline a light-touch approach through encouraging greater transparency and improving use of purchase power. We also believe it would benefit transparency of employment practices if it was made unlawful for employers to find out about disability in recruitment and selection where that is not relevant (similar to pregnancy-related questions).

38. The provisions with regards to the provision of goods, facilities and services, the exercise of a public function, the use of transport vehicles, private clubs and education, already contain an "anticipatory" duty to make adjustments which requires service providers and others to anticipate the needs of disabled persons. It would considerably advance disability equality if an anticipatory duty to make adjustments was introduced in relation to employment and occupation, qualifications bodies, and providers of housing.

Enforcement

39. Effective legislation requires effective enforcement. This will help it to act as a deterrent for (further) discriminatory acts. We want claims to be dealt with swiftly and with a minimum of stress and costs for all parties. So far, effective enforcement of the DDA has been limited because of the difficulties of bringing a case (particularly in non-employment areas) and because of the limited powers of courts and tribunals.

40. In fact, the very small number of discrimination claims brought when set-off against the substantial anecdotal evidence of discrimination in goods, facilities and services demonstrates that disabled people are not getting a fair deal in combating discrimination and not enough is being done to prevent discrimination.

41. We welcome the Government's proposals to improve enforcement, including raising awareness amongst the judiciary, an additional power for employment tribunals to order changes to policies, procedures and practice, and to make judgments accessible for the wider public.

42. However they do little to address the need for radical measures so that victims of disability discrimination can effectively challenge alleged acts of unlawful discrimination. The Government's rejection of the recommendation of the former equality commissions, the UK Review of Anti-Discrimination Legislation and the Parliamentary Scrutiny Committee on the Disability Discrimination Act 2005 for equality tribunals to hear services and education cases is deeply unfortunate and will hinder effective enforcement and redress.

43. We urge the Government to carry out a review of access to justice for disabled people, including legal aid and access to information and advice.

44. In addition, tribunals should be given the power to order reinstatement, children should be able to take cases in their own right (and not rely on their parent or even corporate parent which may be the alleged discriminator!), and the EHRC should be given a power to enforce SENDIST orders made by tribunals.

Department of Work and Pensions

45. The Department for Work and Pensions helps to overcome systematic barriers to social and economic inclusion, for instance through Access to Work, benefits, and tailored support. However, they will only succeed if they take full account of the barriers that exist for disabled people. For instance, people with learning disabilities remain the most excluded group of disabled people from the UK work force, with an estimated employment rate of 17%[94] compared with 49% of disabled people as a whole. However, 65% of people with a learning disability would like to work.[95] The level of discrimination that exists, and which is beyond the control of the disabled person, needs to be reflected in the Welfare to Work strategy.

[94] Eric Emerson and Chris Hatton (May 2008) *People with a learning disabilities in England*, Centre for Disability Research
[95] Eric Emerson (2005) *Adults with learning difficulties In England*, Lancaster University

46. There is no doubt that the DDA has brought about a shift in the attitudes of some employers, and that they are making genuine efforts to build a diverse workforce that also includes disabled people as well as serving a broad customer base. However, too few employers have shown to actively engage with the equality issues, and we would like the government to take action to encourage employers to employ and to retain disabled people.

47. Access to Work is an important programme in that it helps to realise equality of opportunity for disabled people in employment. We welcome the announcement that the budget will be doubled by 2013 and that more people will be eligible for support. This needs to go hand-in-hand with an awareness raising campaign run by DWP, amongst disabled people as well as amongst employers, particularly smaller businesses.

48. Access to Work needs to be expanded to include support for people with fluctuating conditions. It should also be able to provide support in the form of temporary staff cover, for instance for someone with a fluctuating mental health condition who needs time off. This would reduce the employer's anxiety about taking on someone who might require above-average sickness leave—just as support to install a lift removes an employer's anxiety about the costs of employing someone requiring major access improvements.

49. We would welcome a stronger entitlement to Access to Work. The introduction of the Employment and Support Allowance allows for the opportunity at an early stage for all claimants to have a basic Access to Work assessment as part of their Action Plan, say at the point of the first mandatory Work-Focused Interview.

50. We believe that Access to Work could be extended to support disabled people's access to work experience and to volunteering—both vital tools to increase employment chances as well as encourage social inclusion and cohesion.

51. We are concerned about the withdrawal of Access to Work funding from the public sector as this may put support for disabled people at risk. This would undermine the equality objective of creating a level-playing field. Access to Work provides disabled people with an independent assessment of their needs, and with choice and control of their support (as far as the budget allows). It obviates the need for budget considerations by an employer in terms of making reasonable adjustments. Anecdotal evidence suggests that the overall impact of the policy is detrimental. The Institute of Employment Studies is currently evaluating the Access to Work programme, and in particular the impact of the withdrawal of Access to Work from central government departments. It would be premature to anticipate the findings; however we look forward to an opportunity to discuss the impact of the policy in more detail at a future time.

Monitoring

52. We believe that monitoring the implementation of the DDA (in future the Equality Act) is an important tool to inform strategies and policies. We would say that this is a key function for the Equality and Human Rights Commission (EHRC) and the Office for Disability Issues (ODI). In this context we urge the EHRC to engage more with the disability community. For instance they need to improve their approachability as the numbers of calls to their Helpline compared to the DRC's helpline have dropped significantly.

53. The *Monitoring the Disability Discrimination Act* research[96] provided a strong evidence base to help identify barriers around the implementation of the Disability Discrimination Act, and to inform action to make it easier for disabled people to challenge discrimination. We would like the ODI and the EHRC to continue this type of research.

November 2008

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10. Memorandum submitted by Help the Aged and Age Concern

Help the Aged and Age Concern are pleased to have this opportunity to submit joint evidence to the Work and Pensions Committee on:

- Equality in Employment.
- Equality in Goods, Facilities and Services.
- The Public Sector Equality Duty.
- Private Sector commitment and support, guidance, advice and information for employers.
- Single Equality Act.

[96] Meager N, Doyle B, Evans C, Kersley B, Williams M, O'Regan S, Tackey ND (May 1999) *Monitoring the Disability Discrimination Act (DDA) 1995*, DfEE Research Report RR119; Sarah Leverton (February 2002) *Monitoring the Disability Discrimination Act (DDA) 1995*, Phase II, DWP In-house Report 91; Hurstfield J, Meager N, Aston J, Davies J, Mann K, Mitchell H, O'Regan S, Sinclair A (February 2004) *Monitoring the Disability Discrimination Act (DDA) 1995: Phase 3*, Department for Work and Pensions and Disability Rights Commission.

1. Executive Summary

1.1 Age discrimination legislation is yet to bring real changes in older people's experiences of finding work. It has to be accepted that attitudinal change will take time, but inconsistencies in the legislation, and in the approach to other areas, send out the wrong messages about encouraging employers to change their attitudes towards older people. In particular mandatory retirement ages leave a gaping hole in legislation for age equality in employment.

1.2 The DWP should be doing significantly more to champion age equality in employment and must use its role as Government lead on age equality, and lead department on extending working lives to bring an end to Mandatory Retirement Ages.

1.3 The DWP must use its role as Government lead on age equality to champion the place of age within the forthcoming Equality Bill and to ensure that robust measures to ban age discrimination in the provision of goods, facilities and services are brought forward without delay.

1.4 We welcome the inclusion of age in a proposed single Public Sector Duty. The DWP should draw on the lessons learnt from the existing equality duties—and particularly the disability equality duty—to ensure that the duty is effective in tackling institutional ageism.

1.5 Help the Aged and Age Concern welcome the Government's planned Equality Bill and believe that this represents an opportunity to make significant developments in advancing towards equality for older people. We are, however, concerned that during the process of getting from the Draft Legislative Programme to a draft Bill some of the ambition that surrounded this project is being lost, and we are concerned that there is a risk that the end product may fall short of realising the full opportunity that this Bill presents.

1.6 Help the Aged and Age Concern are concerned that age is frequently seen as the poor relation of the equality strands. It is important that age equality, a key element of the Government's Equality Bill is fully examined as part of the Committee's inquiry. It is vital that the DWP is scrutinised as they hold cross departmental responsibility for work on age discrimination and there is a tendency within the Department to place insufficient emphasis on the important role of championing age issues in its contributions to Equality debates.

1.7 Help the Aged and Age Concern are delighted that the Government recently announced that the Equality Bill would include vital measures to ban age discrimination outside the workplace. At present age discrimination remains legal outside the workplace, leaving many older people vulnerable to being treated as second class citizens by public and private sector services.

1.8 Whilst we were delighted by this announcement, we were concerned that the bulk of the legislation on age would be introduced through secondary legislation—risking the possibility that older people would face further delays in securing rights to fair and equal citizenship. These concerns seem now to be being borne out, as a recent Written Ministerial Statement issued by Phil Hope MP on *Age discrimination in health and social care*, setting out the timetable for drafting regulations to enact anti-age discrimination legislation in health defines a programme of advisory groups taking over 18 months to complete, only after which would regulations be drafted and consultation undertaken.[97] We believe that this sends out entirely the wrong message about the importance of age discrimination. It is vital that DWP uses its leading role on age to seek to ensure that the Government delivers fully on its manifesto commitment to an integrated equality bill within the lifetime of this Parliament.

2. *How effective has DWP been in achieving equality in employment, how would it have to change to achieve greater equality in employment?*

2.1 Age Concern and Help the Aged believe that it is clear that there is still a long way to go before age equality is realised in employment. This is despite, and in part because of, the introduction of the Employment Equality (Age) Regulations 2006 (the Regulations).

2.2 The Regulations were introduced to transpose Directive 2000/78/EC into domestic legislation. The UK Government waited until the latest possible date allowable under EU law to bring in the legislation, and then did so in what we believe to be an unacceptably watered down format.

2.3 In particular we were disappointed that the Government, under heavy lobbying from some elements of the business community, decided to continue to allow companies to retire people at or after the age of 65. We believe that the exemption in Regulation 30 allowing enforced retirement at the age of 65 is unjustifiable discrimination, contrary to fundamental human rights and principles of equality. This provision effectively allows employers to legitimately dismiss their employees at or after the age of 65 years on the grounds of their age, provided they comply with the correct procedure. We believe it is incompatible with the Directive. It is vitally important that Regulation 30 of the Regulations is removed.

2.4 The National Council on Ageing, which operates under the names Age Concern and Heyday, with support from Help the Aged and others, has brought a legal challenge to the Age Regulations, arguing that by introducing a national default retirement age the Government has failed to transpose correctly the 2000

[97] *Hansard* HC vol 482 cols 46–48WS (11 November 2008)

European Equal Treatment Directive. Several questions about the correct interpretation of this Directive have been referred to the European Court of Justice, whose judgment is pending.[98] The case will then return to the High Court.

2.5 The Government has committed to reviewing this provision in 2011 but, for many older people who wish to work past 65 years, this is too late. Age Concern and Help the Aged believe that all workers, irrespective of their age, should be allowed to continue to work for as long as they are able or wish to. Indeed, with an ever increasing ageing population and skills shortages reported across the country, this is likely to be an economic necessity. A century ago only one in 20 people were over 65 years; today one in six are over 65 years.[99] In the next 10 years, the population of over 65s will increase by 15%, and the population of over 85s by 27%.[100] In the next 20 years, the number of people aged 85 years and over in England is set to increase by two-thirds, compared with a 10% growth in the overall population.[101] By 2041, more than 20 million people will be over 60 years; that equates to 37% of the population.[102]

2.6 It is clear that older people want to work but are effectively prevented from doing so because of Regulation 30. More than a million 50–65 year olds who want to work can't get a job because of barriers to retaining or recruiting older staff. Only a third of those who retire early do so entirely voluntarily.[103]

2.7 We believe that chronological age is not a proxy for capability. We would support the use of capability procedures that assess an individual's capability on the basis of job performance, and not age.

2.8 An unintended consequence of the Age Regulations has been the forced retirement at age 65 of employees who would have been able to continue working beyond that age had the legislation not been introduced. According to a 2006 DWP survey conducted to establish the effects of the forthcoming legislation, 57% of establishments had no compulsory retirement age but many have introduced one since the Regulations came into force.[104]

2.9 Additionally, a mandatory retirement age creates a barrier to opportunities for selection, promotion, training and job mobility for people in their late 50s and early 60s. A "fixed" point at which individuals can be asked to retire inevitably influences employer decisions about their personal development and opportunities in the years leading up to it.

2.10 Many older people want to continue to work:

- A study of people in their 50s and 60s who were still working revealed that 58% said that they wanted to carry on after 65 and 10% did not want to retire at all.[105]
- In another survey Berwin Leighton Paisner questioned more than 50 private and public organisations, with a combined staff of almost 80,000, to find out the impact of the current Age Regulations. More than 40% of employers had received requests from employees to work past retirement age.[106]

2.11 A survey carried out by The Age and Employment Network found:

- 89% of respondents were aware that there was legislation covering age discrimination in employment.
- Only 63% of people claimed that they understood roughly what the age discrimination legislation said and the rights that it gave them.
- Just 13% of people agreed that age discrimination legislation had helped older people find work.
- 38% of respondents had experienced age discrimination in the workplace.[107]
- 50% had experienced age discrimination in seeking employment.

It is clear that far more needs to be done to stamp out age discrimination in the workplace.

2.12 Older jobseekers believe that employers' perceptions play a significant part in the difficulties that they face in getting work. For instance, 63% thought that they were seen as too old by employers and 42% though that they were seen as too experienced or over-qualified.[108] Additional barriers faced by older jobseekers include a history of self-employment and modern recruitment practices indirectly discriminating against them.

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[98] *R (Incorporated Trustees of the National Council on Aging) (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2007] EWHC 3090 (Admin); Also see Case C-388/07

[99] Healthcare Commission, the Commission for Social Care Inspection and the Audit Commission, *Living well in later life: a review of progress against the National Service Framework for Older People* (March 2006).

[100] Taken from the Mental Health Foundation website, 22 July 2005

[101] D Wanless, *Securing good care for older people*, Kings Fund, London (2006), figures from Government Actuary (2004)

[102] Age Concern, *How Ageist is Britain?* (2005) and *Ageism: A benchmark of public attitudes in Britain* (2006)

[103] TUC, *Ready, Willing and Able* (2006)

[104] Survey of employers' policies, practices and preferences relating to age, DWP, 2006

[105] Age Concern, *Have Your Say*, survey in Heyday (2006), reported in the Equalities Review (2007)

[106] Survey reported in the *Financial Times*, 28 June 2007

[107] The Age and Employment Network, *Survey of Jobseekers Aged 50+* (2008)

[108] TAEN, *Survey of Jobseekers*

2.13 There is still a long way to go before equality of earnings is achieved for older people. In the UK in 2007, full-time workers aged 50–59 earned on average (median) 6.5% less per hour than full-time workers aged 40–49, while those aged 60-plus earned an average of 20.1% less.[109]

2.14 DWP is ideally placed to play a leading role in championing older people's employment rights, particularly by encouraging other departments across government to ensure that not only are they not discriminating against older people in recruitment and retention, but that they are encouraging older people to apply for vacancies and to develop within government departments. Taking the lead in this way will provide an example for private sector employers to follow.

2.15 Age Concern and Help the Aged were pleased to note that in 2007 the employment gap between younger and older workers had reduced by 0.8 percentage points from 2006, to a level of 2.7%.[110] We are, however, concerned that more needs to be done in this area and we are particularly worried that the current difficulties in the economic climate may lead to the employment gap between younger and older workers starting to rise again. In previous recessions, older workers have been the first to be laid off and have found it harder to return to the workplace than their younger colleagues.

3. *How can the Equality Bill open up opportunities in employment, particularly for disabled people, carers and pensioners?*

3.1 The Equality Bill can open up opportunities for carers by enshrining the protection given to them by Coleman in domestic legislation and by leading to the development of guidance for employers from DWP or BERR.

3.2 It is clear that volunteering can act as a pathway to employment and open up opportunities in the job market. However, many older people are prevented from participating in volunteering activities.

3.3 We believe that volunteering opportunities should be treated as a "facility" in legislation outlawing age discrimination in the arena of goods, facilities and services. This would ensure that older people were not excluded from volunteering positions on grounds of their age alone.

3.4 Older people make up 74% of the volunteer workforce in health and social services, the main areas in which voluntary organisations are involved,[111] with around four and a half million over the age of 50 engaged in formal volunteering through groups, clubs and associations.[112]

3.5 In 1998 one fifth of volunteering organisations admitted using upper age limits, whilst many others are thought to dismiss individual volunteers without good reason.[113] Similar research carried out in 2006 showed that 7% still had an upper age limit for their volunteers.[114]

3.6 Arbitrary age limits for the retirement and recruitment of volunteers are clearly discriminatory and should be abolished. Individuals should be assessed on the basis of their capability and performance, not their age.

3.7 The benefits of legislation to outlaw upper and lower age limits to volunteering are clear: it was estimated that the value of unpaid work contributed to the economy by older volunteers (formal and informal) in 2001 was approximately £5 billion a year.[115] This figure would only increase if arbitrary age limits were removed. Individually, older people would also greatly benefit from the increased activity, both physically and mentally, as well as developing their skills and actively participating in society.[116]

3.8 According to research carried out by Age Concern, there would be no additional liability insurance costs to organisations in retaining older volunteers.[117]

4. *How should the Equality Bill respond to the decision in the Malcolm case in respect of disability rights in employment?*

4.1 It is clear that many older people who have disabilities will be adversely affected by the House of Lords decision in the *Malcolm* case, which has had a profoundly damaging impact on the effectiveness of the Disability Discrimination Act and will make it far harder for people with disabilities to succeed with claims or in using the DDA as a defence. The House of Lords held by a majority that the correct approach to the legislation was to compare treatment of a disabled person to the treatment of a non-disabled person

[109] Office for National Statistics, *Annual Survey of Hours and Earnings 2007 Results (Table 6.6a)* (2007)
[110] *Opportunity for All Indicators Update (Indicator 19: Indicators for People of Working Age),* Department for Work and Pensions (2007)
[111] C Rochester and B Thomas (2006), in M Lee on behalf of the Inquiry Board, *Improving services and support for older people with mental health problems*, the second report form the UK inquiry into mental health and well-being in later life, published by Age Concern England (August 2007).
[112] Age Concern, *Age of equality? Outlawing age discrimination beyond the workplace* (2007).
[113] National Centre for Volunteering, *Issues in Volunteering Management: a report of a survey* (1998)
[114] Rochester and Thomas, *The indispensable backbone of voluntary action* Volunteering in the Third Age (2006).
[115] Age Concern, *The Economy and Older People* (2004)
[116] See for example M Lee on behalf of the Inquiry Board, *Improving services and support for older people with mental health problems*, the second report form the UK inquiry into mental health and well-being in later life, published by Age Concern England (August 2007)
[117] See Age Concern, *Age of equality? Outlawing age discrimination beyond the workplace* (2007)

in the same situation. Thus, the correct comparator in *Malcolm* should have been a non-disabled tenant who had also illegally sublet their home. The decision also overturns existing caselaw in the field of employment; for example, if someone were to be dismissed because of long-term absence from work, the correct comparator would be whether the employer would have dismissed a non-disabled person who was also absent from work. We urge the government to use the opportunity presented by the Equality Bill to amend the DDA in order to restore the previous legal interpretation of this provision.

5. *How should the Government improve protection of carers in equality legislation, following the decision in the Coleman case?*

5.1 The ECJ has recently confirmed in Coleman that EU law on workplace discrimination protects those who have been discriminated against on grounds of their association with someone who is disabled.[118] It follows that discrimination on grounds of association with someone who is of a particular religion, belief, age or sexual orientation is also prohibited by EU law. This ruling gives employment rights to carers of people with disabilities, but it equally follows that those caring for elderly people will also be protected. Help the Aged and Age Concern believe it is important to enshrine this clarification of European law on the face of domestic legislation, and would urge the Government to include similar protection in the age discrimination provisions in the Equality Bill and would urge the Work and Pensions Committee to recommend that the draft Bill reflects this need.

5.2 Research shows that carers are most likely to be caring for older people.[119] The General Household Survey indicated that 70% of those cared for are 65 years or over.[120] Including provisions on association with respect to age would avoid the need for a carer to demonstrate that the older person being cared for was DDA disabled.

5.3 Furthermore, the peak age for caring is between 55 and 59, when one in four people is a carer. Approximately a third of the 5.7 million UK carers are aged over 65; over 340,000 of this group provide 50 hours or more of unpaid care per week.[121] So, carers are more likely to be found in older cohorts of workers than among younger people.[122] Carers are more likely to give up work early in order to care and this is particularly true of workers just before retirement.[123] Because of the age profile, if a carer gives up work to care, they find it harder to return to work after a period of caring because of gaps in their CV. Many feel that employers will not want them because they are too old.[124]

5.4 Therefore, older carers are more likely to suffer multiple disadvantage—on grounds of their own age and because of their association with older people. We believe that such people should have legal protection against discrimination on both grounds.

5.5 According to research by Carers UK, carers can be teased, treated differently, or bullied by others because someone that they care for has a disability or chronic illness, highlighting the need for discrimination by association for disability.

5.6 Many older carers support spouses with dementia, and intensive caring places carers at significantly higher risk of experiencing poor mental health;[125] a third of people who provide unpaid care for an older person with dementia have depression,[126] which means that carers are also at an increased risk of suffering direct and associated disability discrimination.

6. *How could the duties in Goods, Facilities and Services of the DDA be built on to deliver systemic change?*

6.1 These duties should be transferred into the new Equality Bill so that there is a single unified duty covering all of the discrimination strands. We believe that it is particularly important that this covers age and we are pleased that the Government has indicated that this will be the case. This then presents a golden opportunity to deliver tremendous change across society. It is vital that this opportunity is not lost.

[118] Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27
[119] Census 2001, Office for National Statistics
[120] Maher J and Green H, *Carers 2000*, Office for National Statistics, Stationary Office, London (2002)
[121] Age Concern, *The Age Agenda 2005: public policy and older people,* England: Age Concern Reports (2005)
[122] Census 2001, Office for National Statistics
[123] Carers UK 2006, *Who Cares Wins: the social and business benefits of supporting working carers*, statistical analysis: evidence from the Census. See also, *Real Change not Short Change*, Carers UK, 2007
[124] Carers UK 2007
[125] Office of National Statistics—Population Trends (2005) (ONS: London)
[126] M Lee on behalf of the Inquiry Board, *Improving services and support for older people with mental health problems*, the second report from the UK inquiry into mental health and well-being in later life, published by Age Concern England (August 2007)

7. *What is the draft EU Directive in GFS proposing and what are the implications for transposition of a new EU Directive for UK law?*

7.1 Age Concern and Help the Aged have welcomed the European Commission's publication of a draft framework directive on equality outside of the workplace,[127] which would prohibit discrimination in the provision of goods, facilities and services across the four strands not currently covered by EU legislation, including age. At this stage it is not clear what support there will be for such a directive, or what form it might ultimately take but both our organisations are concerned to support this initiative. It would further the EU goal of equal treatment and would complement existing protection against age discrimination in employment and training. An EU level initiative would also help promote competition and efficiency in financial services and support reciprocal arrangements in healthcare.

7.2 We are concerned, given the likely lengthy timescale for approval of any Directive, that it would not be acceptable to delay the Equality Bill while the Directive is finalised. We do believe that this proposed European measure demonstrates that there is a pressing need for legislation prohibiting discrimination and promoting equality.

8. *Is the draft EU directive welcomed?*

8.1 As stated above, Age Concern and Help the Aged warmly welcome moves to extend the prohibition on age discrimination in the provision of goods, facilities and services at EU level. We believe it makes sense to develop a unified approach to equality issues across all strands and throughout member states.

9. *Does the Equality Bill incorporate the provisions of the draft directive?*

9.1 Until the text of a draft Bill is produced it is impossible to be certain whether it will incorporate the provisions of the draft directive. However at this stage it appears as if both the Equality Bill and the Draft Directive are moving in similar directions.

10. *How can it be made easier for disabled people, carers and pensioners to bring and pursue cases in GFS?*

10.1 Claims under current discrimination legislation relating to goods, facilities and services are generally brought through the County Court. At present awareness of, and access to legal redress on goods, facilities and services issues are very low, including amongst older people. Clearly until legislation on age discrimination is in place, older people would not be able to pursue cases of discrimination on the grounds of age, but may be able to achieve some improvements in their circumstances using the Disability Discrimination Act.

10.2 Access to the County Court is currently hampered by the size of court fees, the risk of adverse costs orders and the relative complexity of the Civil Procedure Rules. There has been some debate as to whether the Employment Tribunal should extend its jurisdiction to goods and services cases, a proposal which has both advantages and disadvantages. However, if the County Court retains responsibility for goods and services cases, we think it would be possible make radical improvements to the way that these cases are handled. For example, it would be possible to provide specialist training to a small number of County Court judges. It would also be possible to establish a circuit system, with "ticketed" discrimination judges covering on a rota several County Courts in one region. The Ministry of Justice and the Court Service could also consider allowing goods and services claims to be handled under the County Court small claims track, to a maximum value of (say) £50,000. This would provide access to a faster and less formal procedure and limit the parties' exposure to costs.

10.3 Age Concern and Help the Aged also believe that the problem of County Court fees must be addressed. We are opposed to the Government's "full cost recovery" policy for the court fee scheme, which ignores the role of the courts in delivering public justice and the deterrent effect of high fees on people with low incomes. In any event, the Court Service should recognise the social value of providing effective access to justice for victims of discrimination cases by reducing the fees for these claims. The central starting point for Government policy decisions on this question is that there should be effective access to justice for victims of discrimination. The UK has ratified the International Covenant on Civil and Political Rights, which states (Article 26) "… The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, religion, political or other opinion, national or social origin, property, birth, or other status".

10.4 We also wish to raise serious concerns about the severe limitations in the availability of legal aid for advice and representation on discrimination law. This cannot be ignored as a key factor in the low number of goods and services cases being brought in the County Court. The Legal Services Commission is a powerful gatekeeper to the justice system, and there are widespread concerns about its current system of fixed fees and proposals for market-based reforms to civil legal. We urge the Government to review the impact of these ill-considered reforms at the earliest opportunity.

[127] Commission (EC), *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation* COM (2008) 426 final, 7 July 2008

10.5 We believe older people have been less likely to use disability legislation to seek redress as a result of an artificial dividing line which is often drawn between younger disabled people and people who have age related disabilities.

10.6 The Equality and Human Rights Commission can play a key role in communicating effectively to older people about the definition of disability under the DDA and how it might be used by older people.

10.7 The DWP should also seek to draw its workstream on disabled people and older people more closely together in order to improve understanding.

11. Should discrimination by association extend to GFS?

11.1 Yes. For example, Age Concern and Help the Aged believe that the discussion on carers in response to above applies to discrimination in goods, facilities and services.

12. *What are the implications of the Malcolm case and how should the Equality Bill take these into account?*

12.1 Help the Aged and Age Concern believe that the Equality Bill will need to clarify exactly what is meant by the phrase "a reason that relates to" in the Disability Discrimination Act.

12.2 We are particularly concerned that the harsh results of this judgment for a blind person reliant on a guide dog can not possibly be viewed as fair. Lord Scott of Foscote believes that it is acceptable for a restaurant to refuse entry to a blind person accompanied by a guide dog, because "[t]he problem was the dog". Therefore, "[i]f he is refused entry it is not because he is blind but because he is accompanied by a dog and is not prepared to leave his dog outside".[128] With respect, this can not be right. It is not that the blind man is not prepared to leave his dog outside. It is that he is unable to do so. The suggestion that, at some level, it is the blind man's attitude that is to blame seems at odds with the intent behind the various pieces of equality legislation.

13. How could a Disability Equality Duty in the public sector be built upon within a Single Equality Duty?

13.1 Help the Aged and Age Concern recognise that in many respects disability is a special case compared to the other discrimination strands and that it cannot be treated as identical to them. However, we believe that a Single Equality Duty within the Equality Bill represents the way forward as it is the best method to ensure protection against multiple discrimination for disabled people. In this respect it is important that age is included in any Single Equality Duty.

13.2 It is, of course, essential that the Equality Bill is not taken as an opportunity to roll back the gains that have been made towards equality for disabled people, or to in any way reduce the extent of the Disability Equality Duty.

13.3 We believe that a clear statement of the purpose of a single public sector duty would give direction to public sector duty provisions, and would greatly assist with clarification, application and interpretation of the duty. We would also support the use of a purpose clause within the Equality Bill itself. A purpose clause would greatly aid public understanding of the legislation and have an educative role by providing an important statement of basic principles.

13.4 We believe that a purpose clause is necessary because discrimination law is complex and contains many specific provisions and exceptions, as well as giving rise to many issues of principle, leading to the necessity of clarity and guidance on underpinning principles.

13.5 A purpose clause would serve as useful guidance for courts, tribunals and anyone else dealing with the legislation as to how it should be applied and interpreted, helping to ensure consistent judicial interpretation and decisions, which in turn would lead to greater legal certainty.

13.6 The purpose clause would help to supply context for interpretation and application of the specific provisions of the Act, setting out the essential purpose, guiding principles and overall objectives, without overriding more specific legislative provisions.

13.7 A purpose clause should set out the objectives of: preventing discrimination, ensuring equality of opportunity, recognising different treatment to achieve equality in practice, tackling disadvantage, social exclusion and systematic discrimination. It should state the underlying purpose of such legislation in protecting human dignity, recognise the intention of the legislation to provide effective remedies and draw attention to the role discrimination law plays in helping to maintain good relations between different groups.

[128] *London Borough of Lewisham v Malcolm* [2008] UKHL 43 [35]

14. Is a Single Duty desirable?

14.1 Yes. Such a duty is not just desirable, but it is also necessary to ensure parity of protection and access to justice. Discrimination laws are not enough. An integrated duty will also deliver efficiency gains for public bodies. In view of the fact that positive duties can have a "profound bearing on the life chances of disadvantaged groups"[129] we think that the benefits far outweigh the anticipated costs (as set out in the DCLG Impact Assessment) and act as a way of properly responding to an increasingly diverse society.

14.2 Help the Aged and Age Concern believe that it is just and equitable to extend public sector equality duties to all equality strands. Current inconsistencies between the equalities laws for different equality strands heighten the risk that, due to this fragmentation, individuals will be unable to understand, and so secure, their rights in full.

14.3 We believe that proactive consideration of age issues through a public sector equality duty for age would encourage recognition and eradication of ageism and age discrimination, without the need for litigation, and promotion of age equality and human rights.

14.4 We know from experience of other equalities legislation that individual legal rights to challenge potentially discriminatory practices are not sufficient to bring about equality in practice. Whilst discrimination laws help to secure equal treatment, equality of opportunity is a much wider concept which goes beyond treating everyone equally and includes taking proactive steps to combat entrenched disadvantages and recognising every individual's diversity.

14.5 Indeed, the public sector equality duty was introduced because it was recognised that anti-discrimination legislation was not sufficiently effective to shift entrenched and institutional inequalities for race, gender and disability. However, without an extension of the duty to cover the other equality strands, older people would be left without any legal protection against discrimination outside of the workplace since anti-discrimination legislation relating to goods, facilities and services does not currently exist for age.

14.6 We would also welcome inclusion of the additional general duties for disability in an integrated single duty (ie the duty to have due regard to the need to eliminate harassment that is related to a protected characteristic, promote positive attitudes towards each protected group and encourage participation by each protected group in public life).

14.7 We believe that the existing equality duties should be harmonised to include and reflect the best aspects of the current race, disability and gender duties, and extended to cover all equality strands. We support the use of a model akin to the disability equality duty, which was "… designed to reflect experience with the race equality duty by having greater focus on the equality outcomes to be achieved and being less prescriptive about the processes to be followed".[130] However, we feel that appropriate safeguards must be put into place to ensure that the issues specific to each of the equality strands are not marginalised.

14.8 An integrated duty (covering age) would also have the potential to tackle multiple discrimination, for example, particular disadvantage faced by older, disabled people such as lack of flexible transport concessions; or lesbian and gay older people, such as lack of provision for same sex couples in care. We believe that an integrated positive duty would be the most effective way of supporting and achieving equality for older people, whilst minimising the costs and administrative burdens placed on public bodies.

14.9 Due to changing demographics and life course patterns people are in education for longer, marrying and starting families later, getting mortgages later, have less in savings and lower pensions. Therefore, working lives need to extend in order to generate increased income, through labour and taxes, to support people in older age. A public sector equality duty for age could encourage longer working life amongst employees of public authorities and those who work for privately owned companies that provide public services, which in turn would help to support the economy and provide increased autonomy to older people. As noted in the Discrimination Law Review green paper: "… many public authorities are major employers—the NHS, for example, is the world's third largest employer—so their employment policies can have a significant effect on participation in and experience of the labour market".[131] To give this effect we suggest that the duty could include a "forward looking" requirement to plan for a changing population, for example with respect to demographic ageing.

[129] DLR Green Paper [5.1]
[130] *Discrimination Law Review—A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (2007) [5.16]
[131] DLR Green Paper [5.25]

15. *Has the Disability Equality Duty been effective in promoting equality in the public sector, including local government?*

15.1 Help the Aged and Age Concern believe that specialist interest groups with more expertise in disability equality will be better placed to focus on the Disability Equality Duty. We believe that there is a clear need for an Equality Duty that includes age.

15.2 Where public sector equality duties covering age exist, research suggests that this has led to increased dialogue with older people, a focus on those issues which affect them most directly and growing evidence of improved outcomes.[132] For example, in Northern Ireland the positive equality duty for age has:

- Provided "groundbreaking protection against age discrimination".
- Raised the profile of age issues.
- Brought together older people's organisations and facilitated working across strands.
- Positively influenced the culture of public authorities and encouraged them to take a joined-up approach to equality.
- Raised the issue of multiple identities.[133]

15.3 Help the Aged and Age Concern believe that consideration should be given to replicating the duties to promote positive attitudes towards disabled people and to encourage participation by disabled people in public life for older people.[134] There is ample evidence that ageist attitudes pervade many sections of society. For instance one in three respondents to a survey viewed the over 70s as incompetent and incapable.[135] 45% of over-65s believe that once you reach very old age people tend to treat you like a child.[136] It is important that more work is done to change these attitudes.

16. *What is the evidence in the DWP Secretary of State's report on the success of the Duty in his department?*

16.1 As the Secretary of State is only required to report on progress made in relation to disability equality[137] Help the Aged and Age Concern defer to those special interest groups with more expertise in this field. However, we believe that one consequence of the Equality Bill should be that the Secretary of State should be required to report on progress in relation to age equality.

17. *How does the Department fare in promoting equality and tackling discrimination?*

17.1 We believe that the DWP has yet to really make its mark within Government as proactive champion for age equality issues, such that its role as Government lead on age equality is little recognised particularly in comparison to its prominence on disability issues.

18. *How could procurement be made a more effective lever for equality outcomes?*

18.1 We believe that there is a great need for clarity on the face of the legislation that the public sector equality duties apply to the procurement functions of public authorities. Indeed, the confusion that currently surrounds the definition of "public functions" within the Human Rights Act 1998 demonstrates the need for clarity within the legislation on this issue. In this context, we welcome the initiative of the Office of Government Commerce in clarifying the legal position in relation to procurement.

18.2 Whilst we would welcome: "clearer, consistent and practical guidance on the legal and policy framework and the ways in which equality can be factored into the various stages of the procurement process, together with case studies and examples of good practice",[138] we do not think that this alone will be enough.

18.3 We endorse the view of the Equalities Review: "the Government has so far failed to do enough to ensure that an equalities dimension is part of the public sector's procurement or commissioning decisions. The public sector spends billions of pounds a year on procurement … The Panel believes that public agencies should require suppliers to adopt the same principles under which they themselves are required to operate."[139] Further, that there is "scope for doing more" but "little clarity" exists amongst procurement and commissioning professionals about what can or should be done.

[132] C O'Cinnedie, *Taking Equal Opportunities Seriously: the extension of positive duties to promote equality*, for the Equality and Diversity Forum (2004)
[133] Age Concern, *Tackling Age Discrimination Beyond the Workplace: Age Concern Seminar Series* (July 2006); See also, Age Concern, *Age of equality? Outlawing age discrimination beyond the workplace* (May 2007)
[134] Disability Discrimination Act 1995, ss. 49A(1)(e)–(f)
[135] Age Concern, *How Ageist is Britain?* (2005)
[136] Spotlight Survey 2008, ICM Research for Help the Aged (2008)
[137] By virtue of Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 (SI 2005/2966), Reg 5
[138] DLR Green Paper [5.99]
[139] The Equalities Review *Fairness and Freedom: The Final Report of the Equalities Review* (2007)

18.4 Given the acknowledged importance of procurement as a lever for promoting equality in the private and voluntary sectors, and the fact that the public sector procures £125 billion worth of goods and services annually,[140] we feel that there is a clear need for stronger, clearer and more enforceable legislation.

18.5 However, we believe that obligations regarding procurement should be stated within the general duty (as an additional part of the duty), and that there should not be a specific duty on procurement. Regulations to assist public bodies to comply with this element of the duty are also necessary to ensure that all public bodies embed equality into the procurement process.

19. *How can guidance on procurement improve at EU and national level to make procurement a more effective lever for equality outcomes?*

19.1 There is already a considerable amount of guidance on this issue and, as stated above, we welcome the recent attempts by the Office of Government Commerce to clarify the law. However, uncertainty on entitlement and obligation remains; experience has shown us that guidance has limited effect if the law is unclear, and we must now look to the legislation (as well as statutory guidance) to ensure that public bodies are clear about their entitlements and obligations in this regard, which will in turn promote consistent practice.

20. *Is an Equality Duty on the Private Sector workable?*

20.1 Age Concern and Help the Aged would welcome the introduction of a voluntary "equality standard" for the private sector, covering all six strands. We recognise that placing a statutory Equality Duty on the Private Sector may encounter some difficulties, but we believe that it should be maintained as an option if a voluntary standard, backed by effective procurement policies, prove ineffective.

20.2 We believe that many private organisations are already implementing policies which mirror the current public sector equality duties, and so making such duties a legal requirement for the private sector would ensure a more level playing field; such that those who chose not to implement best practice are not placed at a competitive advantage from doing so.[141] Indeed, the CBI has reported that some public authorities adopt a "lowest cost mentality" when awarding contracts, regardless of equalities criteria.[142] And that: "Public bodies have considerable spending clout, and employers believe that procurement could be a highly effective tool for encouraging equality, as long as contracts focus on results and not box ticking". We agree.

20.3 Furthermore, without the extension of positive duties to the private sector there will be a two tier system, where public sector employees are more likely to have equal opportunities and less likely to be discriminated against in practice because of the mechanisms accompanying positive duties.[143]

20.4 The need for parity of opportunity in the private sector as well as the public sector is underlined by the fact that it provides approximately 80% of all employment opportunities in the UK.[144]

20.5 We believe that extending positive duties to the private sector, whether through voluntary measures or a statutory scheme, would be an important step towards making workforces more representative of the entire population and help to address under-representation of sectors of the population in senior jobs, professions and sectors, as well as tackling inequality in pay and employment.

21. *What can be done in the realm of light-touch regulations, guidance and advice to promote a culture change in the private sector for all those subject to discrimination?*

21.1 There are already a number of schemes in place to support employers to work more effectively on age including the DWP's own *Age Positive* scheme, the Employers Forum on Age and others. Additionally Help the Aged works with a network of private sector organisations in its *Engage* network. We believe Kitemarking and other schemes have a role to play in encouraging good practice, but work best alongside legislation to establish the baseline, rather than as a substitute for legislation.

[140] DLR Green Paper [5.96]
[141] C O'Cinneide, *Taking Equal Opportunities Seriously* (2005)
[142] HC Communities and Local Government Committee *Equality*, Sixth Report of Session 2006–07
[143] M Rubenstein, *Equality, the private sector and the Discrimination Law Review: A preliminary report* (2007)
[144] Office of National Statistics, "Public sector employment", taken from HC Communities and Local Government Committee *Equality*, Sixth Report of Session 2006–07

22. *What is the role of the Equality and Human Rights Commission within the single Equality Act?*

22.1 We believe the Equality and Human Rights Commission has a vital role to play in the short term in making the case for a robust Equality Bill which levels up equality protection across all strands.

22.2 In the longer term the Commission will need to ensure that the new protections and requirements of the Bill are effectively communicated both to individuals and organisations. This must include publication and dissemination of robust statutory guidance and tailored communications targeting all the audiences who need to be aware of rights and responsibilities under the law.

November 2008

11. Memorandum submitted by Federation of Small Businesses

The Federation of Small Businesses (FSB) is a membership organisation which represents 215,000 small businesses around the UK.

- Small Firms employ a larger number of women and disabled people as part of their workforce.
- There needs to be more support and information for employers to help keep people in work.
- Confusion over current equality regulation can create barriers between employers and employees rather than help the employee.
- Small firms do not tend to classify their employees, either at interview or during employment.
- The FSB would not support restrictions on procurement based on equality policies.
- Access to work should be targeted at small employers who are most likely to struggle to make adaptations.
- The FSB would echo the European directive "that the size and resources of the business should be taken into account when looking at the costs of making changes".

We have tried to answer these questions reflecting the views of small firms where there is often a unique employment relationship that is often not taken into account in legislation.

Equality in Employment

1) Equality in employment has been as much affected by changing attitudes and communities in the UK as it has by legislative changes. Small businesses in particular tend to reflect the communities they are based in, and as a result tend to employ more women, older people and disabled people in their work force than larger firms. The Federation of Small Businesses (FSB) is launching a paper from Westminster University on 10 December which highlights the important social role small businesses play in this area. A copy is attached as further evidence.[145]

2) As discussed in the IEA publication *Should we mind the Gap?* by J.R. Shackleton, direct pay discrimination in the work place is actually very rare. There have also been other massive strides in this area which the reports highlight with full time employed single women in the UK now earning more per hour on average than single male counterparts. This is a huge change, and the result of a range of factors, but importantly the different expectations of educational attainment from 25 years ago. Work still needs to be done to provide better careers advice for girls leaving education at 16 so they do not automatically end up in the lowest paid skill sectors, whereas their male counterparts tend to enter the more skilled workforce eventually commanding higher pay.

3) No one has quantified yet whether the changes to maternity and equality legislation in the last ten years have improved the gender pay gap after women have children. In this case while women who were unprotected, and had lower educational expectations at school remain in the workforce it is impossible to see a change in outcome when looking at the overall pay gap.

4) Employers need more help, support and information to keep employees they already employ who become disabled or long term sick. Low levels of awareness of Access to Work amongst small business owners automatically disadvantage their employees. It also damages the chances of a disabled person getting employment in direct competition at interview as business owners will not be aware of support and help they can receive when considering reasonable adaptations.

5) Many small business owners tell us that they are unsure of whether they can discuss disability issues in interviews or employment situations without being seen to discriminate. We believe that the lack of clarity in this area actually creates a barrier between employers and potential disabled employees. Work should be done with disability employment advisors before interviews to enable the disabled person to speak confidently about adaptations and access to support.

[145] Not printed.

6) Because of the unique employment relationships that exist in micro firms we know that employers are more likely to respond positively and make adaptations to help employees who are carers. Current levels of awareness of flexible working also show a cultural shift in the UK workforce which should enable carers to fulfil their role without facing discrimination. The vast majority of small business owners tell us that flexible working for all employees, not just parents, is common sense in a valued small team of staff.

Equality in Goods, Facilities and Services

7) We are concerned about any requirements that will make businesses make physical adaptations to premises. These are often costly to the firm. Many small businesses lease their buildings making it actually impossible for the business to carry out physical adaptations to the premises. The FSB was pleased that the EU directive explicitly states that the size and resources of the business should be taken into account when looking at the costs of making changes and hopes this is also reflected in UK law.

8) Small businesses do not want to cut themselves off, either as employers, or providers of services from a significant potential market, so it should be their desire to make reasonable adaptations. However, where it is not possible, physically or financially, to make a change the FSB does not want to see another costly burden on business.

The Public Sector Equality Duty

9) The FSB understands why the Department for Work and Pensions (DWP) would look at procurement as a way of improving disability outcomes in the private sector. However, the FSB believes that this is not a practical measure for small firms. The Department of Business, Enterprise and Regulatory Reform (DBERR) is looking seriously at how to improve the number of small firms gaining public sector contracts, we would not want to see another written "policy" requirement added to procurement that would act as a stumbling block for small firms.

10) The majority of small firms do not record the minority or disabled status' of the employees they hire, or of applicants for jobs. These informal recruitment practices often actually work in favour of traditionally disadvantaged groups in the work place, which is shown in the Labour Force Survey. In many cases small business owners believe that asking for either the age, or ethnicity of an employee would be discriminatory against them. Any clarification in the regulation in this area would be welcome. The FSB also believes that it is positive that employers do not tend to categorise their employees at any stage during their employment allowing them to respond to individual needs rather than labels.

11) We also have concerns that a "Kite Mark" for employers would automatically work against small firms who would not have the HR expertise, or the resource to put into acquiring a Kite Mark which large firms are more able to commit.

Private Sector Commitment and Support, Guidance, Advice and Information for Employers

12) As stated in paragraph 4, Access to Work is the best kept secret in the DWP. The FSB fully supports an extension of the budget for this service, but believes it should be more effectively targeted at small firms who are least able to commit capital to adaptations or adjustments. We would like to see more employers aware of this service. The DWP has often concentrated on large firms who develop policies rather than small firms who accommodate the needs of every single person when it comes to disability. Whilst larger firms are recruiting more people what DWP gains more by working with one person can seem greater, small firms have informal networks with one another, which leads to good practice through word of mouth. To aid people staying at work we believe that General Practitioners (GPs) should be made aware of the service so they can signpost any one in work (who develops a long term illness or disability) to help them stay in employment at the earliest stage.

13) To properly enable the individual and support employment it is the disabled person who should be approved for support from Access to Work regardless of whether they have an offer of employment. Funding would not be available until an offer is made and accepted but pre-approving individuals would empower them in the job market. If this happens then the disabled person could go for job interviews knowing that they will be able to get funding if they are offered a job. Clearly the level of funding would be unknown, but as the majority of people look for work in similar roles is should be possible to know whether they will require a buddy, help getting to work, support for a limited time, or physical adaptations in a general office environment. This would also reassure the employer that they will be able to apply for funding, which is currently an unknown element, and enable the individual, whatever their condition, to go into an interview with more confidence to talk openly about their disability. This can be a problem with mental illnesses.

14) Passporting funding so that support is attached to the individual not the job will also enable the disabled person to move on in their career. If there is doubt over whether support will be ongoing if the recipient wants to move into different organisation then this can hamper their employment opportunities, and therefore hinder their personal development.

15) Access to Work should also be detached from the Jobcentre. Sadly the Jobcentre has a poor reputation amongst small employers and having to go through the Jobcentre to gain the funding does not inspire trust or confidence in an employer looking at the scheme for the first time.

November 2008

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12. Memorandum submitted by Young Equals

The Young Equals campaign group is coordinated by the Children's Rights Alliance for England (CRAE). Members of the steering group include Action for Children, the British Youth Council, Families Need Fathers, National Children's Bureau, NSPCC, the National Youth Agency, Save the Children UK, The Children's Society, Youth Access and 11 Million, the Office of the Children's Commissioner for England (observer status).

1. Executive Summary

1.1 The Young Equals coalition urges the Work and Pensions Committee to review the Government's proposals for further equality legislation in the context of:

- The UK's international obligations as a signatory to the UN Convention on the Rights of the Child and the recent concluding observations of the UN Committee on the Rights of the Child on the UK published in October 2008.[146]
- The Government's 10-year strategy for children *Every Child Matters*.[147]

1.2 It is our view that the Government must reconsider its position, set out in *A Framework for a Fairer Future*, that the minimum age limit for legislation to protect against age discrimination in the provision of goods, facilities and services should be 18 years.[148] It is imperative that this measure also offers children protection against less favourable treatment on grounds of age.

1.3 It is currently intended that children's services (including education) should be exempt, in respect of age discrimination, from the proposed public sector equality duty (covering race, sex, disability, sexual orientation, religion or belief and age). Young Equals believes that such a move would not only be a missed opportunity to reduce the inequalities that currently impact on children but would also prove deeply damaging to the relationship between children and wider society.

2. Introduction

2.1 Young Equals is a group of charities and children and young people who are campaigning to stop children being treated less favourably on grounds of age. We are seeking legal protection for children and young people from unfair age discrimination in the provision of goods, services and facilities to be enshrined in national and European Union law and for education and children's services to be included in the integrated equality duty.

2.2 Article 2(1) of the International Covenant on Civil and Political Rights states "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." This is also reflected in Article 2 of the Universal Declaration of Human Rights and Protocol 12 of the European Convention on Human Rights. Children as well as adults are protected by this non-discrimination provision. In accordance with its international obligations the UK Government must apply this standard to its proposals for further equality legislation.

2.3 Harriet Harman, Secretary of State for Equalities said in an interview in the *New Statesman* in January 2007, "You can either be against discrimination or you can allow for it. You can't be a little bit against discrimination."[149], we urge the Government to take a strong stance against all discrimination, rather than the "little bit" approach it is currently proposing.

2.4 We will confine our submission to two of the areas highlighted by the Terms of Reference set out by the Committee; Equality in Goods, Facilities and Services and The Public Sector Equality Duty.

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[146] Committee on the Rights of the Child, 49th Session, unedited concluding observations, 3 October 2008 http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf

[147] Cm 5860, September 2003. The equivalent strategy documents in Scotland and Northern Ireland are *Getting it Right for Every Child and Children and Young People—Our Pledge: A ten year strategy for children and young people in Northern Ireland 2006–2016*, respectively.

[148] Government Equalities Office (June 2008) Framework for a Fairer Future—The Equality Bill

[149] *New Statesman* (29 January 2007) Interview with Harriet Harman

3. Equality in Goods, Facilities and Services

3.1 In *A Framework for a Fairer Future* the Government set out its intention to legislate to protect against age discrimination in the provision of goods, facilities and services. The proposed minimum age limit for this protection is 18 years. In our view the exclusion of children is in itself discriminatory and must be challenged. If it is not, the new legislation will potentially undermine community cohesion, sending as it does a strong signal to children that they are not part of mainstream society. One young person taking part in an online debate organised by CRAE, remarked:

> "I think young people should definitely be covered—what [is it] about them being under 18 [that] makes them any less of a person than those people over 18? We all deserve to be treated equally… You can't make a law outlawing discrimination apart from certain types!"

3.2 The Government has consistently failed to acknowledge age discrimination as an issue that affects children. In a statement to Parliament on 26 June 2008 the Equalities Minister, Harriet Harman MP stated; "The provisions will not cover people under 18. It is right to treat children and young people differently, for example through age limits on alcohol consumption, and there is little evidence of harmful age discrimination against young people. Harmful age discrimination is basically against older people."[150] This view was confirmed in the Government's response to the consultation *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* which maintained "We have considered the arguments which were put forward for prohibiting age discrimination against children as well as adults. However, we continue to believe that age discrimination legislation is not an appropriate way to ensure that children's needs are met."[151]

3.3 Young Equals strongly refutes this position and has presented the Government with extensive evidence demonstrating that age discrimination affects children as well as adults. In research carried out by CRAE and others on behalf of the UK government in 2007, under 18 year-olds were asked to state whether they had ever been treated unfairly because of their age, gender, disability, amount of money their family had, skin colour, religion or culture, the beliefs or behaviour of parents/carers, the child's own beliefs, language, sexual orientation or something else. Over 3,900 children and young people participated in the online survey in the UK. 43% reported that they had been treated unfairly because of their age. Three in 10 (29%) of the under 11s felt that they had experienced age discrimination and, nearly two-thirds of older teenagers (64%) reported this. Unfair treatment on the grounds of age was by far the single biggest example of discrimination.[152]

3.4. Similarly, Save the Children UK research with 50 children and young people, aged between nine and 19 in Scotland, found that a large majority thought that they are treated unfairly because of their age, Only 6% of those consulted did not think this was so.[153]

3.5 Furthermore there is much evidence of children and young people experiencing unfair treatment because of their age in the UK. For example:

- Sixteen and 17 year-olds finding it difficult to access social services and mental health services, falling in the gap between children's and adults' provision.[154,155]
- Children and young people not being taken seriously when reporting a crime or calling for emergency services.[156,157]
- Children and young people being treated unfairly in public spaces, eg in shops, using public transport, or where mosquito devices are in use.[158,159]
- Public places such as leisure centres and libraries and transport facilities being unfit for adults with babies and young children.

3.6 Age discrimination faced by children and young people goes largely unnoticed and is often seen as legitimate. Signs on shop doorways stipulating "No more than two children", bus drivers failing to stop for teenagers, young people being followed around department stores and restricted from gathering in public spaces, are common occurrences for many children and young people across the UK. Commenting on the often-invisible nature of age discrimination, one young man noted:

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[150] *Hansard*: Volume No. 478 Part No. 119 26 Jun 2008 : Column 506
[151] *The Equality Bill—Government response to the Consultation* July 2008 (para 3.3)
[152] Willow, C, Franklin, A and Shaw, C. (2007) *Meeting the obligations of the Convention on the Rights of the Child in England*. Children and young people's messages to Government. DCSF
[153] Save the Children (2006) *Children and young people in Scotland talk about discrimination*
[154] Office of the Children's Commissioner (January 2007) *Pushed into the shadows*. Young people's experience of adult mental health facilities.
[155] Office of the Children's Commissioner (October 2008) *Out of the shadows?* A review of the responses to recommendations made in Pushed into the Shadows
[156] CRAE (2007) *We are all equal and that's the truth*. Children and young people talk about discrimination and equality.
[157] Inglis, G and Shepherd, S (March 2008) Independent Police Complaints Commission Confidence in the police complaints system: a second survey of the general population interim report, BMRB.
[158] CRAE (2008) *Get ready for Geneva* submission to the UN Committee on the Rights of the Child.
[159] Mosquito devices are electronic devices being used across England to stop teenagers from congregating in public places: it works by emitting a painful high-pitched noise only heard by young people.

> "If the Prime Minister lived my life for a week, he would find that he is constantly victimized just for being a young person. He would find that instead of walking in to a shopping centre, proud to be a world leader, he would instead be frowned upon by the world as a trouble maker and potential shop lifter. He would find that instead of being able to go where he wants, when he wants, that he is restricted by signs saying 'no more than one child at any time'. At this point he'd think to himself, if that sign said 'no more than one gay at any time' or 'no more than one old person at any time', that it would be against the law." (Male, 17, Lincolnshire)

3.7 By setting the minimum age for protection at 18 the Government is implicitly recognising that adults can face discrimination at any age, not only by virtue of being older but also younger than others, and that the law should offer protection against this. In light of this acceptance it is in our view an untenable position to hold that children do not merit equal protection. The Government has said that age discrimination legislation is complicated but is prepared to spend time getting it right for Britain's 55.5 million over 18s. Surely it would not be too complex for the Government to ensure that the 13 million under 18s in Britain are given the same protection.

3.8 The unique status of children and young people must of course, be recognised and provided for, alongside measures to tackle negative age discrimination. The preamble to the UNCRC reaffirms the principle, first set down in its predecessor, the Declaration of the Rights of the Child, that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." This concept is well established in the UK and is clearly reflected in the wide range of child-specific services currently offered by both the public and private sectors in the UK. We see absolutely no contradiction between this and our ambition to prohibit unlawful age discrimination against under 18s. As will be the case for older people, genuine service requirements would allow a service provider or shop or hotel, for example, to seek to justify different treatment on the basis of demonstrable need. Exemptions should be kept to an absolute minimum.

3.9 The cross cutting draft European Directive on anti discrimination and equal treatment sets out proposals to extend legal protection from unfair discrimination beyond the workplace. The Directive, if passed by the Council of Ministers, will extend existing EU protection to the provision of goods, facilities and services, education and healthcare. Crucially the Directive seeks to outlaw discrimination on the grounds of age, religion, disability and sexual orientation. The inclusion of age in the Directive is a defining moment in enshrining children's human rights in law. As it stands, the Directive will provide much needed legal protection from unfair age discrimination to Europe's 94 million children, as well as adults. We urge all Member States to support the retention of the age element of the Directive in order to secure legal protection from negative age discrimination for all people, including children.

3.10 Several European countries have taken steps to enshrine legal protection from unfair age discrimination for children and young people in the provision of goods, facilities and services in national and local laws. For example, both Belgium and Finland have specific measures in their national constitutions relating to discrimination on the grounds of age. Additionally children and young people have been protected from age discrimination in the provision of goods, facilities and services in Australia since 2004 (Age Discrimination Act 2004). The Government has expressed concerns over litigation, but these are unfounded. Ensuring legal protection for children from less favourable treatment has not resulted in excessive litigation in Australia in the four years since the passing of the Age Discrimination Act. Age discrimination legislation may not yet be the norm, but it is clear that many countries are starting to recognise that children do experience discrimination on the grounds of age, and that legislation is an effective and justified means of remedying this situation.

4. The Public Sector Equality Duty

4.1 A *Framework for a Fairer Future* also signals the Government's intent to introduce an integrated equality duty (covering race, sex, disability, sexual orientation, religion or belief and age) on all public authorities. It is currently the Government's position that children's services (including education) should be exempt from this duty in respect of age discrimination. The reasons given for this exemption are set out in the Government's response to the consultation *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*; "However, despite the arguments put forward in favour of including children's services in the age duty, we do not consider that this would be appropriate. Of course, we do not condone the abuse, bullying or maltreatment of children. However, the use of discrimination law, and particularly an age equality duty, does not seem an appropriate mechanism to combat poor treatment of children in children's services; and could become impractical and even counter-productive. … An age duty which in effect required public authorities to distinguish between the needs of and services delivered to 9-year-olds as distinct from 10-year-olds would be unworkable."[160]

4.2 Young Equals believes that a commitment to equality should be a unifying feature of all public services without exception. The laudable ambition for the public sector duty is that it should be a vehicle to promote the human dignity and equal worth of every individual in our society. While respecting their entitlement to special protection by virtue of their age, children must not be excluded from this aspiration.

[160] The Equality Bill—Government response to the Consultation July 2008 (para 2.62)

As noted by Trevor Philips in the Equality and Human Rights Commission's response to *A Framework for Fairness*, legislation is not the only remedy for inequality but it does sets the tone for the broader cultural change that we aspire to and as such must be comprehensive: "Fairness is a 21st century value and it is about everyone. It is a value we want to uphold and share. … This is as much about changing the culture as changing the law. We also want to build an enduring consensus for fairness that unites all sections of society"[161].

4.3 Children also experience the effects of negative attitudes towards them. The Good Childhood Inquiry, set up by The Children's Society to open an inclusive debate about the nature of modern childhood has received evidence from children concerned about the discriminatory attitudes that some adults display towards them. Links were made between these individual attitudes, and a perception of general societal attitudes towards young people and of stereotyping, as the quotes below illustrate:

> "Bullying and scared of crime which is exagerated by media who overestimate the figures and levels of crime. Also young people in general are blamed for Britain's 'rising crime' (according to media) this makes people scared and frightened of young people."
>
> "People thinking we are all the same eg a teenager might have been rude to someone, elderly, person etc. So they think we are all like that and then be rude to other teenagers."

4.4 The UN Committee in the Rights of the Children recently conducted an examination of the UK's record on children's rights. In its concluding observations, published in October 2008, it drew particular attention to this issue recommending "that the State party ensure full protection against discrimination on any grounds, including by: a) taking urgent measures to address the intolerance and inappropriate characterization of children, especially adolescents, within the society, including the media…"

4.5 Children's services (including education) are uniquely placed to lead the public sector's drive towards promoting more positive attitudes towards children and young people. Children want the professionals they meet to respect them and genuinely listen to their views and perspectives. At their best, children's services and educational establishments already place great emphasis on the child's human dignity and equal worth but in too many instances children continue to experience services as paternalistic and not focused on the individual needs, rights and perspectives of children. It is our view that being excluded from this aspect of equality law will undermine the professional status of the children's workforce (including teachers). A broad Equality Duty already exists in relation to young children (Under-5s) in the Childcare Act 2006.

4.6 It is widely accepted within the sphere of public policy that children currently face serious levels of structural inequality, such as that exhibited by the high rates of child poverty in the UK. Therefore Young Equals believes that there is a strong case for the integrated equality duty to also include a duty to reduce socio-economic inequalities among children, especially given cross-party support for ending child poverty. In 2007, child poverty increased for the first time in seven years, with a rise of 200,000 more children living in poverty. The proposed public sector duty has the potential to be an effective driver in tackling such inequalities, for example by improving access for the most disadvantaged children to high quality education. The opportunities to maximise the role it can play must not be lost by the exclusion of children and education services from this duty.

4.7 Northern Ireland has operated a broad equality duty on all its public authorities for 10 years and children's services and education are included in this, without any undue difficulty.[162] In Europe, education providers in Sweden have had a broad equality duty since 2006, which also includes taking active measures to prevent harassment and other degrading treatment towards school students.[163]

November 2008

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13. Memorandum submitted by M Campbell

0.1 The Government has said that it is essential for individuals to fulfil their potential and that we cannot tackle inequality if it is hidden. Yet the Equality Bill itself, along with much other Government policy, all but ignores the disadvantage and inequality of present or past caregivers who are not in the labour market, especially if they live in couples. The main purpose of my evidence is to highlight this issue—where lack of transparency is partly due to the increasing and confusing use of the phrase "gender inequality" to mean "equality between men and women", ignoring the huge inequalities that have opened up since the 1970s between women with and without care responsibilities and family constraints (for example, Muslim women have paid jobs to a greater extent before they get married than afterwards). A further implication is that, just as child poverty definitions and targets have had to be made more complex to make policy achievable (some would say they've been "watered down"), so here we may have to look for our "real" goal to the word "equity" (in the sense of individual fairness and autonomy) rather than "equality" in its most precise usage if we want to cut back on the worst "gender" inequalities. Many women (and some men) want to trade lower earnings for more time with their children or adult dependents than even the most benign employers can

[161] EHRC (July 2008) *Fairness A new contract with the public*
[162] Section 75 of the Northern Ireland Act 1998
[163] The Act Prohibiting Discrimination and Other Degrading Treatment of Children and Pupils (2006:67) now enshrined in the Discrimination Act (2008:567) and the Education Act 1985:1100

afford—and for longer than the single year after birth permitted by maternity legislation (with a right to return to previous employment). They thus "reject" the current and projected policy provision for gender "equality" in the labour market as traditionally defined. But this does not mean they should be left with no money at all in thejr own right, with no autonomy (or hope of autonomy) and no help to return to the labour market (except when they or their partners become dependent on means-tested benefits). This issue is neglected in the Freud Report and its follow-ups—which do not recognise within-household dependency as dependency at all.

0.2 I have been researching and writing for more than two decades, particularly on poverty and tax/benefits. Women without children and mothers with their own money have long had the potential to achieve almost as much as their male peers in the labour market—or to make a "real" choice not to. My main focus therefore has always been on low-income women with limited autonomy, whose choices and ability to earn are constrained by family responsibilities. This focus includes the interrelated impacts of tax/benefit policy on their partnership situations, their individual poverty and autonomy, and their labour market "choices": all too often policy analysis by all political parties looks at one of these, ignoring the impact of their proposals on the others. Lone parents are now well catered for in policy debate and action. Carers for the disabled are beginning to get the policy attention they deserve. But there is an army of "invisible" women in couples who are still treated by most policy analysis and action as residuals in the lives of their children and their partners. As individuals, many of them flit in and out of the DWP's radar screen as they shift from partnered to lone parent status and back again, or their partners move in and out of employment. But, in their own right, they are all but ignored.

0.3 I set out three overarching recommendations in the next two pages and, in paragraph 1.4, a list of ideas for possible examination. An Appendix expands on this material.

1.1 The use of the word "gender" in official publications now usually refers to differences between men and women, rather than distinctions that arise from the economic and social disadvantage suffered by women that have (or have had) care responsibilities. The "capabilities" approach to defining inequality adopted by the Equality and Human Rights Commission (EHRC) is a big step forward but in the transition to policy/action it downplays women in general (compared to other disadvantaged groups) and mothers/carers in particular. The Government has decided not to introduce protection against discrimination for carers (or parents) as such (and indeed converting this disadvantage into workable anti-discrimination legislation would be even more difficult than in the case of sex or race). These and other developments mean that, outside pregnancy and recent maternity (and in an overall context where the disadvantage suffered by women *qua* women compared to men is much diminished compared to 40 years ago), and with the exception of Muslim women, the current Equality Bill does little or nothing to combat the disadvantage suffered by the women who most need action in today's world. Mothers and other carers (plus Muslim wives and some male caregivers) without jobs will remain financially, economically and sometimes even legally unequal. No amount of action on gender pay will help them. The Government is doing very little to combat this, especially if the women live in couples: even the right to request is irrelevant to those whose family situations present them with all-but-insuperable barriers to taking a job.

— Recommendation 1: That the Committee recognise that the current Equality Bill mainly focuses on the remaining inequalities of the women who are already least disadvantaged, that it identify the disadvantage faced by the sub-group of women who are largely ignored by policy and by the EHRC's definition of disadvantage and that it make proposals for non-statutory action to combat these deep disadvantages.

1.2 There is mounting evidence that child poverty cannot be cracked without tackling the individual poverty of their mothers. Similarly, without the poverty that arises from years of unpaid caregiving, most Pension Credit payments would be unnecessary. Further, the evidence is now overwhelming that paid work is the best route out of poverty—and that to keep children out of poverty in low-wage families both parents need to earn. On the other hand, the evidence now is overwhelming that many women want to spend time at home when their children are babies and toddlers—and that some, if forced, will choose poverty rather than paid work at this stage in the life course. Carers often also make the same choice. This in effect means that many women are de-prioritising gender equality as defined in the current Bill (ie mainly in relation to the labour market). This development is not unique to UK—in Scandinavia, women's labour market participation peaked in about 1990 and remains well below men's (see charts)[164]. There is evidence that taking more than a few months off work damages future career and earning opportunities and that most such mothers (and carers) plan to return to paid work sometime—often within the next five years. The increase in marital and relationship break-down also makes it imperative that neither parent should lose touch with the labour market. In most of continental Europe, the right to return to an employer in a similar job lasts for longer than a year—often much longer—so that new mothers are able to spend longer at home without losing their jobs and having to fight their way back into a job. Mothers also receive much better financial support for the short periods when their children are tiny. There is evidence from the United States that mothers are least favoured in job offers, and evidence from the UK shows that much more action is needed to change the anti-mother-as-worker culture among employers here too.

[164] Not printed.

— Recommendation 2: That the Committee recognise that (a) just as complete elimination of child poverty is now accepted as impossible, complete achievement of "gender" equality is not achievable either but that (b) a culture and policy framework that promotes and permits long-term or permanent withdrawal from the paid labour market for care is inimical to the welfare of women and children and (c) make recommendations accordingly.

1.3 Age disadvantage is particularly suffered by women who spent time out of the labour market and even if this declines with time it will be decades before women as individuals achieve a sufficient level of income in their own right. There is no possibility of equity between men and women, let alone equality, so long as much of the £30billion annually of Exchequer contributions in the form of tax relief is disproportionately focused on the highly paid (usually men). The rise in the state pension age poses new problems, and there are specific issues arising from ageist attitudes among employers.

— Recommendation 3: That the Committee take action to improve women's pension prospects so that former caregivers are credited with enough to give them individual financial autonomy in retirement and that it revisit the issue of pension tax relief.

1.4 Some examples of the sort of approach and detailed policies that the Committee might care to consider under Recommendations 1.1, 1.2.and 1.3 above:

— Explicitly recognise that current official usage of the word "gender" usually now means "men and women" and neglects women's social role as caregivers: caregiving is recognised only indirectly and occasionally. (1.1)

— Distinguish between different groups of women and explicitly focus the gender sections of the Committee's investigation on women who are most disadvantaged. (1.1)

— Ensure that the EHRC's definitions of disadvantage take full account of caregiving—a move that is all the more essential because the government has decided not to include it in the statutory stream of policy. (1.1)

— Balance the Equality Bill's focus on "gender" equality for women in general with investigation and recommendations that lead to more gender equity and autonomy for women who are disadvantaged (whether temporarily or permanently) not least by being outside the labour market altogether. (1.2)

— Increase the amount of Government money made available to people (usually women) who are out of the labour market for care reasons, perhaps by recommending to the Treasury that it permit them to claim Working Tax Credit on the basis of their individual income when they either have a child under two or claim Carer's Allowance (this would be cheaper, better targeted and involve less "deadweight" than extending maternity pay) limiting this households with annual income under, say, £30,000. (1.2)

— Recommend to the Treasury that it permit "second adults" in such households (ie under £30,000) to claim Working Tax Credit in their own right when they start to earn, in effect making the partner's tax credit transferable from a sole earner and converting Working Tax Credit into a seamless means of support for each individual worker-carer in low-income couple households. This would also cut back the so-called "couple penalty" in Working Tax Credit (which in fact applies mainly to comparisons with lone parents who earn). (1.2)

— Recommend to BERR that it extend the right to return to an employer after maternity leave to two years from the current one year (if necessary, restricted to mothers or fathers with some service entitlement). This would still be shorter than in continental countries that use their female labour force more efficiently than we do. (1.2)

— Given that over 500,000 women with home responsibilities are jobless but wanting to work, and that over 500,000 WTC claimants are male sole earners (presumably claiming the partner's WTC in addition to their own), recommend that DWP focus as much attention on identifying the 500,000+ women who want to work and give them labour market activation opportunities on a par with benefit claimants. Women whose male partners are employed are a forgotten army of potential workers—they get help from the state only when their partners lose their jobs and/or when their relationships fail so that they become jobless single mothers. (1.2)

— Extend Home Responsibilities Protection to the forthcoming Personal Accounts (National Pension Savings Scheme): if this were done, the need for Pension Credit would be diminished to perhaps 10% of its current level, and mis-selling could no longer be validly alleged in connection with this scheme. (1.3)

— Recommend that the biggest source of inequality among pensioners—the 40% (soon to be 45–60%) tax relief on pension contributions—be reduced to 20% and the "lump sum" be taxed at 20% for those with pension values above, say, £100,000 at the time they claim it. (1.3)

— Legislate now to extend the age discrimination limit for employers from 65 to 68 in say, 2012, to give an impetus now to culture change (particularly among employers) well before the new age limit for the state pension comes into force. (1.3)

— Take action under the proposed new "Equality Duty" to ensure not only that those who already have jobs can continue in employment until age 65, but that getting a new job in your fifties or older is made much easier.

2. Appendix: Some Detail

2.1 Para 1.1 above: The *Interim Report of the Equalities Review* in 2006 listed eleven inequality challenges. Only three of these mentioned women and only one was concerned with women's roles as caregivers[165]. The vulnerabilities of women as caregivers may achieve a higher profile in the final "list" drawn up by the EHRC as the basis for implementation of its remit. But the usage of the word "gender" equality to mean "equality between men and women" does not help caregivers. Research for the DWP suggests that the most disadvantaged mothers and wives in the employment context are Muslim women[166]. However, white mothers (lone and partnered) account for the largest numbers because they account for over 90% of women in the sample and employment rates of all mothers of younger children are on average 15–25 percentage points lower than other women (about 15%pts less than mothers of older children and 30%pts less than single women without children). Research now distinguishes between discrimination whilst in employment (for example in access to training), discrimination in the process of getting a job and discrimination in being unwillingly deprived of a job. Different groups suffer varying levels of discrimination in each of these situations. It is also beginning to distinguish (a) discrimination by employers; from (b) discrimination within the home; and (c) employment disadvantage arising from the caregiver's own attitudes, including views of what they "ought" to do. The programme of work-focused interviews and the New Deal for the partners of benefit claimants illustrate these distinctions[167]. The vast majority of non-parental carers among those assessed in this scheme were caring for the main claimant and felt a mixture of duty to care with a wish to "escape" their caring role into paid work, at least for some hours each week. Few parents of small children would consider formal childcare. "There was much evidence that traditional gender roles of male 'breadwinner' and female 'homemaker' still exert a strong influence over many couples" (p25) and amongst those for whom English was not a first language, the main [male] claimant was more likely to be the decision-maker. The "yield" from these programmes was found to be low and DWP does not seem to provide labour market activation services for non-working partners of people who are not benefit claimants.

2.2 Paragraph 1.2 above. The LFS statistics list 538,000 female "homemakers" as being without jobs even though they want to work (compared with 1.5million who do not want a job). It is difficult to see how the Equality Bill will help them. Amongst claimants of Working Tax Credit, 500,000 are male sole earners (including those without children). Evidence is mounting that, on the one hand, many mothers do not want to be in jobs while their children are tiny—nor to judge from the limited evidence so far do they want to equally share care at this age with the fathers of the children. Current attitudes on breadwinner/homemaker roles such as those quoted above may not be a valid indicator of future attitudes in Britain. But the evidence from Sweden points in the same direction. The Fawcett Society, ippr and others have all published compelling research to the effect that it will be extremely difficult, even impossible, to defeat child poverty without reducing their mothers' poverty too. Essentially this means giving more money to mothers while their children are tiny, and removing the barriers to them going back into jobs as their children grow. One of the most important barriers to paid work across all mothers and carers seems to be financial. Amongst the partners of claimants cited above, a quarter said they would be worse off financially if they took a job. In its first years, the household-assessed tax credit regime had a big beneficial effect on reducing child poverty, but at the price of building barriers to second adults taking jobs (and both adults increasing their earnings).[168] The more that the Government heaps money into WTC and Child Tax Credit, the more their effect on child poverty diminishes as they reduce the marginal gain to earners from paid work, and especially the gains from having both adults in couples in work. In 2007, Mike Brewer of the IFS concluded that increasing WTC would particularly help one-earner families, while a transferable tax allowance would deter "second" earners from taking a job.[169] Doubling the WTC for couples in its current format would have a deterrent effect on second earners. Only in effect by giving the "second adult" their own WTC or the household a double WTC if s/he took a job can this effect be overcome (there are several ways of achieving this technically). The Treasury launched a consultation on Tax Credits earlier this year, but took no action in the November 2008 PBR. If the tax credit programme has indeed reached a stage of diminishing returns, then until something is done to remove or limit the financial barriers to work, it is difficult to see how the DWP can achieve much more reduction in child poverty and inequality in employment through labour market activation.

2.3 Paragraph 1.3. One way to cut the several Gordian knots associated with Personal Accounts would be for the National Insurance Fund to pay annual credits to the Personal Accounts of those who qualify for Home Responsibilities Protection. It would provide a big, simple wadge of money to the private sector

[165] Ben-Galim, Campbell and Lewis (2007) *Equality and diversity: a new approach to gender equality policy in the UK*, International Journal of Law in Context, 3,1.
[166] Berthoud and Blekesaune (2007) *Persistent Employment Disadvantage*, DWP Research Report No 416; note that religion may be a bigger driver of persistent employment penalty than ethnicity.
[167] Coleman and Seeds (2007) *Work-focused interviews and New Deal for Partners*, DWP Research Report No 417.
[168] For a longer discussion, see Campbell (2008) *Labour's Policy on Money for Parents: Combining Care with Paid Work*, in the journal "Social Policy and Society", 7.4, October 2008.
[169] Brewer (2007), Chapter 12 of the IFS Green Budget

providers—and much of it would come back to the Exchequer a few decades later in the form of lower means-tested pension credits: two-thirds of Pension Credit beneficiaries are women (although women in couples do not usually receive the money—80% of couple claims are paid to the man and the individual incomes of women in pensioner couples are hardly more than a third of men's). But the biggest single source of inequality arises from the current system of tax relief on pension contributions, which the November 2008 PBR puts at about £30billion pa (gross of tax paid on pensions). It is indicative that when the November 2008 Budget announced the higher tax rates for very high earners (to 60% in two small income bands), the IFS calculated that the yield might be nil rather than the projected £1.6billion—not least because these folk would simply increase their pension contributions in order to reduce their taxable income. It is often argued on a variety of grounds that this pension tax relief could not or should not be reduced. Many admit that there is little defence for the tax-free status of the lump sum—but nothing is done. Pension providers are daily giving out that day's valuations of individuals' pensions, in contexts of job moves and divorce for example. The "final salary" Universities Superannuation Scheme, to quote just one example, provides annual figures for the percentage of salary being paid on each individual's behalf by their employer and the employee—14% and 6.35% respectively in 2005. Given today's levels of employment flexibility and career breaks for care (not to mention corporate bankruptcy etc), reliable progress up the career ladder to a "final salary" pension is by no means a certainty for many, even in the public sector. If the Select Committee really means to "evaluate the effectiveness …of the DWP in achieving equality in employment" and how the DWP would "have to change to achieve greater equality in employment", it is difficult to see how it can ignore this greatest of all state-sponsored inequality in the context of employment.

November 2008

14. Memorandum submitted by Cloisters Chambers

Introduction

1. Cloisters is a barristers' chambers specialising in discrimination and equality law. Many of our members have been involved in the leading cases under the Disability Discrimination Act 1995, and we welcome the opportunity to comment on the questions posed by the Committee, which affect us as practitioners on a daily basis.

2. The passing of the Disability Discrimination Act 1995 ("the Act") marked a major milestone in the securing of rights for disabled people. The Act has undoubtedly made a major difference to disabled people in employment situations—particularly in enabling retention, as a result of the obligation to make reasonable adjustments. The number of employment tribunal claims relating to disability discrimination has steadily increased. The latest employment statistics (see http://www.employmenttribunals.gov.uk/Documents/Publications/AnnualStatictics0607.pdf) indicate that 5,533 employment tribunal claims claiming disability discrimination were lodged in 2006–07, although only 3% of disability claims were successful at tribunal (the same percentage as those alleging race discrimination). Many of course are settled prior to hearing.

3. There have been some decisions which have had a major impact on the way in which the legislation has worked, not merely in the courts but also "on the ground"—in the workplace. These include in particular *Archibald v Fife* ([2002] ICR 954)—where the expansive nature of the reasonable adjustment duty was made clear—and—prior to *Malcolm*, which will be discussed later—*Clark v Novacold* ([1999] ICR 951) which made clear that disability discrimination is different, and that the focus in cases where treatment was related in some way to disability was whether an employer could justify it or not.

4. The *Malcolm* case has caused serious concerns amongst discrimination practitioners—not just because of its potential legal effects (in particular, rendering the UK government in breach of its duty to effectively transpose the European Employment Framework Directive) but because of the message that it sends out about disability rights and the DDA (in particular, comments made by the Lords about the problem, in a case where a guide dog user is refused access to a café because of the dog, being the dog rather than amounting to disability discrimination).

5. This submission will answer those questions that Cloisters feels qualified to deal with, under the questions posed in the Work and Pensions Committee.

6. In addition, however, we also wish to raise the issue of the definition of disability. Although a question not posed by the Committee (other than in the context of the *Coleman* decision) the definition is nevertheless critical to any examination of the Act. At present, unless the definition is met—or an individual can rely upon the European Employment Framework Directive—there can be no claim under the Act.

7. Ever since the DDA was passed there has been a strong body of criticism about its definition of disability on the basis that it derives from the medical model, focusing as it does on the functional limitations of an individual.

8. The social model of disability identifies "disabling barriers" rather than "impairment" as the problem to be tackled. Disabling barriers are the attitudinal, economic, and/or environmental factors preventing certain people from experiencing equality of opportunity because of an impairment or perceived impairment. The term "disability" is used to describe a social experience. A disabled person might say, therefore, "My impairment is the fact that I can't walk; I am disabled by the fact that the local authority building is accessed only via a flight of stairs". By contrast the medical model focuses on impairment as being the cause of limited opportunities and life chances. The social model not only provides the foundation for the modern disability rights movement, but also provides the basic premise for any law prohibiting disability discrimination.

9. The present definition of disability can cause considerable difficulties for Claimants. In particular, where it is unclear whether or not an individual meets the definition—and this is relatively common—they will be "put to proof", which will usually mean an extensive witness statement explaining what they can and cannot do; an expert medical report; and a hearing at which the claimant will be cross examined. This is a costly and often distressing experience.

10. In addition, it can also cause difficulties for Respondents. Very often Respondents are put to unnecessary expense because of the need for such a hearing. Both sides incur medical expert expenses which establish the nature of the impairment and the Respondent is then left with a decision as to cross examining on whether the impairment has more than minor or trivial adverse effects on the Claimant's ability to carry out normal day to day activities. However that evidence very often relates to matters that take place in the home, to which the Employer has no access. Thus the parties may incur medical expenses and the hearing is aborted on concession by the employer on sight of the Claimant's evidence on this point. The net effect is to draw out proceedings and to increase the stress of the proceedings as described.

11. The definition is particularly problematic for people with mental health issues, given the requirement that the effects of an impairment must be "long term" (ie likely to last or have lasted for more than 12 months). If, for example, an individual has depression which has lasted for only two months but an employer refuses to employ/promote them because of this, there is nothing that they can do under the current Act.

12. There is also the difficulty of predicting the likelihood of duration. This must be judged as at the time of the act of discrimination. In many mental health cases it is simply not possible to say at that time what the duration is likely to be. The Directive (post *Coleman*) would suggest that the characteristic of disability plays a role if in fact the person's condition is long term. That has nothing to do with whether it is possible to predict that it is likely to last a certain period of time. However the current law (and its interpretation) suggests that these predictive factors are relevant.

13. It is our view that the Act should reflect the social model of disability, focussing not on the individual's impairment but on the reasons for treatment and/or barriers placed in the way of disabled people.

14. We would suggest that the definition of disability should be altered so that protection from discrimination is afforded to everyone who has (or has had or is perceived to have) an impairment without requiring the effects of that impairment to be substantial or long term. This would ensure that the focus of any tribunal or court hearing is upon the treatment afforded to the claimant, saving costs and time.

How can the Equality Bill open up opportunities in employment, particularly for disabled people, carers and pensioners

15. The equality bill provides an opportunity to positively encourage the employment of disabled people, carers and pensioners, not merely by tackling the difficulties with the current legislation, but also by expanding on opportunities for positive action; by creating an effective single equality duty; and by full and effective use of procurement. These issues are expanded upon below.

How should the Equality Bill respond to the decision in the Malcolm case in respect of disability rights in employment?

16. The decision in *London Borough of Lewisham v Malcolm* ([2008] 3 WLR 194) has had a major impact on claims brought under the Act.

17. Whilst it is true that the majority if not all employment cases involve a failure to make reasonable adjustments; and that this together with the expanded definition of harassment means that the legal effects in employment are likely to be limited, the *Malcolm* decision nevertheless causes difficulties in the employment arena.

18. Whilst there are cogent legal arguments as to why the decision should not apply in the employment context, we are nevertheless aware of claims of disability related discrimination having to be abandoned as tribunals apply the decision in the employment context. This is particularly problematic in recruitment cases, where the duty to make adjustments, which would otherwise be relied upon, is only applicable where an employer knows or ought reasonably to be expected to know, that an individual is disabled and is likely to be affected in that way. In such cases, there will not be a duty to make reasonable adjustments and so there will be no basis on which an individual can bring a claim.

19. In addition to the practical effect in the employment tribunal, it is also the case that the principle of disability related discrimination placed the obligation on an employer to justify any treatment related to a disabled person's disability. This was a very effective tool for claimants and trades unions to use in changing the behaviour of employers towards disabled employees.

20. Now, unless a claim falls within the narrow confines of direct discrimination, the onus is on the employee to identify reasonable adjustments that might be made—ie a provision criterion or practice placing them at a substantial disadvantage.

21. This shift may affect the behavioural changes of employers that the DDA has undoubtedly contributed to.

22. There are two further issues to be considered in relation to *Malcolm*: firstly, the effect it has had upon the government's compliance—or otherwise—with the Employment Framework Directive; and secondly, what should ideally be done to remedy its effects.

23. The provisions of the DDA in its current form as it relates to employment are intended to comply with Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. This was made explicit in the process that lead up to the amendments made by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (S.I. 2003 No. 1673): see the explanatory note.

24. The Directive does not have a concept of disability related discrimination. However it does have a concept of indirect discrimination.

25. The view taken by the Secretary of State when making the 2003 regulations was that by having a provision to be understood in the sense of *Novacold* and a reasonable adjustment provision it was not necessary to also have any provision dealing with indirect discrimination.

26. If the reasoning in *Malcolm* is applied in the case of section 3A—the employment discrimination provision relating to disability related less favourable treatment—the basic premise for not introducing a concept of indirect discrimination into the DDA has disappeared.

27. The second issue is that of what to do to ensure that the parliamentary intention as expressed in Baroness Hale's opinion in the Lords in *Malcolm* is fully represented in any future legislation.

28. Whilst indirect discrimination is an option, and the government has just released a consultation on this as the solution, which we have not had any time to consider, it will in our view cause difficulties in the context of disability for three reasons:

(i) its possible inability to address individual, one off acts (despite *Starmer v British Airways* [2005] IRLR 862, there is no guarantee that any future decision would retain this approach);

(ii) the potential for confusion, particularly in relation to the pool for comparison which must be identified for a claim of indirect discrimination to succeed. Whilst in the "modern" version of indirect discrimination statistical comparison is not required, there is nevertheless a requirement to show a disparate impact, which may cause difficulties for disabled people who experience the effects of an impairment in different ways. In addition, indirect discrimination is a very complicated, time consuming and expensive basis on which to bring a claim; and

(iii) whilst knowledge should not be an issue in indirect discrimination, the Lords in *Malcolm* expressed very strong views about knowledge being necessary, and it is unclear what approach the courts would take to knowledge in the context of indirect disability discrimination.

29. For these reasons, we would suggest that unless indirect discrimination can address these three potential weaknesses, a form of disability discrimination which prohibits treatment based on the consequences of disability, putting the onus upon an employer (and others) to justify their treatment of a disabled person, should be adopted. This could be based on the existing wording of disability related less favourable treatment, but with the removal of the comparator, and subject to objective justification.

How should the government improve protection of carers in equality legislation, following the decision in the Coleman case

30. Whilst a decision is awaited in *Coleman* as to whether or not the DDA can be read so as to be compatible with the decision of the European Court of Justice, it is our view that whatever the outcome, the legislation should make coverage of discrimination by association explicit.

31. In addition, the legislation should also cover those who are treated less favourably because of a perception that they are disabled. This is in order to give full effect to the words of the Directive which prohibits less favourable treatment "on grounds of" disability.

We would also point out, however, that the decision in *Coleman* means only that direct discrimination and harassment based on association with a disabled person must be prohibited under domestic legislation. It does not address the matter of flexible working—and in particular, it does not provide carers with a right to reasonable accommodation, which may be necessary in order to ensure their effective participation in the workplace.

How could the duties in goods facilities and services of the DDA be built on to deliver systemic changes

32. The goods facilities and services provisions—and in particular, the fact that the duty to make reasonable adjustments is anticipatory in nature—have the potential to drastically improve the lives and social participation of disabled people. The Court of Appeal decisions in *Roads v Central Trains Ltd* (2004] EWCA Civ 1541) and *Ross v Ryanair Ltd & Anor* ([2004] EWCA Civ 1751) emphasised the importance of these duties and also the aim of the Act itself.

33. However, it is not difficult to see on any high street the number of service providers who have failed to comply with the reasonable adjustment duty specifically in relation to physical features. One of the reasons for this must lie in the fact that—particularly in comparison to employment cases—very few goods facilities and services cases have been brought and this in our view relates in part to the venue for such claims (on which, see below).

34. In any event, relying upon individuals to bring about systemic change through individual litigation places a heavy burden upon disabled people who, in many instances, experience discrimination on a daily basis which it would be time consuming and exhausting to challenge on each and every occasion.

35. Whilst the disability equality duty should address this to a great extent in the public sector, there is no such obligation at present in the private sector.

36. It is our view that consideration should be given to a radical reconsideration of the duty to make adjustments in relation to physical features. In particular, accessibility standards, such as those drafted under the Americans with Disabilities Act, enforceable by a local authority inspectorate, may provide greater certainty and remove the burden of ensuring an accessible environment from individual disabled people.

37. In addition, there should be greater harmonisation between the concepts used in employment and those used in goods and services—in particular, the trigger points for the duty to make reasonable adjustments.

What is the draft EU Directive in GFS proposing and what are the implications for transposition of the new EU Directive for UK law

38. The Directive will as presently drafted have a number of significant implications for domestic legislation. In particular, it will necessitate:

- — the introduction of the concept of indirect discrimination to disability discrimination legislation;
- — the introduction of a concept of harassment for a reason relating to disability in services and premises;
- — changes to the housing provisions (expanding the duty to make reasonable adjustments);
- — expansion of the duty to make adjustments in relation to transport and education; and
- — shifting of the burden of proof.

Is the draft EU Directive welcomed?

39. The draft Directive is extremely welcome and it is particularly positive that it is a single Directive extending to all the grounds, and not disability alone, as was mooted at one point. It is important that there is consistency and coverage across all the discrimination grounds.

40. Whilst it is extremely positive that there will be some consistency of approach across Europe in relation to disability discrimination, there are nevertheless some areas of the Directive which are of concern.

41. These are in particular:

- — no addressing of the definition of disability;
- — the relatively broad justification for discrimination by insurance providers;
- — no requirement to provide alternative methods of service;
- — effect of Article 4(3) that the Directive is without prejudice to European community and domestic rules covering goods and services; and
- — no mention of accessibility of manufactured goods.

42. In addition, there is no protection for multiple discrimination, a subject to which we will return below.

Does the Equality Bill incorporate the provisions of the draft Directive?

43. There is very little detail in the public domain as to what the government is intending to address in the bill and it is not clear at present to what extent the equality bill will incorporate the provisions of the draft Directive. It is clear though that in relation to disability the government is not proposing to introduce at present provisions which would transpose the draft Directive as it stands.

How can it be made easier for disabled people, carers and pensioners to bring and pursue cases in GFS?

44. There is a paucity of goods and services cases litigated. This is in our view not surprising, given the procedural difficulties which bringing such a case in the county court give rise to. In particular, cost at the outset for issuing a case; the fee attached to an allocation questionnaire; the possibility of a claim being listed in the fast or multi-track, meaning that the Claimant risks the possibility of considerable costs being awarded if they do not succeed in their claim.

45. The Disability Rights Commission prepared detailed submissions on such claims which we endorse. It is our view that an equality tribunal, empowered to hear all types of discrimination claims (but with the ability to transfer certain types of case—such as housing or actions against the police—to the county court where appropriate) would be better suited to hearing such cases.

46. Claims brought under the discrimination provisions are not merely personal actions, but contribute to eradicating discrimination which society has indicated it should not tolerate. As such they are qualitatively different from other claims brought in the county court, such as consumer cases. For this reason, they should be treated differently, and steps take to ensure their effective enforcement.

Should discrimination by association extent to GFS?

47. We have certainly had experience of having to advise on situations where individuals have been subjected to less favourable treatment because they are with a disabled person. At present, they have no remedy.

48. Should the draft Directive be finalised, there would be a need for explicit protection against discrimination by association.

49. There are in any event sound reasons for such treatment being prohibited by the legislation.

50. As was said in the Advocate General's opinion in *Coleman* "directly targeting a person who has a particular characteristic is not the only way of discriminating against him or her; there are other, more subtle and less obvious ways of doing so. One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them but third persons who are closely associated with them and do not themselves belong to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they too, affect the persons belonging to suspect classifications".

51. In the interests of consistency coherence and equality we would recommend that discrimination on the basis of association—and indeed perception—be prohibited under the goods, facilities and premises provisions.

What are the implications of the Malcolm case and how should the equality bill take these into account

52. It is our view that any changes to remedy the effects of *Malcolm* must be implemented across the DDA. Whilst there are reasons for distinguishing *Malcolm* in the context of employment (and indeed post-16 education) it is very difficult because of the drafting of the provisions to make such cogent arguments in relation to goods facilities and services.

53. In addition, in premises it is perfectly clear that courts are bound by the *Malcolm* decision, and, as the duty to make adjustments is much more restrictive in premises, there are not the same options for mitigating the effects of *Malcolm* as there are in employment, goods and services and education.

54. It is our experience that premises cases have had to be abandoned in light of *Malcolm*—for example, where a disabled person has failed to pay rent because their depression has resulted in their failing to complete a housing benefit form, then they will no longer have a basis on which to resist any possession proceedings brought against them on this basis.

55. It is important, however, to ensure that objective justification applies in order to avoid the situation raised in *Malcolm*, where the justification provisions were so restrictive that landlords were left with no means of evicting an individual, pre-*Malcolm*, where, for example, arrears arose for a reason relating to disability.

How effective are the provisions in Part 3 of the DDA on buying selling and letting

56. Apart from the issues raised by *Malcolm*, we have limited experience of the duty to make adjustments in the housing field. And in fact we are unaware of these provisions having been used widely at all.

57. It is clear however that they are restrictive when compared to the expansive reasonable adjustment provisions in relation to goods facilities and services.

58. Of particular note is the fact that there is no anticipatory duty to make adjustments. In addition, there must be an individual request for the adjustment, and specific other conditions must apply before the duty is owed.

59. We would suggest that, again in the interests of consistency and in order to make the provisions as effective as possible, the premises duties to make reasonable adjustments should be made anticipatory in nature. Given that the steps to be taken are limited in any event by what is "reasonable" this should not impose an undue burden upon landlords and would result in more effective removal of barriers to disabled people's participation.

60. In addition, having similar duties in this area to those in goods facilities and services would make the law easier to apply and for premises providers to understand.

How could a disability equality duty in the public sector be built upon within a Single Equality Duty? Is a single duty desirable? Will there be unintended consequences for disabled people or disability rights?

61. The equality duties have been used as the basis to challenge a number of public authority decisions, and the courts have been particularly receptive to arguments about their nature. In the context of disability, for example, the case of *R (on the application of Chavda and Others) v Harrow London Borough Council* ([2007] EWHC 3064) was particularly useful in reinforcing the need for local authority councillors to be aware of the duties and to ensure their application when making decisions about budgets for social care.

62. There are at present three different equality duties and with the intention to introduce duties in respect of religion or belief, age and sexual orientation, it is important that there is a strong, coherent framework for these duties. This is particularly the case with the specific duties which, whilst extremely important in providing a "plan" for what an authority is to do, have confused some local authorities because of their differences.

63. It is important, however, that the key elements of a disability equality duty are preserved within a single duty—in particular, the duty to have due regard to the need to take steps to take account of disabled people's disabilities, even where that involves treating them more favourably. This has been particularly effective in reinforcing the reach of the reasonable adjustment duty, and in promoting substantive, as opposed to formal, equality.

64. The other elements of the disability equality duty—equally important—ie harassment, public participation and positive attitudes are equally important as regards the other equality grounds, and these should be reflected in a single duty.

65. In addition, a single duty would need to provide guidance on how multiple discrimination should be considered. Guidance would be needed on how to avoid a hierarchy of equalities, eg with age and disability at the bottom because they are capable of greater justification.

How could procurement be made a more effective lever for equality outcomes?

66. The experience under the Race Relations Act demonstrates that more is needed generally to ensure that public authorities, especially central government departments, fully embrace and implement their positive duty to promote equality. In particular, despite comprehensive guidance prepared by the CRE in 2003, and subsequently by the DRC, and EOC, that illustrated how at each stage of the procurement process, a public authority should, and could, while complying in full with the requirements of EU law, take their race equality duty into account, there is very little evidence of this occurring. CRE guidance illustrated that the race equality duty was relevant not only to contracts involving the provision of services to the public but also internal services and purchases of certain types of goods and work. Critical, and of general concern, are the ways in which, through procurement, a public authority can secure improvements in equality of opportunity within the contractors workforce.

In the absence of (or even alongside) a private sector equality duty, public procurement is a critical lever for the promotion of equality within the private sector. Whilst the general duty as framed in the RRA, the DDA and the Equality Act 2006 should be sufficient to ensure that the equality duty is exercised in relation to procurement, we would recommend that the new legislation should make this explicit. This appears to be necessary to overcome the hesitation by public authorities, which, in turn, is based in part on the extremely cautious approach of the Office of Government Commerce (OGC). A clear statutory duty to apply the equality duty to public procurement should overcome the problems that have arisen due to the reluctance of the OGC to recognise procurement as a "function" of public authorities.

How does disability fit in a single equality act?

67. A single equality act harmonising and "levelling up" provision across the grounds is clearly desirable. It is important that particular attention is paid to the inconsistencies in current disability legislation—the differing trigger points for the duty to make reasonable adjustments and the different approaches to justification being just two examples—and that these are addressed. It is also important that where necessary—for example, in relation to disability-related discrimination—a different approach is taken—harmonisation should not come at the expense of effective disability legislation.

Should the social model or medical model apply for disability?

68. We have set out above, in our introduction and also in relation to the definition of disability, why it is our view that the social model of disability should underpin any legislation prohibiting disability discrimination.

Multiple/intersection discrimination

69. Whilst a question has not been raised as to this, it is nevertheless important in our view to address a current gap in the legislation in relation to what is often termed "multiple discrimination".

70. This relates to the impact of the current provisions on people who suffer from discrimination on more than one ground. Such discrimination may be additive (a disabled woman whose employer discriminates on the grounds of sex and disability will be doubly disadvantaged by her combined disability and sex), or it may be intersectional (a disabled woman whose employer discriminates only against disabled women, but not against non-disabled women or disabled men will be uniquely disadvantaged by her combined disability and sex). Multiple discrimination (whether of the additive or intersectional variety) can be experienced by disabled women, elderly men or women, Asian women, Black men, lesbian women, and by those defined by reference to extensive grounds (Muslim women of South Asian extraction, for example, or British born young Black men).

71. Additive discrimination is open to challenge under current domestic law as long as those subject to it can fulfil the normal standards of proof in relation to each of the grounds of discrimination which they allege. But domestic law fails to address multiple discrimination when it takes the intersectional form. In *Bahl v Law Society*, for example, the claimant (an Asian woman) alleged that she had been discriminated against as a Black woman. A tribunal, finding in her favour, declared that she had been treated less favourably as a Black woman. (She was, in fact, the first Law Society office holder who was not both white and male.) The Employment Appeal Tribunal ([2003] IRLR 640) overturned the tribunal's decision, Elias J ruling that the tribunal erred in law "in failing to distinguish between the elements of alleged race and sex discrimination". The Court of Appeal ([2004] IRLR 799) upheld the EAT's approach, ruling that the tribunal had failed to identify what evidence goes to support a finding of race discrimination and what evidence goes to support a finding of sex discrimination. It would be surprising if the evidence for each form of discrimination was the same… In our judgment, it was necessary for the [employment tribunal] to find the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it was making the inference which it did in favour of Dr. Bahl on whom lay the burden of proving her case.

72. Had Dr Bahl been either white or male, the first instance decision would have been immune from interference given the tribunal's finding of less favourable treatment in relation to a number of incidents and the inference permitted from such treatment and a difference in sex or (but not, it appears, and) race. As it was, Dr Bahl's claim had to be made by reference to white women and Black male comparators (actual or hypothetical) and could (in the former case) readily be defeated by evidence relating to the employer's non-discriminatory treatment of either group.[170] Such evidence would not, of course, disprove discrimination against Black women as Black women.

73. Similar issues arise in relation to indirect discrimination.

74. The Single equality act should ensure that action can be taken on the basis of a combination of prohibited grounds i.e on intersectional discrimination.

November 2008

15. Memorandum submitted by Saga Group

1. This response of the Saga Group reflects our views on the suite of questions posed by the Select Committee entitled "Equality in Goods, Facilities and Services".

2. Saga built its highly successful British business on niche marketing to the over 50s. Our robust and highly popular brand is based on trust, quality, dependability and value for older people. We focus on understanding and designing bespoke services to meet the changing needs and demands of our target market of people aged 50+ in the UK, a demographic group comprising about half the electorate and forecast to grow from 20 million to 25 million people by 2015.

3. We support measures to combat unfair discrimination that denies people the ability to live life to the full. However, a purist approach to equality would threaten our business model. For example, our insurance business, if forced to offer premiums to all age groups, would become less competitive for the over 50s because we would have to bear extra costs of quotation. Our holiday business currently serves only the over 50s and the popularity of our holidays partly depends on the over 50s being the specific target market. A

[170] Though note that on the facts of the instant case there would have been no actual women or Black comparators.

Single Equality Bill, promised before the end of this Parliament, might inadvertently make all age discrimination in the provision of goods, services and facilities illegal. Some campaigners for equality regard the loss of benefits for the elderly as a price worth paying. We disagree.

4. Saga welcomes the pragmatic approach in the Government's Command Paper, *A Framework for a Fairer Future*, published in June 2008. Holidays restricted to age appear to be relatively safe now that the paper specifically appears to exempt them: "The new law will ban unjustifiable age discrimination against over-18 year olds…It will not affect the differential provision of products or services for older people where this is justified—for example free bus passes for over-60s and priority flu vaccinations for over-60s or group holidays for particular age groups or actuarially justifiable age-based treatment in areas such as financial services." Chapter 2: Ending Age Discrimination, Pg. 16, *Framework for a Fairer Future—The Equality Bill,* June 2008.

5. We have obtained assurances from Commissioner Spidla that group holidays by age will not be outlawed by the forthcoming Council Directive on Equal Treatment. We remain vigilant and concerned about this aspect because there are many campaigning in the equality field that any exemptions undermine the fundamental principles of what they are trying to achieve.

6. The Government Response to the Consultation on the Green Paper, published in July 2008, reports that legislation on banning unjustifiable discrimination of the provision of goods and services may be left to secondary legislation. Given the difficulty of influencing secondary legislation, we would prefer these issues clear on the face of the Bill, so that any perception of risk to our business model is removed in accordance with the Command Paper's clearly stated intention.

7. The position on insurance is rather more complex and subject to ongoing consultations. We accept that some elderly people find it more difficult to obtain holiday, car or health insurance, although since we supply these services without age limit we think Saga is part of the solution not part of the problem. There is also conflicting data just on how big the problem actually is. Mystery shopping exercises commissioned by Help the Aged and Age Concern found that 20% of attempts to obtain a quotation for car or travel cover by the over-65s were unsuccessful. Conversely, a SAGA Populus survey in 2008 found that only 3% of those who responded aged over 65 had been denied motor insurance on grounds of age[171]. It may be that part of the difference is explained by sampling—the Saga Populus survey covered 3,307 people over 65: the Age Concern research sample was 229.

8. We believe that the problem—insofar as it does exist—could be easily and relatively cheaply dealt with by the practice of signposting. The company that does not insure a particular market segment would undertake to signpost the customer towards an insurance provider that could help. The other alternative of forcing companies to quote for business they do not want will add significantly to costs.

9. Article 12 of the draft Directive provides for Member States to have an Equality Body at national level to promote equal treatment and give independent help to victims of discrimination through the legal system. This function in the UK will be fulfilled by the EHRC. What we cannot be certain about at the present is how purist and interventionist the EHRC may be. If it seeks to reverse the pragmatic spirit of the Command Paper, perhaps by exploiting unresolved issues on the face of the Bill, then it may represent a threat to our business model. Thus, as with the point about secondary legislation, we would prefer these issues to be settled within the primary legislation.

10. Article 2 of the EU Draft Directive, paras 6–7 currently seems to offer a great deal of flexibility for national interpretation of what is and is not discrimination: "Notwithstanding paragraph 2, Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In particular, this Directive shall not preclude fixing of a specific age for access to social benefits, education and certain goods or services".

11. On the refusal to quote or supply insurance by age, it is not clear to us whether Article 3.1(d) (access to and supply of goods and services) of the draft would cause difficulty by identifying it as discrimination. We are seeking official clarification. The Commission regards the pricing in of genuine risk factors by age as acceptable, but wants to consult with the industry and other stakeholders to achieve a better understanding of the areas where age or disability are relevant for the design and pricing of products. In this respect the Commission seems to be at a parallel stage to the UK Government in its consideration of these matters.

12. The question: "Does the Equality Bill incorporate the provisions of the Draft Directive?" is very pertinent. At present, the European Parliament is taking a view on the Council's Draft Directive, and there are attempts being made to tighten up provisions, notably around insurance, and disability. Our best assessment is that this Directive may not emerge in final form before the second half of next year. Therefore,

[171] The Saga Populus poll found that three quarters (77%) of respondents support the idea of insurance companies being obliged to quote everyone regardless of age. However, it found support for this fell away significantly when the implications for Saga were made clear: 40% now supported the idea, 28% were neutral and 29% said it was a bad idea. Furthermore, there were fears of a fall in the quality of service offered by specialists such as Saga if anti-discrimination law obliged insurance companies to sell to all regardless of age—61% feared that this would be the case. In fact, when the question was put a different way—should promoting and selling to particular groups be banned, three quarters disagreed. Nor was there appetite for age discrimination law to be expanded to cover discounts offered to particular age groups (78% disagreed).

the Equality Bill is unlikely to be able to incorporate all the provisions of the Directive as it emerges from the legislative pipeline. We think that it would make more sense for the Equality Bill to be legislated after the Directive is completed. Otherwise, the UK may be faced with returning to Parliament to amend or legislate anew.

SUMMARY

- Saga's business model is based on niche marketing to the over-50s. Research shows that people support age discrimination in marketing which is beneficial.
- We urge that the forthcoming Equality Bill legislates only against discrimination that is harmful and exempts justifiable age-based treatment in the provision of goods and services.
- We recommend that legislation on banning unjustifiable discrimination of the provision of goods and services is settled in primary legislation. This will help us to avoid potential difficulties involved in predicting or complying with secondary legislation.
- For the problem of ensuring that the elderly have better access to insurance we recommend the adoption of signposting so that an insurance company which does not wish to quote is obliged to point the customer to a company that will.
- It makes more sense for the Equality Bill to be legislated after the Directive is completed. Otherwise, the UK may be faced with returning to Parliament to amend or legislate anew.

APPENDIX A

SURVEY OF 500 SAGA TRAVEL CUSTOMERS

- 78% prefer to go on holiday with others aged 50 and over.
- 97% do not object to holiday companies that offer holidays for particular age groups.

BMRB SURVEY OF 2,004 ADULTS

- 93% do not object to goods and services being offered at a discount to people of a particular age.
- 57% think that it would be a bad thing if legislation made it illegal to offer holidays confined to a certain age group. Only 9% thought it would be a good thing.
- 60% thought it would be a bad thing if legislation made it illegal to offer discounts on goods and services to people on the basis of their age. Only 13% thought it would be a good thing.

SAGA/POPULUS ONLINE SURVEY OF 14,809 ADULTS OVER 50, DECEMBER 2006

- 84% agreed that discounts on products should be offered to specific age groups.
- 86% feel it acceptable to sell products such as holidays and car insurance that are confined to specific age groups.

SAGA EUROPEAN OMNIBUS POLLING OF 4,312 ADULTS ACROSS EUROPE MARCH 2008

- 78% of Spanish respondents felt that businesses that offer discounts or favourable terms on products and services to specific age groups acceptable, while those from Germany were least likely to think so (62%).
- Again, German respondents were least likely to think that businesses that promote and sell products such as holidays or car insurance confined to specific age groups were acceptable (54%), while Spanish respondents were most likely to do so (73%).
- 64% of all respondents disagreed that offering discounts or favourable terms on products and services to specific age groups should become illegal under European age discrimination legislation.

APPENDIX B

BETWEEN APRIL AND MAY 2008, 101 MEPS WERE SURVEYED USING SELF-COMPLETION POSTAL AND ONLINE QUESTIONNAIRES

When asked whether they thought it is a good or bad thing that some holiday companies offer holidays to a certain age group, such as 18–30 or over 50s, more than four out of every five MEPs (84%) are either neutral in their opinion (46%) or think that it is a good thing (38%). Only 8% think such holidays are a bad thing.

MEPs unequivocally think that the EU should NOT make it illegal to offer holidays to a particular age group. Only 4% of MEPs think that it should be made illegal while 83% do not.

MEPs are very much in favour of the practice of offering discounts to people of a particular age, for example people over 60. Nearly nine out of ten MEPs think that it is either a good thing (62%) or a neutral thing (27%). Only 6% think it is a bad thing.

MEPs were asked whether discounts on goods and services offered to certain age groups should be made illegal by the EU. Nearly nine out of ten MEPs (87%) do not think such discounts should be made illegal. Only 6% of MEPs think such activity should be made illegal.

MEPs were in turn asked whether they thought it is a good or bad thing that some insurance companies specialise in offering insurance to specific age groups. In partial contrast to the earlier result about discounts to over 60s, while 72% of MEPs think it is a good (33%) or neutral thing (39%), 20% of MEPs think that such activity by insurance companies is a bad thing.

Therefore linking the two issues, protection of the elderly and offering age specific discounts on insurance products, could increase the level of support for the latter.

The majority of MEPs (63%) do not think that the EU should make it illegal for companies to confine their insurance business to certain age groups only. However 22% of MEPs do think it should be illegal.

November 2008

16. Memorandum submitted by Employers Forum on Age

1. About the EFA

The Employers Forum on Age (EFA) welcomes the opportunity to contribute its thoughts to the Select Committee, with particular reference to topics in which we regard age as a significant issue.

The EFA, established in 1996, is the first ever employer led initiative to promote the business benefits of an age diverse workforce. We campaign against age discrimination at all ages. The EFA has some 180 employer members from the public, private and voluntary sectors, representing over 10% of the UK workforce.

The EFA works closely with employers to share good practice in age employment policies and to represent their interests to Government and others.

2. Equality in Employment

2.1 *How effective has DWP been in achieving equality in employment, how would it have to change to achieve greater equality in employment?*

We observe that responsibility within Government for equality in employment has historically been somewhat fragmented (for example, with the lead on the transposition of the European Framework Directive 2000/78 into UK law falling to BERR). In consequence, we consider that the effectiveness of DWP in this regard can only be fairly judged in respect of strands[172] which have fallen naturally within its remit, and therefore most notably age.

The EFA considers that DWP has, through the Age Positive campaign and more widely, been a strong influence for an age neutral workplace and the benefits of encouraging a greater participation rate of older workers.

Whilst on-going responsibility for the Employment Equality (Age) Regulations—and hence for the review of the operation of the Default Retirement Age in 2011—has thus far been allocated to BERR, we are firmly of the view that DWP should have co-ownership of the latter, in view of the need for a harmonised approach on extended working life, occupational pensions and State benefits.

2.2 *How should the Government improve protection of carers in equality legislation, following the decision in the Coleman case?*

Whilst we wait to see how the originating Employment Tribunal will deal with the case following the ECJ judgment, we believe that the Government may need to consider amending the Age Regulations to include age discrimination "by association", since the current definition used does not permit such a claim. Without such additional protection, the position of many carers may be disadvantaged.

[172] By strand we mean a characteristic, such as age or sexual orientation, which is protected against discrimination in the field of employment or more broadly.

3. The Public Sector Equality Duty

3.1 *Is a Single Duty desirable?*

Many public sector members of the EFA have already gone beyond the current compliance threshold established for gender, race and disability to embrace the other strands. We believe that a Single Duty is essential to ensure that there is no possibility of creating a hierarchy of strands, and to avoid duplication. Whilst we appreciate the concern to avoid a dilution of the existing strand-specific duties we believe that pragmatic solutions must be found to avoid perpetuating a silo approach to equality.

4. Private Sector Commitment and Support, Guidance, Advice and Information for Employers

4.1 *Is an Equality Duty on the Private Sector workable?*

We do not believe that there is clear evidence to support the need for an Equality Duty on the private sector, and there is a real risk that many employers would see this as over-regulation. Provided that appropriate indicators of diversity performance are adopted (and that these are not narrowly or prescriptively restricted to, for example, the gender pay gap), we believe that substantial change in the private sector will flow from an increased focus on equality and diversity in public sector procurement from private sector suppliers.

4.2 *What can be done in the realm of light-touch regulations, guidance and advice to promote a culture change in the private sector for all those subject to discrimination?*

The EFA, like the other employers' fora, campaigns for culture change in respect of its own domain of discrimination. The guidance and advice provided by institutions such as ACAS is an invaluable aid to these efforts, and we look to the EHRC also to contribute where appropriate.

We are less optimistic about the prospects for an equality "kite mark", which has been suggested as desirable for the private sector. If such a proposal is to be progressed, we consider it essential that employers' views are properly canvassed, along with those of the employers fora which offer strand-specific benchmarking, to ensure that the "kite mark" is workable.

5. Single Equality Act

What is the role of the Equality and Human Rights Commission within the single Equality Act?

Whilst not the architect of the proposed single Equality Act, the EHRC should be a key influence on its shape and has a crucial role to play in ensuring its provisions are upheld. We are encouraged by the progress the commission had made in establishing a broad base for consultation on its future direction, and we believe its holistic, theme-based approach to equality and diversity—extending as necessary beyond the consideration only of groups protected under discrimination law—will be instrumental in breaking down barriers to fairness.

November 2008

17. Memorandum submitted by British Chambers of Commerce

About the British Chambers of Commerce (BCC)

1.1 The British Chambers of Commerce is the national body for a powerful and influential network of Accredited Chambers of Commerce across the UK; a network that directly serves not only its member businesses but the wider business community. Representing 100,000 businesses that together employ five million people, the BCC is the Ultimate Business Network.

Summary

2.1 Employers want to recruit and retain the best people for the job irrespective of race or gender. Whilst we support the intentions behind this bill, we think that the mechanisms used will increase the administrative burden on business and are unlikely to have the desired impact in terms of equality.

2.2 In these tough economic times, the government's priority should be to make the tendering process for public sector contracts easier for small businesses. The Glover Review recognised that it is already difficult for small firms to access the £160billion of public sector contracts that are on offer each year. There is a danger that these measures will make it even more difficult for small firms to access these contracts.

2.3 We strongly oppose the idea of representative actions in employment tribunals. Representative actions will undermine the key feature of the tribunal system: that it is low cost and it is easy for both the employer and employee to represent themselves.

2.4 There is a risk that the proposal for positive action will complicate an already complex area of employment law and confuse employers and employees alike. We do not believe that the supposed benefits will be worth this added confusion as it is unlikely that SMEs will use this law. This is for two reasons; firstly, because positive action may only be taken if two candidates are equally qualified and it is improbable that this situation will arise. Secondly, because an SME could use another reason for hiring or not hiring a potential employee which is less "risky" in terms of legal action.

BCC Response

How could procurement be made a more effective lever for equality outcomes?

3.1 We question the premise that procurement should be a lever for equality outcomes. However, it is important that whatever method is made to do this it does not further disadvantage small firms in the procurement process. The Glover review highlighted the difficulties small firms already face and now that many capital projects have been brought forward to help the economy out of recession, it is even more important that small firms can access these contracts. Large firms are going to find it easier to find the time to fill in extra paperwork and find the resources to prove that they are fulfilling the equality requirements. The focus on procurement should be on helping small firms access more public contracts and we are concerned this could represent a significant barrier to achieving the 30% target proposed in the Glover Review.

Is an Equality Duty on the Private Sector workable?

4.1 Laws preventing discrimination in the workplace already operate in the private sector as well as the public sector. Employers cannot discriminate either in the recruitment process or during employment on the grounds of race, religion, gender, age, disability or sexual orientation. Employers want to hire and retain the best staff and when discrimination does occur, the tribunal system is set up to allow employees' access to justice relatively cheaply and easily.

4.2 A further equality duty along the lines of the one the Bill places on the public sector would not be workable. According to *Framework for a Fairer Future*, "the duty will require public bodies to consider how their policies, programmes and services affect different disadvantaged groups in the community," and we do not believe this remit should apply in the private sector. Most employers want to create a culture of acceptance and diversity and we believe the government can better support this through guidance rather than legislative action.

What is the role of the Equality and Human Rights Commission within the Single Equality Act?

5.1 We are concerned that the Bill provides for representative actions within the tribunal process; with the assumption being the EHRC and the Trade Unions would be able to bring claims. We strongly oppose this proposal and think it will undermine the tribunal service which aims to allow employers and employees alike to cheaply access justice and represent themselves.

November 2008

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18. Memorandum submitted by The Law Society

— The Law Society is the representative body for more than 100,000 solicitors in England and Wales ("the Society"). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

— This response has been prepared by the Society's Employment Law Committee and its Mental Health and Disability Committee. Both committees are made up of senior and specialist lawyers from across the country who volunteer their time. Employment Law Committee members provide advice and representation to employers and employees through practice in City and regional firms, local government, industry, trade unions and law centres. Some Committee members are part-time employment judges. The diversity of the Committee's composition is intentional. The Mental Health and Disability Committee is made up of lawyers practising in the fields of disability discrimination, mental health, mental capacity and community care on both the claimant and respondent side and also has members from other professions.

— This is a summary rather than a detailed response outlining the Law Society's views on the decisions handed down in the *Coleman*[173] and *Malcolm*[174] cases; discrimination by association in Employment and Goods Facilities, and Services; the introduction of a Single Equality Duty; and Private Sector commitment in line with our support for the use of public procurement to improve transparency and equality in the private sector.

Equality in Employment

The Law Society does not consider that any government department has been particularly successful in reducing inequality in employment. On a day-to-day basis, people with disabilities continue to face significant discrimination in employment.

The Law Society considers that the Equality Bill should include provisions to reverse the decision handed down in the *Malcolm* case. This has had the effects of narrowly defining the comparison for disability related discrimination in premises cases so that the test for disability-related discrimination is now effectively that for direct discrimination, as well as requiring that a disability is known about for discrimination to have taken place. If the decision is not reversed by the Equality Bill, the Law Society nevertheless considers that the decision should not apply to employment, education or other goods, facilities and services cases.

Following the decision handed down in the *Coleman* case, the Law Society believes that there should be increased protection for discrimination against carers (or indeed in respect of any discrimination by association) by amending the domestic legislation such that it reflects the wording of the Equal Treatment Directive, which prohibits discrimination by association.

The Law Society considers that many employers react to requests for flexible working by (1) assuming that the business cannot support alternatives to full time work; and (2) subsequently looking for the business needs to justify this position. In light of the *Coleman* case, it would be valuable to facilitate increased awareness on the part of employers of the possibility of a Disability Discrimination Act 1995 claim by a carer of a disabled person whose flexible working request is rejected based on an argument of unlawful discrimination on grounds of association with a disabled person.

Further, given the effects on Part 4 of the Disability Discrimination Act 1995 as amended of the UK's interpretation of the European Employment Framework Directive 2000/78/EC, discrimination by association should be extended to carers who are students in Further and Higher education.

Equality in Goods, Facilities and Services

We are not clear whether the committee is including the provision of education under this heading as it does not appear elsewhere.

In terms of making it easier for a range of people to pursue goods, facilities and service cases, The Law Society considers that it would be best to create an equality tribunal which could hear GFS and education cases and cases on multiple discrimination grounds, subject to the Tribunal judges having the necessary specialist training. Taking a case in the county court is extremely daunting for most people, given the complexity of the county court rules. Comprehensive public funding, including funding for representation at tribunals, is also a key factor for effective access to justice.

The Law Society considers that discrimination by association should be extended to GFS. Please see our comments under Equality in Employment on the *Malcolm* case.

The Law Society welcomes the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

The Public Sector Equality Duty

The Law Society welcomes the introduction of a Single Equality Duty. However, it recommends caution that if too broad, such a duty will not take into consideration the different needs of individual groups. We think statutory guidance should emphasise the need to address each strand individually and should strongly discourage a "one size fits all" approach.

Private Sector Commitment and Support, Guidance, Advice and Information for Employers

We support the use of public procurement to improve transparency and equality in the private sector.

[173] *S Coleman v Attridge Law & Stephen Law*—C-303/06
[174] *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43

Single Equality Act

The Law Society believes that the "social model" should apply to the definition of disability in the single Equality Act as this is the model adopted by the Convention on the Rights of Persons with Disabilities and used by the Equality and Human Rights Commission. The EHRC should continue to have formal investigation and enforcement powers.

November 2008

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19. Memorandum submitted by the Royal National Institute for the Deaf

About RNID

1. RNID is the largest charity dedicated to the UK's nine million deaf and hard of hearing people. Our vision is of a world where deafness or hearing loss do not limit or determine opportunity, and where people value their hearing.

2. We aim to achieve this vision by campaigning and lobbying vigorously, by raising awareness of deafness and hearing loss, by providing services and support, and through social, medical and technical research.

3. We welcome the opportunity to feed into the Work and Pensions Committee's inquiry into the Equality Bill and what steps the Department for Work and Pensions should take to achieve greater equality. We use the term "deaf people" to refer to deaf, deafened and hard of hearing people throughout.

Executive Summary

4. RNID welcomes the Equality Bill as an opportunity to streamline discrimination legislation, ensure comprehensive rights, remove disparity between strands and strengthen enforcement.

5. RNID is part of the Disability Charities Consortium (DCC), whose priorities for the Bill include: a comprehensive definition of discrimination; extension of protection to people who experience discrimination and/or harassment because of association with a disabled person; retain the key principles of the disability equality duty; strengthen the enforcement of equality legislation.

6. The Equality Bill must anticipate the new obligations that will be laid out in the EU Equality Directive, which RNID welcomes for the comprehensive and enforceable minimum standards it will provide for protection against discrimination in non-employment areas across Europe.

7. RNID calls on the Government to ratify the UN Disability Convention without undue delay and without reservations or interpretative declarations.

8. There are many positive actions that the DWP has taken to help protect deaf people from discrimination, such as the Access to Work programme, but there is more that the Department can do to promote what is already in place and further mechanisms that can be introduced to ensure greater equality for deaf people.

Equality in Employment

9. The introduction of the Disability Discrimination Act 1995 was welcomed as a positive step for the UK's nine million deaf people, providing deaf people with enforceable human rights. Other Government actions, such as the introduction of the Access to Work scheme, have had a positive impact on deaf people in employment.

10. However, deaf people still face barriers to gaining and retaining employment. Deaf people have experienced higher rates of worklessness and for lengthier times than the general population, over an extended period of economic prosperity, and the employment rate for deaf people has not changed significantly since the introduction of the DDA despite a strong desire to find paid work.

11. RNID research shows that 63% of deaf people are currently in employment[175] compared to 75% of the general population.[176] 57% of deaf people had been looking for work for more than 12 months, this compared to only 20% of the total of unemployed people at the time.[177]

12. This is partly due to the fact that statutory employment service provision has proved largely ineffective for deaf people. We are therefore concerned that the Government's plans for helping disabled people into work will not work for deaf people, and that they will be left behind. Supporting a profoundly deaf person into work takes a great deal of investment that some providers may not be prepared to meet.

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[175] *Opportunity Blocked*, 2006—The December 2006 Labour Force Survey estimated only 59% of those with "difficulty in hearing", though has a high margin of error.
[176] *Labour Force Survey*, March 2008
[177] Extrapolation from the *Labour Force Survey*, March 2006

The situation could be improved if the Government measured the outcomes of its employment programmes to show how people with different impairments and conditions fare on them. We believe that only those service providers who manage to succeed across the board should be rewarded with further contracts.

13. The voluntary sector can play a pivotal role in ending inequality for disabled people in employment. RNID is keen to play our part in enabling deaf people into work, but the current arrangements mean that we are not being offered a fair price for success, and are asked by prime contractors to run our services at a loss. We need a funding model that takes account not only of the actual costs to get someone into work, but of the need to invest and expand. We need a model that goes beyond full cost recovery. Deaf people need to have access to employment-related training that is accessible and viable in order to gain equality in employment. The Pathways to Work scheme, within which any provider must work, places smaller specialist providers such as RNID at a potential disadvantage.

14. Where successful Government initiatives to end inequality in employment are in place, there are issues around the promotion of them. For example, little awareness raising work amongst groups that stand to benefit most from the Access to Work scheme has been undertaken by the Government. It is hoped that the ongoing review of the scheme will see greater emphasis on targeting those (employers and employees) with the greatest need. A similar review of Remploy (which has few deaf employees) has freed up funding from sheltered employment to be invested in moving those with more complex barriers towards the open labour market.

15. We would also like to see Access to Work funding made available to volunteers, as volunteering is an important route into employment for deaf people, but many are blocked from this route as neither they nor the employer they are volunteering with can fund an auxiliary service such as a British Sign Language/ English interpreter. It is also important that volunteers are protected against unfair treatment in light of Government proposals for "community service" and requirements for British citizenship.

16. Additionally, we would like to see the Access to Work scheme opened up to all claimants of Employment and Support Allowance, with everyone entitled to a basic Access to Work assessment as part of their claim. This could occur at the time of the first mandatory Work-Focused Interview and would form a key part of the claimant's action plan. This would also allow for ESA claimants to experience the kinds of adjustments that Access to Work can provide as part of any vocational or training schemes that they may be part of.

17. It is also vital that employers are challenged about their attitudes towards deaf people and their abilities. Unless they change their practices and procedures, even the most highly trained and skilled deaf people will continue to be turned away. The Government's proposals for reforming the welfare system place the onus of responsibility for finding work on the individual working with private or voluntary employment service providers. However, there has been little or no comparable work with employers to improve recruitment or awareness of deaf or disabled people on the part of a Government that is very reluctant to add to the regulatory burden for business.

The Public Sector Equality Duty

18. The introduction of the Disability Equality Duty has ensured that public authorities must take action to promote equality and to eliminate discrimination and harassment, at the same time promoting positive attitudes towards deaf people and encouraging participation in public life.

19. RNID welcomes a single public sector equality duty and we believe that it is possible, and indeed necessary, to retain strand-specific duties, for instance the need to take into account a deaf person's needs, even where that involves treating a deaf person more favourably.

20. It is vital that the new equality duty is at least as effective as the existing disability equality duties.

21. We believe that a specific duty around public procurement is desirable as it would signal that public authorities can be held accountable when contracted services or publicly funded services are not compliant with disability equality. The Government's proposals on this issue outline a light-touch approach through encouraging greater transparency and improving use of purchase power but we do not believe that this goes far enough.

Social Inequality

22. It is essential that anti-discrimination legislation be backed up by social policy measures that enable disabled people to live independently and enjoy the same opportunities, quality of life and respect as non-disabled people. RNID is committed to making this a reality through the supported housing we provide and our community and outreach work. We provide high quality care and support for deaf people who have additional needs. Our supported housing provides support for independent people who still need some level of assistance to live on their own and our community and outreach work allows us to support people living in their own homes who want help with daily living skills, finding work, college courses and training, accessing the deaf community, housing issues and social skills.

23. We are also working on a new community based residential care home in Derby for deaf people who have mental health support needs. The service will provide an increased level of independence for individuals who are not able to live fully independently but who do not require institutional care.

Education

24. On its introduction in 2005, the DDA did not cover education. This was rectified through the 2001 Special Education Needs and Disability Act (SENDA). There is strong evidence that deaf children need protection against discrimination in education. There is a wide educational attainment gap between deaf pupils and their hearing peers. In 2006, only 47% of pupils with a hearing impairment achieved level 4 or above at Key Stage 2 English, compared to 79% of all pupils.[178] In 2007 only 32.9% of hearing impaired children achieved five GCSEs at grades A to C, compared with a national average of 57.1%.[179] Therefore it is important that the specific educational elements in the DDA are protected in any future legislation.

November 2008

20. Memorandum submitted by Carers UK

1. About Carers UK

1.1 Carers UK is the leading organisation representing the views and interests of the six million carers in the UK who care for their frail, disabled or ill family member, friend or partner. Carers give so much to society yet as a consequence of caring, they experience ill health, poverty and discrimination. Carers UK seeks to end this injustice and will continue to campaign until the true value of carers' contribution to society is recognised and carers receive the practical, financial and emotional support they need.

1.2 Carers UK is an organisation of carers, for carers, with a reach of around 1,500 organisations, including many run by carers, who are in touch with around 950,000 carers between them. Including Carers Week our reach extends to around 4,000 groups and 2.5 million carers.

1.3 Carers UK runs an information and advice service and we answer around 16,000 queries from carers and professionals every year. We also provide training to over 2,600 professionals each year. Our website is viewed by nearly 300,000 unique visitors and nearly 1,000 carers are members of our website forum.

1.4 Carers UK has offices in Wales, Scotland and Northern Ireland and we also run a specific project in London. This response reflects the views of the organisation, UK-wide.

2. Introduction and Summary

2.1 Carers UK believes that this Inquiry has the potential to build on and complement the Committee's earlier groundbreaking report on carers, *Valuing and Supporting Carers*. We firmly believe that our proposals will increase carers' life chances and equality, as well as delivering benefits to business, local communities, families and to society as a whole.

2.2 As this response sets out below, we believe that carers are discriminated against and that this is one of the major reasons why they have such unequal outcomes across a range of indicators. These include their health, access to employment, income and social inclusion.

2.3 We believe the DWP should take a more strategic approach to improving opportunities for carers, particularly in employment. In its interaction with carers through the benefits system and return to work support, its engagement with employers and through its influence across government in other key areas such as social care, the Department could support considerable improvements in policy development and implementation.

2.4 However even with policy improvements in these areas, we believe there is a very strong case for extending legal protection to carers against discrimination in the three key areas of:

- a single public sector equality duty;
- discrimination in employment; and
- discrimination in the provision of goods, facilities and services.

[178] Data based on Pupil Led Annual School Census Returns. The data refers only to pupils placed at School Action Plus and those with statements where hearing impairment is the prime type of special educational needs. Data on the attainment of deaf children placed at School Action of the SEN Code of Practice is unavailable as is data on children placed in independent schools.

[179] http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070306/halltext/70306h0011.htm

2.5 We believe that serious consideration should be given to all these three areas because:

- Each measure would be less effective without the others. The public sector duty needs to be implemented along with anti-discrimination protection to ensure that it is underpinned and discrimination law would also be less effective without the driving force of the duty to effect culture change and a positive promotion of equality.
- This would provide the most practical and effective way of tackling discrimination while also providing the most clarity for carers, employers and service providers alike.
- Anti discrimination policy for carers has been tried and tested by the best employers and service providers and is in many ways a less onerous and challenging area of discrimination to implement than some of the other diversity strands. It should not be a difficult issue to address in practice and it would have tangible and long lasting benefits.
- This recognises the existence of multiple discrimination. Many carers face discrimination on a number of grounds and cannot be easily pigeon-holed into any one category; a new protection for carers would be helpful in linking multiple forms of discrimination and incentivising good practice.
- This would recognise the realities of people's lives—most of us will experience caring at some point in our lives. It is at such times of our lives—when we are in most need of accessing flexible employment and services—that the issue of protection against discrimination is at its most relevant.

3. Carers and the Single Equality Act

3.1 Carers UK welcomes the Single Equality Act as we believe it will be simpler for those relying on the protection it offers, and for employers and services providers. We believe it offers the opportunity not just to consolidate existing legislation, but to review the progress made over the last 30 years and ensure that the law reflects the issues we face in the 21st century.

3.2 The position of carers does interact considerably with existing equality strands and it has been an issue that has been recognised by the Equality and Human Rights Commission (EHRC) as a key priority for its work.

- Disability—Carers are two to three times more likely to have a life limiting illness if they are providing substantial care compared with those who are not carers. (Source: Census 2001). The recent ruling in the *Coleman v Attridge Law* case also confirmed that disability discrimination legislation is intended to cover those "associated with disability" ie those who are caring for a disabled person.
- Age—The peak age for caring is between 45 and 54 when one in four people is a carer (Census 2001) and, because of the age profile, if a carer gives up work to care, they are more likely to find it harder to return to work.
- Race—Bangledeshi and Pakistani men and women are three times more likely to provide care compared with their white British counterparts (Source: *Who Cares Wins, Statistical analysis of the Census 2001*).
- Gender—women have a 50:50 chance of providing care by the time they are 59 compared with men by the time they are 75 years old and women are more likely to give up work in order to care (Source: *It Could be You*, Carers UK 2000).
- Sexual Orientation—people who care and who are in a lesbian or gay relationship face additional barriers in accessing the sorts of services that they need and face different prejudice.
- Religion or Belief—the way that services are supplied to a family may not be religiously appropriate.

3.3 These considerations have led to some people suggesting that caring is a cross-cutting issue, and should not be a strand protected in legislation in its own right. We believe this approach would not recognise the reason why a carer is discriminated against, and would not give them the protection they should be entitled to in their own right. Existing legislation in these areas has not been effective in protecting carers from discrimination to date: the new Single Equality Bill provides an opportunity for a new approach.

3.4 It has also been suggested that carers are likely to be covered through indirect discrimination, particularly on the grounds of gender or age. However this is a difficult vehicle to use as it involves complex stages for proving the definition, is untested in law and does not provide clarity for employers or employees. Relying on this form of protection would also lead to further inequalities as, eg, indirect sex discrimination would not protect men who are carers and indirect age discrimination would not protect younger carers who are often most at risk of social exclusion. There is still a lack of understanding about who carers are and considerable stereotyping of them as a group. The reality is that caring is something that can and probably will affect most of us, and at that time we will all want recognition, support and equal access to employment and services.

4. The Evidence of Discrimination Against Carers

4.1 Carers are a hidden but very substantial part of our population, constituting around six million people in the UK, ie 10% of the total population and approximately 12% of the adult population. This number is also set to rise considerably, with an estimated additional three million carers required by 2037 (Source: *It could be you: a report on the chances of becoming a carer*, Carers UK, 2001).

4.2 However, carers remain one of the few groups against whom it is possible to discriminate; they themselves feel very strongly about this as can be witnessed by the calls that we receive on a daily basis to our helpline CarersLine. These include instances of discrimination from employers, discrimination when applying for jobs and discrimination in terms of access to services, goods and facilities. Examples of these include:

4.3 *Lack of access to work*—One in five carers gives up work to care; this can lead to loss of income, pension and long-term financial security and is a loss to the carer and to the employer alike. (Source: *EOC and Real Change Not Short Change*, Carers UK). Carers have also been refused jobs on the basis of their caring responsibilities; for example, in a job interview a local authority employer told the interviewee to reapply for similar positions once his wife with MS had died. Comments which used to be asked regularly of women about their childcare responsibilities, and suggestions that they might not be completely committed to their work, are now targeted at carers.

4.4 *Lack of ability to return to work*—Some carers can and do return to work but many are unable to do so because of a loss of skills, confidence and networks. The benefit system also disincentives people to work as Carer's Allowance has a cliff-edge.

4.5 *Lack of access to training at work*—Carers frequently report problems in accessing training courses provided by their employers, for example, if these are held at weekends or during the evenings and no alternative care is provided. Even where employers take child care requirements into consideration they often overlook carers of adults; for example CarersLine took on a case where an employer had paid alternative care costs to enable an employee with a child to attend training but was not prepared to do so for an employee caring for a disabled adult.

4.6 *Lack of flexibility and understanding at work*—Carers face problems especially when alternative care services are unavailable or inflexible. Many have to use their paid annual leave to cover their care needs meaning they do not get a break themselves. Although some succeed in reducing their hours or changing their working patterns, many feel forced to look for a different type of work or to change their jobs. At work some have also met with ignorance, disrespect or hostility because of their need to work flexibly. As an example, a day centre in Halton was closed without properly consulting or considering carers' views; the resulting plans forced many parents to give up work in order to care for their adult sons and daughters because the more "flexible" packages of care assumed they would provide the care in between.

4.7 *Harassment and negative attitudes at work*—Carers often experience this from managers or colleagues. Comments such as the following from a carer employed in social services are typical experiences:

> "There was a time when my son was poorly and when I came into work, the first thing they said was, "Ooh, you've had time off again have you? You've been on holiday again, have you?" These sorts of digs. She must have known why I was off, that my son was really sick, poorly. Even when I told her, she carried on with these comments and digs. Never once said, "Oh I'm sorry, how is he? Is he OK?" Ironic when you think they are educational social workers supporting families where children have special needs.

4.8 *Lack of access to alternative care and support services*—This problem is repeatedly reported by carers of all ages. A major research study of working carers found that only a quarter of them felt they had adequate support from formal services to enable them to combine work and care. Furthermore between 40 and 50% of working carers say that a lack of flexibility and sensitivity in the delivery of services is hampering them. The majority of working carers say they need at least one type of formal service which they are not currently receiving. (Source: *Carers, Services and Employment Report Series*, Carers UK, 2007). Working carers of sick or disabled children also face a particular challenge in that much childcare provision, including after school and school holiday care, is not accessible to disabled children. In addition, access to respite care and sitting services is often limited and few carers have the support of formal alternative care services or any contact with their local social services department. (Source: *Caring for Sick or Disabled Children*, Centre for Social Inclusion, Sheffield Hallam University, 2006). Comments such as the following are typical experiences faced by such carers:

> "At first it was okay, but now, as time goes on, (father's) more dependent, and the longer you do it, the more it seems to wear you down, so the more you feel that you need a break from it. It would allow me to be better mentally prepared to do the (training) course and look after Dad—not just trudging from one task to the next task, and not any break in between, and it just grinding you down".
>
> "I could probably find computer-based work to do at home, but since I am unable to leave the house without first finding someone to look after my father, and there is no mechanism for registering people such as me with the job centres, realistically I'm not going to find anything like that."

4.9 *Lack of access to education and qualifications*—Working carers are more likely to be unqualified, and less likely to hold university degrees, than other people in employment. Among women in full-time paid work, those who provide unpaid care for 50 hours or more per week are twice as likely as non-carers to be unqualified. (Source: *Who Cares Wins, A report for Carers UK* by the Centre for Social Inclusion, Sheffield Hallam University, 2006)

4.10 *Lack of access to higher level jobs*—Related to the above point, working carers of both sexes are much less likely to be in higher level jobs. Almost 45% of men and 55% of women who are in paid work and caring for 20 or more hours a week are in elementary occupations, "process plant and machine operative jobs" or in sales, customer services or personal services. (Source: *More than a Job: Working Carers*: Evidence from the 2001 Census). Other evidence shows that almost half of those working part-time say that they are only in work of this type because of their caring responsibilities (Source: *Carers, Services and Employment Report Series*, Carers UK, 2007).

4.11 *Lack of flexibility and understanding from service providers*—This is a widespread problem reported by carers. For example, in one case both health and social services assumed that a woman with a broken leg would be able to rest it despite the fact that her husband was in the terminal stages of cancer and required 24 hour care from her. They eventually provided her with support too late, leaving her with lasting complications and constant pain from her broken leg as it was not able to heal properly. Many carers report the constant battle with service providers in order to get support and having to be at breaking point before they receive any response, for example, the following experience is typical:

> "I'd just got to breaking point, and I'd phoned (social services), and phoned them, and asked: 'Can you just take him out, can someone take him for a couple of hours?'—No. So I got to breaking point and I phoned them and I said to them, 'You have two hours … to come up with some sort of thing to help me', I said, 'I'm bringing him down to your office', and I said 'I'm leaving him there because I cannot cope with him any more with no help'. Then, funnily enough, within three hours later, I had the pack in the post, saying you have this many hours".

5. Equality in Employment

5.1 As have been shown above, carers currently do not have equal access to employment. Many carers fall out of work when their caring responsibilities start or after a number of years of trying to juggle their multiple responsibilities. There are a number of factors which prevent carers from working, many of which could be prevented by effective measures to tackle discrimination.

5.2 Discrimination against carers can take many forms. It can be (sometimes unspoken) cultural discrimination which prevents carers from applying for jobs, or from revealing their caring responsibilities during an interview. Caring is not well understood or recognised, and many carers are afraid to mention that they are a carer. This is something that DWP and its agencies could address in its role as a large employer. It should encourage carers to identify themselves and in particular encourage managers to be open about their caring responsibilities.

5.3 However discrimination can also be targeted action against an individual carer. In these cases, knowing that they have the support of the law would make carers more confident in asserting their rights to request flexible working or to complain about unequal treatment, harassment or bullying.

5.4 The recent *Coleman v Attridge Law* case has considerable implications and in effect means that carers cannot be discriminated against in employment. We believe that the Government must use the Equality Bill to clarify the implications of the *Coleman* case and provide a clear steer for carers and employers: it must form an integral part of the Equality Bill. This must also be reflected in guidance which should be published as soon as possible.

5.5 Before the *Coleman* case, Government had resisted the suggestion of including carers in discrimination and instead had pointed to other legislation such as the Carers (Equal Opportunities) Act 2004 and the Work and Families Act 2006 which introduced the right to request flexible working. We do not believe these pieces of legislation and those which preceded them, provide the protection that carers need. The Carers (Equal Opportunities) Act 2004 only places a requirement on local authorities to take a carer's wish to work into account when they carry out a carer's assessment. Evidence suggests that this is not being well implemented and local authorities are not being creative in supporting carers to work. And while the right to request flexible working under the Work and Families Act is very helpful, this type of flexibility cannot cover the whole range of problems outlined above as:

- Carers' needs can be very different to those of parents since adult care packages (and those for disabled children) are more complex than childcare and there is also often more uncertainty about how their caring role will change in the future.
- The type of harassment and negative attitudes that carers report—which can force people out of work as much as inflexible working practices do—have less to do with flexibility than with the more fundamental issue of discrimination.

5.6 Carers UK believes that the legal position of carers should be made clear to both employers and employees by extending protection from discrimination to carers. We propose that there should be a new prohibited ground of discrimination against carers following the format of the Disability Discrimination Act as this is the most appropriate to the position of carers.

5.7 DWP also has a role to play in improving its service to carers who access Jobcentre Plus services. Our experience of Jobcentre Plus to date is that advisers do not understand carers' needs and do not have much to offer them to support them to return to work. Whilst we welcome the Government's commitment to introduce Care Partnership Managers and to improve training for advisers, we have yet to see progress on the implementation of these policies. We still hear regularly from carers who have not been supported adequately by JCP to find a job, or to remain in work if they are at risk of having to give up their job.

5.8 In addition it is essential that DWP has a stronger voice in the debate about the future of care and support since the existing failings in the social care system restrict carers' opportunities. Whilst Government does recognise that improvement is needed in care services, this agenda should be explicitly linked to employment. Links must also be made at a local level so that advisers are able to help carers find social care services in the same way they do with parents who need support to access childcare.

6. Equality in Goods, Facilities and Services

6.1 Carers also report discrimination in accessing goods and services in many areas including lack of access to: alternative care services, education and training, childcare services, medical services, transport, quality housing, leisure facilities and affordable legal advice and services. Many of these services have a significant impact on carers' ability to work, and to participate fully in the community. Specific examples of areas where legislation could improve access to goods, facilities and services include:

6.2 *Lack of access to medical services*—Again, this problem is repeatedly reported by carers of all ages. For example, the need to take time off work for hospital appointments was cited as a barrier to combining work and care by 30% of carers surveyed by Contact a Family on behalf of DTI in 2004–05. (Source: *Caring for Sick or Disabled Children Centre,* for Social Inclusion, Sheffield Hallam University, 2006). Carers of sick or disabled children face a particular challenge in that the organisation of such services for their children can adversely affect their ability to fulfil work obligations as appointments are often at fixed, inflexible times during office hours.

6.3 *Lack of access to transport services*—Surveys of carers of sick or disabled children have shown that inflexible or unreliable transport services (ie because of late running, strikes, cancellations or diversions without notice) have caused frequent care emergencies which have been particularly problematic for working carers. Despite the expense involved, nearly all working carers surveyed had to have a private car in order to ensure that they could access the support services they needed and get to their workplace. However, 23% of families in England and Wales with a sick or disabled child have no access to a car or van. (Source: *Managing More than Most: A Statistical analysis of families with sick or disabled children,* Carers UK/University of Leeds). For carers without a car, relying on public transport or on taxis (which are relatively costly) restricted their lives and work opportunities even further. (Source: *Caring for Sick or Disabled Children*, Centre for Social Inclusion, Sheffield Hallam University, 2006). Another issue reported by carers is the problem of lack of availability—or high cost—of hospital parking spaces when they are attending for appointments.

6.4 *Lack of access to quality and affordable housing*—16% of families in England and Wales with a sick or disabled child are living in overcrowded accommodation compared with 10% of other households. 34% of these families are also living in social housing compared with 21% of other households. (Source: *Managing More than Most: A Statistical analysis of families with sick or disabled children,* Carers UK/University of Leeds)

6.5 *Lack of access to leisure facilities*—It is often forgotten that if the cared-for person cannot access the facilities (for example, because of a disability), nor can the carer who is accompanying them. Here it could be argued that the introduction of protection against "discrimination by association" (already mentioned in this paper), would cover this. However, as in the area of employment, this would not cover a carer who is caring for a non-disabled person or who is trying to access the facility without the person they are caring for being present but is unable to do so because of inflexible opening times or other barriers.

6.6 *Lack of access to legal services and advice*—On the service side, at present claimants must use county courts in England and Wales or Sheriff courts in Scotland (as opposed to tribunals as in employment cases). Such courts are a relatively complex and expensive process and are off-putting. Cases are therefore not being pursued, not because this type of discrimination does not exist, but because of the complexity and the costs involved. Most of the carers we are in contact with have enough to cope with; they are put off by the huge stress and pressure, plus the cost, of taking legal cases. This, in itself, denies carers the access to the justice they deserve.

6.7 As in the case of employment, we do not believe that current protection is adequate as:

— Taking the indirect discrimination route is highly complex and untested in law.

— Evidence suggests that the Human Rights Act 1998, which should ensure that public bodies take account of individuals' rights when providing services, is not providing adequate protection in practice. Indeed, Carers UK believes there are several articles of the Act where carers' rights may be being violated including: a right to life; a right to be free from inhuman or degrading treatment; and a right to respect for private and family life. In addition, the Act only covers public bodies so does not protect people working in, or receiving goods and services from, the private and not for profit sectors. The DWP should investigate whether carers' human rights are being violated through its policies.

6.8 Despite reports of widespread discrimination in this area, there is currently no recognition in law that the reason carers are facing problems in accessing some kinds of services is because of their caring responsibilities. We therefore believe that the legal position of carers should be made clear to both service providers and recipients by means of an extension of protection from discrimination to carers. As in the Disability Discrimination Act, we believe that there should be a duty to make "reasonable adjustments" in relation to the carer. We also believe that there should be a specific prohibition against harassment in relation to goods and services. Carers UK is currently working with employers on the adjustments they have made in their businesses to accommodate carers.

6.9 Cost wise, there is likely to be some initial outlay for providers in adapting their services to make them more responsive. However, this should also have the positive effect of driving services to be more efficient and cost effective, particularly if facing increased competition. There are also advantages in simplifying and clarifying the grounds of discrimination in reducing the number of cases coming to court out of ignorance and hence saving money for service providers and claimants. This would be particularly helpful in the area of discrimination in services which is often less well understood than employment but has significant and devastating effects on carers' lives.

7. The Public Sector Equality Duty

7.1 Carers UK welcomes the principle of replacing the existing three public sector duties (race, disability and gender) with a streamlined single duty and the extension of this duty to the strands of age, sexual orientation and religion or belief.

7.2 However we do not believe that the single equality duty could be either inclusive or effective without addressing the discrimination, harassment and inequalities that are faced by such a significant and growing part of the population as carers. We believe that Section 75 of the Northern Ireland Act 1998 provides a good precedent for extending this protection to carers; it is not an untested duty and it provides useful learning. In summary it places:

> "a statutory obligation on public authorities in carrying out their various functions (relating to Northern Ireland) to have due regard to the need to promote equality of opportunity:
>
> — between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
>
> — between men and women generally;
>
> — between persons with a disability and those without; and
>
> — between persons with dependants and those without.

7.3 The Northern Ireland duty requires public authorities to regularly consult with "persons with dependants" or their "recommended consultees" on the policies and procedures that underpin the authority's functions, both as service providers and as current or potential employees. In general there are three stages to this consultation process: (1) producing an overall equality scheme (2) screening; and (3) impact assessment. Public authorities do not all have to follow exactly the same process, however they do have to include all of these stages.

7.4 The addition of the category of "persons with dependants and those without" was felt to be an important provision in Northern Ireland not just for the many carers affected themselves but also for the people who rely on them for support. For example, in her evidence to the UK Parliament Joint Committee on the Draft Disability Discrimination Bill on 7 April 2004, Dame Joan Harrison, Chief Commissioner to the Equality Commission for Northern Ireland, stated that "as well as disabled people, Section 75 covers people with dependants. This is particularly important in ensuring comprehensive rights for disabled people, many of whom rely on carers for support. If carers experience discrimination, this can have a knock-on effect on disabled people. Examples include additional costs incurred when disabled people need to be accompanied. Including carers within such an equality framework would help ensure that these issues are considered by policymakers."

7.5 During the recent review of the implementation of Section 75 by public authorities in Northern Ireland, public bodies and other respondents highlighted the many positive outcomes, including:

— Integration of the duties into corporate strategic objectives;

— Structural change including appointment of equality officers and location of these officers in Chief Executives' departments;

— Involvement of affected groups through consultation and participation;

and specifically regarding carers:

— 51% of public authorities reported increased opportunities for people with and without dependants.

— For the first time policies have been assessed for their impact on carers and parents.

Specific examples include:

— Two Education and Library Boards piloted a new policy on home-based working for the benefit of people with dependants to be rolled out cross all Board areas.

— The Equality Impact Assessment (EQIA) on Pay Scales undertaken by the Colleges of Further and Higher Education identified the potential impact of disrupted pay affecting staff with caring responsibilities.

— Belfast Institute started to open on Saturdays, specifically to provide access for those who reported difficulty attending college during the week, including those with caring responsibilities.

— SHSSB EQIA on Temporary Transfer of Services identified a need for the provision of a bus service during a temporary transfer of service between two hospital sites to mitigate adverse impact on persons with dependants, older people and disabled people.

— Fermanagh District Council EQIA of Community Relations Grants Policy found that the previous policy had a possible adverse impact on some groups eg people with dependants and disabled people, who required additional funding due to the increased access costs. Grants were then raised for these groups.

— Derry City Council worked in partnership with local voluntary and community groups to design and deliver an Equality Awareness programme for Council staff which included training in relation to people with dependants, disability, age, learning disability and mental health.

— The British Council for Northern Ireland raised awareness of untapped additional funds in European programmes which enable better equality of outcome eg funds to enable carers to accompany children with learning disabilities, thus ensuring full participation in the programme.

7.6 We would recommend that consideration be given to the precedent of Section 75 in Northern Ireland with the Section 75 definition being amended from "persons with dependants" to "persons with caring responsibilities". We believe that a similar positive duty in the UK would roll out the positive impacts carers already experience when public authorities do take their needs into account as above.

7.7 We believe that a public duty to promote equality in public services would be the single most effective way of providing recognition for carers, which as our surveys have shown is one of the top concerns of carers.

7.8 We believe that the public sector equality duty should include an explicit requirement for public bodies to build equality considerations into their procurement processes. We believe that this approach, coupled with the provision of practical guidance and the development of an "Equality Standard", would be the most effective way of encouraging and embedding good practice.

7.9 In conclusion, we believe that implementing proposals on the above lines—ie learning from the strengths and weaknesses of the existing three public sector equality duties and addressing the daily discrimination faced by carers—would lead to an inclusive and robust single public sector equality duty which would have very real benefits for public sector organisations, their employees and service users. We also see this form of protection for carers as very important both in implementing equality and tackling discrimination in the public sector and in driving change (through example and directly through procurement processes) in the private and not for profit sectors.

8. Private Sector Commitment and Support, Guidance, Advice and Information for Employers

8.1 We believe that employers, particularly small employers, should be given more support to enable them to implement equality legislation and other requirements for supporting their staff. There should be a dedicated service for SMEs which is able to assist employers and employees with the support they need around all aspects of care ie not just with employment rights but also about accessing appropriate care services.

8.2 Targeted materials for employers, including case studies, are an important way to inform employers about their obligations and to encourage the spread of good practice. Carers UK has recently re-launched Employers for Carers as a membership forum, along with a group of leading employers, and this will be an important forum for sharing information and good practice. We hope that Government departments, including DWP, will play an active role in this forum.

8.3 We also believe that it is important that consideration be given to assisting the development of good practice not only in the private sector but also in the not for profit sector, particularly given its increasing role and importance in the delivery of public service contracts.

Dossier on Discrimination

Carers UK can provide more examples of cases where carers have been discriminated against in all of the areas set out above and how this affects them in their day to day lives. We would be able to match this against what should happen if we were to have more provisions which prevented discrimination and promoted equality.

November 2008

21. Memorandum submitted by Shaw Trust

1. About Shaw Trust

1.1 Shaw Trust is a registered charity and company limited by guarantee. We provide training and work opportunities for people who are disadvantaged in the labour market due to disability, ill health or other social circumstances. We are the largest third sector provider of employment services for disabled people in the UK and have been delivering employment programmes on behalf of DWP for more than 25 years.

1.2 Shaw Trust's delivery of employment programmes on behalf of DWP includes:

- WORKSTEP: our contract is to provide employment support for more than 2,800 severely disabled people.
- New Deal for Disabled People: Shaw Trust is contracted to deliver services in 17 of the 19 districts contract districts.
- Pathways to Work: Shaw Trust holds five Pathways to Work contracts.

2. Our Response to the Inquiry

2.1 DWP has made great strides in improving employment opportunities for disabled people. We welcome wholeheartedly the shift in emphasis from the notion of incapacity to individual ability.

2.2 Third sector involvement in the delivery of provision such as WORKSTEP, New Deal for Disabled People and Pathways to Work has proved positive for clients—ensuring that support is tailored to each individual, and complex needs can be addressed by specialist providers.

2.3 Particularly welcome has been the change to DEL/AME which will allow the reinvestment of benefit savings back into employment programmes. This change will be particularly important for long-term incapacity benefit claimants whom would not otherwise have had the opportunity to make use of Pathways to Work provision.

2.4 We have been disappointed by the negative language that continues to be used by Ministers in relation to benefit claimants. We support the Government's efforts to challenge the notion of long-term benefit dependency but we feel that the responsibility does not lie solely with individual claimants. More needs to be done by Government to ensure that employers play their part, and act responsibly and fairly towards all employees and potential employees.

2.5 We believe that there is a strong case for implementing job retention measures, which would set out a framework for employers in supporting employees with disabilities or long-term health conditions. This will incentivise early intervention when health problems first arise.

2.6 More should also be done to encourage employers to recognise the business case for acting on health. For example, According to mental health charity MIND, one in four of us will suffer from mental ill health during our lifetime. The cost to British business is up to £9 billion each year. Action on mental ill health is good for individuals, good for business and good for the economy.

2.7 Employers are often unaware of support that is available for mental ill health and/or other health or disability-related conditions and often over-estimate the cost of making reasonable adjustments for staff. This can be a further barrier to improving employee health. More could be done to educate employers (particularly SME's) on this matter.

2.8 We welcome the new approach for Access to Work and "up front" budgets to address issues related to the barriers to sustained employment. At present access to funding can be delayed while employer, employee and provider identify and agree on work barriers and the measures required to overcome those barriers. For clients who are job ready, or already working and requiring new reasonable adjustments to sustain them in work, a more flexible fast track approach would be beneficial, allowing funds to be accessed with less bureaucracy and delay.

November 2008

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22. Memorandum submitted by Douglas Johnson

Equality in Goods, Facilities and Services

1. I am the Equality Rights Worker at Sheffield Law Centre and I advise and represent clients affected by discrimination in the field of goods, facilities and services (GFS).

2. I am therefore restricting this response to issues around Equality in GFS although my comments on the case against the DWP may well be relevant to the Committee's examination of the public sector equality duty.

3. The aim of my post is to promote the rights of people affected by discrimination in GFS. By assisting people to take action, we aim to raise awareness of the rights and remedies of people facing discrimination. In practice, most of my work is around disability discrimination.

4. This post was formerly funded by the Disability Rights Commission in partnership with the Law Centres Federation, purely to focus on GFS disability discrimination cases. It was clear that people were finding their way to enforce their rights in the employment context (albeit with difficulty) but only minimally in the GFS field. Very few cases ever reached the courts and those in the higher courts are in single figures.

5. The consequent lack of experience of the DDA amongst solicitors, advisers, organisations of disabled people and the courts means that few cases are reported in the media. In turn, members of the public have little understanding of what is and what is not required by the DDA, despite a generally high level of awareness of its existence.

6. In this respect, awareness of discrimination law (especially the DDA) reflects awareness of the Human Rights Act: understanding of the actual framework of rights is still far lower than the level of misconceptions. This does damage to the validity of the legislation—to the extent that popular stories of people claiming "discrimination" and "human rights" are seen as something that doesn't apply to "ordinary people". Given the large proportion of the population who are protected by the DDA (an estimated 20%), further work clearly needs to be done to bring home the reality of everyday rights to those who feel they are unprotected.

7. I believe the public benefits from seeing actual cases reported in the media. There need to be more cases brought before the courts and positive stories told in the media. These need not be ground-breaking legal battles, just ordinary peoples' stories of individual needs.

8. The following are examples of real cases I have brought but they demonstrate points that, I feel, are of general relevance. Where individuals are named, they have agreed to publicity of their cases.

Angela Sharrock v DWP

9. Sheffield Law Centre's press release is available at:

http://www.slc.org.uk/userfiles/file/press%20release_%20DWP%20discriminates%20against%20blind%20woman.pdf

and a local news report is at:

http://www.thestar.co.uk/action/Department-small-print-broke-its.4300239.jp

10. Angela Sharrock is blind and complained of a number of aspects of her treatment, including the continuing failure to send her correspondence in a format she could read.

11. The DWP has put in place an extensive Disability Equality Scheme and action plans, as befits the sponsor Department of the DDA. Jobcentre Plus has done the same. Nevertheless, when it came to the crunch—Ms Sharrock wanted her letters sent in an alternative format—Jobcentre Plus failed completely.

12. The key feature of this case was the Jobcentre's/DWP's failure to address the real issue at any stage right up until the final hearing. Instead, it simply denied discrimination and continued to deny it for over 12 months that it took to litigate the court process. The reaction to our initial complaint was to deny and delay.

13. It is understandable—and indeed very positive in so many ways—that there is a stigma attached to an admission that discrimination has occurred in an organisation. However, it can also block any attempts to address the real issues.

14. This stance tends to be typical of many larger organisations, which rely on large-scale improvements but fail to pay attention to individual needs that are not accommodated by the general scheme. In my view, there needs to be greater scrutiny of how service providers work in practice. One method of scrutiny is for a body such as the Equality and Human Rights Commission (EHRC) to carry out sample checks or audits on organisations; another is to make the court process work more effectively and efficiently so that individuals have an effective avenue for their complaints.

David Allen v Royal Bank of Scotland

15. A press article is available at http://www.thestar.co.uk/action/Bank-in-court-over-access.3663786.jp

16. The story of David Allen's battle against discrimination is simple: he uses a wheelchair and cannot mount the steps that are the only entrance to his bank.

17. When challenged, the bank was prepared to accept the factual truth of the total lack of access but to deny any responsibility for discrimination. Amongst a number of potential reasons why access had not been provided, the bank relied on a major scheme of building works. They were unable—or refused—to accept that their scheme had failed.

18. The key issue in this case is the practical difficulty of enforcing the complaint in the county court. The claim was for less than £5,000 so would normally be dealt with in the "small claims" track. This track is relatively quick and allows access to the court for relatively small amounts of money without the risk of enormous costs if the case is lost: it is a sensible approach to keep costs proportionate to the amount in dispute. In fact, in this case, the court accepted the bank's argument that it merited a more formal and expensive procedure and allocated the claim to the multi-track. This meant the individual was exposed to a potential risk of very substantial costs—there is always a risk in any litigation. Costs in this case were estimated at up to £50,000 (or more if appealed). This was not a risk that any individual householder could sensibly take—whereas a bank can. The client would have had to withdraw the case if it were not for the exceptional backing of the Equality and Human Rights Commission.

19. Judgment has been given and is expected to be formally handed down shortly.

20. Neither legal aid nor a conditional fee arrangement (no-win no-fee) would be available in this case because awards for injury to feelings in discrimination cases are fairly low, even when they are made at all. A case like this shows why they are so rare.

21. Compare this situation with an employment tribunal where the risk of costs does not exclude claimants and matters can be examined on their merits. There would be some benefit to a "discrimination tribunal" where panel members with experience of discrimination law and the confidence to manage cases appropriately could examine complaints promptly and effectively.

"I get depressed when my cricket team loses"

22. The poorly-reasoned and largely incomprehensible decision of the House of Lords in *Lewisham v Malcolm* has set back the effective rights of disabled people not to be discriminated against by 20 years and is in clear contrast to the scholarly and logical reasoning of the Court of Appeal's judgement or that of Baroness Hale. I have described the Lords' judgment as five dissenting opinions and it is notable that the law reports seem to reach quite different conclusions as to the main thrust of the judgment. My experience is that courts are confused and inconsistent as to the current interpretation of the law.

23. I assisted a client who was a tenant of a large social landlord. He had both physical and mental disabilities, of which the main symptoms were isolation and reclusiveness. Because he could not manage to pursue his entitlement to social security and housing benefits, his landlord decided to evict him. The landlord accepted he was depressed but realised the financial incentive was to take possession action. He was thus brought to court rather than choosing to pursue a complaint. We assisted him to use the Disability Discrimination Act in his defence. The case was then stayed pending the House of Lords' decision in *Lewisham v Malcolm*.

24. Unfortunately, his disability was so severe that he was effectively unable to understand or comply with the court procedures or give evidence. There was a real question about his mental capacity to manage the court proceedings but the judge would not accept he was disabled, let alone lacking in capacity, without medical evidence. Unfortunately, the client was so unclear and reclusive that he only ever gave me the name of his GP too late to get this evidence.

25. The judge did not seem to accept that depression was an acceptable form of disability and commented, "I get depressed when my cricket team loses". He also seemed to understand that *Lewisham v Malcolm* meant that no account could be taken of any disability unless the defendant could prove malicious motivation by the landlord.

26. It was not possible to appeal because the client was unable to give instructions.

27. The key issues in this case were:

27.1 The social housing provider's commercial decision to go ahead with eviction action, rather than address the client's needs, and without expecting any effective challenge in court

27.2 The client's lack of ability to take an effective part in the court proceedings and

27.3 The demonstrated need for judicial training.

28. From my experience in my previous post as a housing adviser, I am fully aware that the tenants who are actually most likely to lose their homes are those with mental health problems. They lose their homes, not because they do not have good grounds for a defence but because they cannot cope with the requirements of court procedures and the amount of preparation that is needed to prove their case.

29. As regards judicial training, it is clear that judges cannot be expected to have a good understanding of the principles and practice of discrimination law unless they see a reasonable number of cases in practice. Employment tribunal judges now have this experience. Judges of the court generally do not. I am not saying that all judges make bad decisions, merely that decisions are unpredictable because there are so few cases before the courts and judges do not have a measure of them.

A Parish Council Discriminated Against a Wheelchair User

30. Sheffield Law Centre's press release is available at:

http://www.slc.org.uk/userfiles/file/Press%20release%20-%20Parish%20Council%20discriminated%20against%20wheelchair%20user.pdf

31. Mr and Mrs Upton had a complaint of discrimination against their local Parish Council. Mrs Upton is severely disabled; Mr Upton is her main carer. Mrs Upton was eventually successful in the county court after a long and protracted battle. Mr Upton, who had also suffered in practice, had no claim because he was the carer.

32. Mr Upton suffered discrimination because of his association with his wife. To outlaw discrimination further, it would be appropriate to give Mr Upton an equivalent right to raise his complaint and to take action on discriminatory behaviour.

Conclusions

33. The DDA was a significant step forwards for disabled people after many years of lobbying on the need to tackle the discrimination. It is clear that rights given by the DDA are useless if they cannot be enforced in practice.

34. From my experience of actual casework, I have seen that the principal obstacles to people enforcing their rights in the GFS field are:

34.1 Lack of awareness of their rights.

34.2 Difficulties related to disability in carrying through the level of preparation and stress in taking on a court case.

34.3 Actual costs in county court litigation compared to tribunals, where parties bear their own costs

34.4 The risk of overwhelming costs from court litigation, wholly outside the scale of money experienced in practice by individuals.

34.5 The perception of the court—which many people still think of as a place of punishment.

34.6 Variability and unpredictability of the likely approach of judges who are not experienced in discrimination cases.

34.7 The fact that individuals are often reacting (eg to a dismissal) in employment cases, whereas generally GFS cases require positive action.

34.8 Awards are so low that neither legal aid nor conditional fee arrangements are generally available for GFS cases.

34.9 Very few solicitors are experienced in, or willing to take, GFS cases.

Recommendations

35. With a view to clarifying the law on disability discrimination and making it fit for the purpose of achieving real rights for disabled people and, in the light of my own observations, I would make the following recommendations.

35.1 There is some benefit to exploring the creation of a discrimination tribunal for GFS cases. This could have powers to refer cases to the county court where appropriate, for instance as does the Leasehold Valuation Tribunal at present.

35.2 There is the need to test the operation of equality duties in practice for public bodies, and possibly other large organisations. Audits or spot checks on how a sample of individuals have been treated in practice may give a better understanding than mere confirmation that an overarching policy or scheme is in place. This might be a role for the EHRC, given appropriate resources.

35.3 Judicial training is to be encouraged.

35.4 Service providers need to accept that discrimination does happen and be prepared to investigate it rather than deny it. The DWP could start by looking in-house at the effectiveness of its procedures. There would be benefit in having guidance available to help organisations respond to complaints against them.

35.5 People who suffer discrimination because they are associated with a disabled person need to be included in the protection of the DDA. There need to be consistency across the strands of discrimination.

35.6 Legislative clarification of the uncertain position after the House of Lords decision in *Malcolm v Lewisham*. In my view, there needs to be effective protection against any unfavourable treatment where it relates to a disability, without having to identify a notional other person who had not suffered poor treatment.

35.7 Service providers who have acted in good faith, have taken the material circumstances into account, who have a substantial and rational reason for coming to their decision and have explained their decision, should be protected through the justification provisions.

35.8 The duty of reasonable adjustments is not affected.

35.9 It does not seem to me that indirect discrimination will address what is needed to guarantee the real rights of disabled people because of the very wide range of different needs of people with different disabilities. Instead, the legislation should ensure a focus on individual needs.

35.10 Streamlining the DDA and making it consistent across all fields—employment, GFS and education—will improve understanding of the law. This should be with regard to the types of discrimination (direct, disability-related, etc) and justification.

November 2008

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23. Memorandum submitted by Employers' Forum on Disability

EFD is the authoritative voice on disability as it affects business, representing over 400 major employers in the UK. EFD works closely with disabled people, government and other stakeholders, sharing best practice to make it easier to employ disabled people and serve disabled customers.

EFD's mission is to mobilise the power of its members to promote the economic and social inclusion of disabled people. For 17 years EFD has been successful in driving forward employer engagement and sets the standard by which business and public sector measure their performance on all aspects of disability.

Summary of evidence

Employers' Forum on Disability (EFD) believes the Equality Bill is an opportunity to address inadequacies in current legislation. Our key points for the Select Committee to consider are:

— Protection against disability discrimination should be extended to people perceived to have a disability and discrimination on the grounds of association with a disabled person.

— Goods, services and facilities cases should be dealt with by the Tribunal system and disabled citizens should be made more aware of their rights as customers.

— It will be important to ensure that the new Equality Bill sustains the requirement under the public duty to "involve" not merely consult disabled people.

— Access to Work is a good scheme but needs consistency of service provision and better promotion to those individuals and companies that do not use it. Jobcentre Plus and related contractors should automatically tell every disabled job seeker that the programme exists and how it might help them find and sustain employment.

— Any new Equality Bill must ensure that employers do not lose the right to positively discriminate in favour of disabled people as they now can under the Disability Discrimination Act (DDA).

— Government should appoint a Minister for Equality and Human Rights at Cabinet level.

— DWP should continue to encourage those responsible for housing benefits to minimise the risks many disabled people associate with taking a job and losing their housing benefit.

— It would be extremely helpful were DWP to make it clear that the barriers created by inaccessible technology are not acceptable. This includes inaccessible on-line recruitment, inaccessible and unusable IT systems, and inaccessible "e-commerce" processes. DWP and the legal framework must communicate that the legal obligations not to discriminate and to make reasonable adjustments apply even when it is technology which is creating the barrier.

— Any new legislation must be supported by expert advice to employers as well as to disabled people—such advice should encourage employers and service providers to work to the spirit of the legislation and deliver best practice.

— It would be helpful if DWP were to indicate how they plan to assess the effectiveness of the new legislation with regards to employment, given people rarely declare they have a disability to their employer. International and UK experience shows that monitoring the numbers of employees an employer can "persuade to declare" produces statistics which are inherently unreliable and which do not drive the desired behavioural change. Monitoring the flow from benefits to tax payments would probably be more accurate and useful over time.

— EFD would be happy to convene a sounding board of employers to advise at any stage—to help DWP ensure that the regulatory framework and supports are credible in the eyes of both employers and people with disabilities.

Introduction

1. The Government has the opportunity to use the Equality Bill to eliminate the inadequacies of the existing pieces of legislation. In principle, this opportunity allows us to strengthen parts of the individual legislation that are working and address those that are not. In order to achieve equality for disabled people and other disadvantaged groups our society needs to have a modern and consistent legislative framework that is fit for the 21st century—a framework that is credible to both employer and disabled people alike.

Equality in Employment

2. Employment rates of disabled people have not increased significantly since the introduction of the Disability Discrimination Act (DDA) in 1995. Nevertheless, EFD believes that the DDA has contributed to increased equality for disabled people in the workplace. It has raised employer awareness and helped build disability competence into the normal way in which people do business.

3. Employers continue to find it difficult to attract qualified disabled applicants and providers that can help them. As a result, well-intentioned and enlightened employers can find it difficult to justify the time, cost and effort required to effect change internally. Those employers who continue to discriminate can justify so doing by pointing to the barriers and uncoordinated services in a system that does not treat them as a customer.

4. The DDA offers more protection for those in work than for those applying for work. The number of Employment Tribunal cases for discrimination in recruitment is far lower than the number for in-work discrimination. This may be because it is more difficult to prove discrimination in recruitment. It does indicate that the tribunal system is not currently fit for purpose as regards to recruitment.

5. The Government's early consultation on the Equality Bill (Summer 2007) indicated that it did not intend to extend protection from discrimination to people associated with disabled people or people wrongly perceived to be disabled even though this protection is available in other areas such as race. This did not sit well with the professed aim of harmonizing and simplifying the law. This statement was also made before the European Court of Justice decision in the case of *Coleman v Attridge Law.*

6. EFD hopes that as the Government has to reconsider its position on association in the light of this decision, it will do the same for perceived disability. EFD members in both the private and public sector felt that this protection should be extended, especially as it would simplify the law by providing consistency across the strands. It was noted that in neither case would there be a duty to make reasonable adjustments, as people wrongly perceived to be disabled would not need such adjustments and there are already regulations that provide some protection to carers who need to work flexibly. The *Coleman* decision was also clear that it was only the direct discrimination and harassment provisions from the EU Directive that applied to people associated with a disabled person.

7. The Government's argument that extending provisions on association would cover too many people is spurious since the race relations act and sex discrimination acts cover people of all races and genders respectively. People who fall into these categories either face the social evil of discrimination or they do not. If they do, they should in this society be afforded protection. There is evidence that people who are associated with disabled people, not just as carers but for example as the partner of someone who is HIV positive or related to someone with a mental illness do suffer discrimination. Similarly people who are wrongly perceived to be disabled eg because of period of ill-health in the past, mental or physical are denied employment opportunities, insurance or other financial products but have no redress because they do not actually meet the definition of disability.

8. The House of Lords decision in *Malcolm v Lewisham*, if followed in employment and goods, services and facilities cases as suggested in the decision has implications for cases of indirect discrimination. The *Malcolm* decision will reduce the number of successful claims for less favourable treatment for a reason relating to disability and this in turn will mean that there will be more reliance on the failure to make reasonable adjustments. In the case, for example, of a disabled person dismissed for being persistently late, he would no longer be able to argue that he was dismissed for a reason relating to his disability even if his lateness was due to difficulty using public transport at rush hour. This is because, following *Malcolm*, the comparator would be someone without a disability who was also persistently late. If he too would have been dismissed then the disabled person had not been treated less favourably for a reason relating to his disability but for a reason relating to the lateness. The disabled person would therefore have to argue that the employer had failed to make a reasonable adjustment for him. If being on time is essential then the reasonable adjustment might be taxis to work but this will depend on Access to Work funding being available as it is unlikely to be reasonable for the employer to have to pay for taxis.

9. Similarly if someone does not get a job because of spelling and typing mistakes in a test they would not have been treated less favourably for a reason relating to their disability because a non disabled person would not have got the job if they had produced a report with the same mistakes. However, with the reasonable adjustment of voice activated software and other adjustments they might not make the same mistakes. Whether or not it is reasonable for the employer to provide such software will depend on its size and resources and the availability of financial help such as Access to Work. The new Equality Bill should be structured so as to minimise the potential of this ruling to undermine the rights of disabled people.

10. There is a danger that disability is increasingly seen as a welfare issue rather than an equality issue in public debate. Messages emanating from DWP and EHRC are inconsistent. EHRC talk about disability and employment in terms of equality and human rights. DWP however appear to see it as a welfare to work and a benefits issue.

11. Government also needs to be stronger on the message that disability and employment is about widening the talent pool for available jobs, not creating new jobs and minimise the inference that many disabled people on benefit are "scroungers".

12. The Equality Bill can open up opportunities in employment for disabled people in a number of ways. New legislation can trigger renewed employer engagement and a drive to set higher standards for best practice. Employers would welcome straightforward equality legislation that ensures everyone is treated fairly and neither conflicts with, nor contradicts other employment legislation or regulations.

Equality in Goods, Facilities and Services

13. EFD members are concerned that the cost and procedural difficulties of bringing claims in the county and sheriff courts has resulted in very few cases under Part 3 of the DDA. This has helped neither disabled people nor businesses because important clarification and interpretation of the law provided by employment tribunals is lacking in goods, services and facilities cases. Having all discrimination cases heard by an Equality Tribunal would help employers and service providers to work to the spirit of the law as well as to meet their legal obligations by providing consistent decisions and so greater certainty.

14. EFD members would prefer goods, services and facilities cases to be dealt with by the tribunal system which is already better equipped to deal with discrimination cases. The employment tribunal already hears cases where there are other related claims for civil wrongs in other courts.

15. In goods and services cases, for example if a retailer insists all customers use chip and pin to pay for goods by cards this is indirect discrimination because it is a seemingly neutral rule that has a detrimental impact on disabled people who cannot remember a pin number. However it is not less favourable treatment for a reason relating to disability following *Malcolm* because a non-disabled customer who could not remember their pin number would be treated in the same way. It is arguable that this is in breach of the EU Directive's requirement for member legislation to have indirect discrimination provisions. Again the customer here would have to rely on a claim for failure to make reasonable adjustments. Whether or not this would succeed would depend on how much changing the retailer's systems would cost and if it is reasonable for them to bear the cost and disruption of accepting an alternative method given the retailer's size and resources. This illustrates the complexity of the customer legislation—complexity that requires the experience and expertise of the tribunal system that has already built up the required expertise on disability discrimination cases.

16. The message from Government needs to be that the customer legislation is as important as that protecting disabled people in employment. Any new Equality Bill must send the same message. Unfortunately part three of the DDA often lacks credibility in the eyes of service providers and disabled citizens alike, due mainly to its enforcement mechanism being in the county courts.

17. Many organisations that take pride in their reputation for customer care still overlook their disabled customers. In fact, many probably do not even meet their basic obligations in law. EFD runs a benchmarking audit for our members called the Disability Standard. Of the participants in the most recent survey, 73% do not anticipate the needs of over 10 million disabled customers and 79% have no relevant

marketing plans. Only 43% of participants that were service providers ensure information is provided to disabled customers in accessible formats as required in law. A further 64% of participants operate inaccessible e-commerce systems.

18. EFD members are calling for the EHRC to provide an effective conciliation service for goods, services and facilities cases. This would give consumers and service providers better clarity of the law and a clearer process to follow when things go wrong.

19. Regarding the EU Directive, EFD brings the Select Committee's attention to the following sections:

(a) "Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other legal entities should be empowered to engage in proceedings, including on behalf of or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts".

(b) "Member States shall ensure that associations, organisations or other legal entities, which have a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure for the enforcement of obligations under this Directive".

The Public Sector Equality Duty

20. EFD members are broadly in favour of a single Public Sector Equality Duty. It would be less bureaucratic to have a single cycle for publishing schemes and will help public authorities to ensure that they are meeting all their statutory duties. However, EFD believes it is essential that each strand would be dealt with separately so that action plans are specific to that particular strand. This would ensure that matters unique to a particular strand are not overlooked.

21. A single public sector equality duty should also provide more scope for addressing issues of multiple disadvantage. In practice many public authorities are already producing or are working towards producing single equality schemes but there has been concern about whether in doing so they are meeting their duties under each single strand duty. Clear guidance and harmonised duties that do not retract from the current duties would be welcome.

22. The concern over the lack of goods, services and public function cases is relevant to the public sector duty. It is very difficult to promote equality when private and public sector organisations can say that they will "risk it" as there are so few cases against them having inaccessible websites and so on. This makes procurement less of a lever than it might be.

23. The public sector duty has in some ways not been well understood in the public sector. The importance of mainstreaming equality, especially in disability, has not been successful. The duty seems to be being interpreted as a tick box exercise, for example being about asking suppliers how many ethnic minorities or women they employ. This is as opposed to looking at barriers to use of a service or function. All too often there is assumed, wrongly, to be no equality angle to a policy such as rubbish collection and recycling, purchasing of a new telephone system or outsourcing security or catering. Impact assessments are not being conducted and the public sector seems simply to be collecting data on how many women, ethnic minorities or disabled people work for the supplier. This data is always unreliable relating to employees with disabilities.

Private Sector Commitment and Support, Guidance, Advice and Information for Employers

24. EFD has 17 years experience in providing advice and guidance to promote culture change in the private sector on disability is employment and provision of goods and services. Employers must be seen as valued customers in the system in order to remove the barriers they face in employing disabled people and serving disabled customers.

25. How one engages with the private sector depends on the person one deals with in the company. Equality traditionally sits within the Human Resources or Diversity department, departments which will have limited senior representational influence. The focus of these departments is employment. However, when one deals with operational directors, the interest is often more on customer and new product development issues. Employers should not be treated as a homogenous group, nor should it be assumed that everyone within an employer will have the same interest. Messages need to be tailored to gain maximum engagement.

26. EFD does not believe that a separate Equality Duty on the private sector is desirable. It would be more practical and more effective to use public procurement contracts to promote best practice in the private sector. In particular we would welcome the support of DWP in encouraging every employer, public and private sector, to only use disability competent suppliers, particularly those suppliers which have a direct impact on the organisation's ability to deliver adjustments for applicants, employees and customers. This includes occupational health services, recruitment agencies, IT suppliers and Facilities management.

27. In EFD's Disability Standard, the private sector was better than the public sector at positioning disability as a business priority. Twice as many private sector participants (39%) than public sector participants (20%) have made an effective economic and ethical case for disability equality and disability confidence in their organisations.

28. In EFD's Disability Standard, we found that 72% of private sector employers do not set disability objectives. Overall the public sector outperformed the private sector, scoring an average of 8% more. More public sector participants are meeting their legal obligations than in the private sector. In addition, more public sector organisations set goals and action plans that cut across departments and they are generally stronger on policy.

29. When looking at commitment to disability equality, effectiveness has to be measured. More public sector organisations measure the positive impact of taking disability equality action. However, more private sector organisations are doing it effectively. Private sector companies measure the positive impact of disability actions in quantitative (17%) and qualitative (22%) terms compared to 4% and 10% of the public sector respondents respectively.

30. Access to Work is a valuable tool that supports over 24,000 individuals in work each year while making it easier to persuade employers to invest in becoming disability confident. However, employers still have varying experiences with Access to Work, and there are aspects of the system that need improvement including consistency of service delivery. There is also concern among public sector employers that the removal of Access to Work funding for employees in central government departments is having a negative impact on the employment and promotion prospects of disabled civil servants. Those disabled employees whose departments are unable to fund the cost of their adjustments out of existing/central budgets may be placed at a disadvantage to non-disabled colleagues.

31. EFD welcomes the increase in funding outlined in the DWP "*No one written off*" green paper. However, it is not clear whether the additional funding will be allocated purely for making adjustments or whether a proportion of it will be given to better promoting the existence and benefits of Access to Work to employers and individuals. It is also a reasonably modest funding increase—a doubling of the budget in cash terms but only over the next six years.

32. Government needs to engage better with employers to ensure they get the support and advice they need and understand the benefits of employing disabled people and becoming disability confident. Many employers, and indeed disabled people, do not know what level of service to expect from Access to Work. This is partially a result of having received inconsistency of service in the past. EFD is working with Jobcentre Plus and DWP on employer engagement and Access to Work projects. These are designed to capture the direct experiences of employers and to streamline service provision to employers, disabled job seekers and employees, We urge government to continue to address employer concerns in the welfare to work system.

33. EFD would be happy to convene a "sounding board" of employers to advise and support DWP as it drives this agenda forward.

34. Because the Access to Work scheme is not well understood by either employers or people with mental health problems, it is not widely used for adjustments that are related to mental health conditions. Employers commonly use Access to Work for assistance in funding pieces of equipment. If the full range of adjustments that the scheme offers was better publicised, employers and employees would be better equipped to use it for fluctuating and non-fluctuating mental health conditions.

35. EFD believes better understanding among individuals, intermediaries and employers of the adjustments that Access to Work can fund is crucial. Where individuals are required to undertake work-related activity such as training or interviews, it is essential that adjustments and Access to Work support are provided where needed. If they are not provided, or adequately funded, the individual will be unable to carry out their duties to the best of their ability. Sanctions should not be imposed on the individual if that support is not provided.

Equality Act

36. There are differences between disability and the other equality strands. Disability requires us to treat people differently to treat them fairly. Many people steeped in traditional equal opportunities thinking 'that we must treat people exactly the same regardless of the group to which they belong', still find this new obligation challenging and resist the implications for policy and practice. Yet progress has been made under the DDA and we do not want to see this lost under the Equality Act.

37. The social model of disability must apply. All the major disability charities accept the social model. EFD strongly believes that it will be a step backwards if there is a return to the medical model on disability. The Disability Rights Commission stated that the "individualistic medical model, disabled people are unable to participate in society as a direct result of their impairment. [. . .] A social model approach states that people with impairments are disabled by physical and social barriers. The 'problem' of disability results from social structures and attitudes, rather than from a person's impairment or medical condition". Using the social model of disability, employers are better able to make reasonable adjustments to enable them to use the service, buy goods or services or work to the standard required by the employer.

38. DWP may find the business rationale for becoming disability confident, which presents the benefits to the business of taking a social model approach, a useful communications tool when setting out to engage employers on this agenda.

39. EHRC has a unique role as the only public organisation that has responsibility for all equality and diversity strands. The division of responsibility within government departments is confusing and surely undermines the effectiveness of any single equality legislation. Disability is dealt with by Office for Disability Issues via Department for Work and Pensions; responsibility for equality is with Government Equalities Office (GEO); and employment rights and workplace dispute regulations are dealt with by Department for Business, Enterprise and Regulatory Reform. It would send a powerful message to the nation were the government to appoint a Minister for Equality and Human Rights with a seat at the cabinet table.

40. EFD understands the role of the Office for Disability Issues (ODI) to be to monitor government policy as it affects disability across all government departments. This makes it in some sense an internal disability audit office. However, in practice it seems that other government departments regard ODI as having exclusive responsibility for disability. This leaves ODI, a relatively small department, taking the lead on disability across all policy areas including employment, education and housing—clearly a massive remit.

41. EFD is concerned that the separation between GEO and ODI will mean that disability issues will not be adequately understood or dealt with within equality legislation. This fear is particularly acute given that GEO have a small staff team and thus limited capacity to build up expertise across all diversity strand areas.

November 2008

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24. Memorandum submitted by Equality and Human Rights Commission

Introduction

1. The Equality and Human Rights Commission (the Commission) is an independent advocate for equality and human rights in Britain. The Commission aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights.

2. The Commission incorporates a statutory decision-making Disability Committee with extensive powers.

3. In September 2008 the Commission submitted its application to gain "A" status National Human Rights Institution accreditation. Achieving "A" status will allow the Commission to participate actively and fully in the Human Rights Council of the United Nations, including the right to make written statements relevant to the Council's programme of work, as well as making oral interventions in periodic meetings of the Human Rights Council and UN Treaty examinations.

4. The Commission has accepted the UK Government's proposed designation as an "independent mechanism" in Britain, tasking the Commission with "promoting, protecting and monitoring" implementation of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in accordance with Article 33 of CRPD.

5, Securing a Single Equality Bill which improves upon the provisions of the Disability Discrimination Act is a central priority for the Commission in carrying out this role. Equally, the Commission will be seeking to ensure that the Bill is effective in promoting equality for older people and for those who may experience discrimination or disadvantage on grounds of their association with a disabled person, including carers.

6. In this initial written submission, the Commission has included as much information as possible concerning its position in response to the Inquiry Terms of Reference. However, on a number of the questions asked in the Terms of Reference the Commission is still evolving its detailed position, or awaiting Government consultation. The Committee Terms of Reference also asked about the quality of the Department for Work and Pensions Secretary of State report. The Secretary of State reports are due to be published on 1 December 2008 and therefore the Commission has been unable to comment at this time. On these matters, the Commission would welcome the opportunity to provide further written or oral evidence.

The Equality and Human Rights Commission's Aspirations for the Equality Bill

7. The Single Equality Bill is an opportunity to transform the patchwork of law that has grown up over 40 years into a coherent set of clear, transparent and practical proposals. The Commission believes the Equality Bill should:

- provide a better and more simple framework for equality in a way that systematically promotes the greatest fairness for all;
- contain a single, outcome-focused public duty requiring public authorities to promote equality of opportunity and good relations between different groups, and to eliminate unlawful discrimination and harassment;

— explicitly require existing public sector inspectorates to monitor the way in which equality is implemented by public authorities;

— place a duty on cabinet ministers, the Welsh Assembly and the Scottish Government to report on progress against national targets for greater fairness;

— ensure public authorities use procurement processes to require every organisation providing public services and paid with public money to demonstrate a commitment to fairness;

— be drafted as clearly as possible and underpinned by "real-life" practical guidance, to ensure that every business can understand and implement the law more effectively;

— ensure transparency enabling shareholders, consumers, prospective employees and the Commission to tell if companies are doing the right thing, and hold them to account;

— give the Commission a simpler and more proportionate tool to promote equality in the private sector alongside its existing inquiry and investigative powers; and

— effectively close the gap in protection from disability discrimination left by the *Malcolm* judgement.

Simplifying the Law—Adopting a New Definition of Disability

8. The Commission believed that the Discrimination Law Review Green Paper failed to address the current inadequacies in the Disability Discrimination Act's (DDA) definition of disability, proposing only minimal change relating to removing the current list of "capacities". Whilst the Commission is not opposed to removing the list of capacities, this is not—in our view—going to assist particularly in removing the hurdles that disabled people face in bringing a claim of discrimination and in meeting the definition of disability. Changing the definition of disability completely, as outlined below, would lead to greater justice for disabled people.

9. If these capacities were to be removed, it is vital that detailed guidance is produced to provide a steer to courts and tribunals as to what a "normal day to day activity" is. In particular, the Government needs to ensure that this proposed change does not undermine existing case law, as this would be a recipe for renewed confusion.

10. The current definition is extremely complex, save in certain narrowly defined circumstances; it requires proof that an individual has an impairment which has a substantial and long term adverse impact on their ability to carry out day to day activities.

11. In June 2006 the Disability Rights Commission (DRC) recommended to the Government that the DDA's definition of disability should be changed to one which gives protection from discrimination to everyone who has (or has had) an impairment without requiring the effects of that impairment to be substantial or long-term. The DRC's recommendation for change followed a request from the cross-party Parliamentary Scrutiny Committee on the Draft Disability Discrimination Bill for the DRC to review the definition. The Committee argued that:

> "if the Government are to achieve their aim of comprehensive, enforceable civil rights for disabled people against discrimination in society or at work then the current inadequacies in the DDA definition must be addressed. Many of the deficiencies . . . would, we believe, be overcome by focusing disability anti-discrimination legislation on the act of discrimination, and not the extent of the impairment".[180]

12. The DRC's public consultation revealed strong support for such a shift in approach from a range of well-informed stakeholders. The Equality and Human Rights Commission fully supports this proposed change. The proposed new definition would move away from protecting a group of "disabled" people and instead protect anyone who experiences discrimination on the grounds of an impairment. Such a change would have many positive benefits. It would:

— Simplify the law, making it much easier for everyone to understand when someone is entitled to protection from discrimination.

  The present definition creates uncertainty. In many cases the only way to definitively determine whether a person is disabled is to go to tribunal. Merely because previous cases have established that someone with, for example, asthma, migraine, or repetitive strain injury, is within the DDA definition, does not mean that other people with this condition will similarly be protected by the law.

— Encourage a more systemic approach to change and to the removal of barriers, bringing the law into alignment with best practice.

  For employees who develop impairments or health conditions, good practice is to respond to any problems as soon as they become apparent, not, for example, to allow lengthy periods of sick leave to elapse before enquiring whether or not steps can be taken to enable an employee to return to

[180] http://www.parliament.the-stationery-office.co.uk/pa/jt200304/jtselect/jtdisab/82/8205.htm#a10

work. In such cases, waiting until it is clear that an employee meets the DDA definition (by having an impairment which has a substantial adverse impact for 12 months or more) before putting in place reasonable adjustments undermines the chances of a successful outcome.

— Ensure clear protection for all those who need it.

Currently there is no protection for people with short term but severe conditions, or those with long term conditions which do not have a substantial adverse impact on day to day activities. In one DRC case a man who had attempted suicide, and had his job offer withdrawn as a result, was held not to be disabled because he could not establish that the substantial effects of his depression were likely to last 12 months or more.[181]

— Shift the focus of attention from the medical condition of an individual to a consideration of whether or not discrimination is occurring and the need or otherwise for a reasonable adjustment and whether treatment is fair.

For example, Mrs Gittins was a nurse who was denied employment on the basis that she had Bulimia Nervosa. The hospital trust concerned did not seek to justify their decision, but rather they successfully argued that since Mrs Gittins' impairment did not constitute a disability under the DDA, she was not legally entitled to challenge their decision.[182] Under our proposed change, the focus would have been on whether the trust could have justified their refusal to employ her because of the risks associated with her impairment.

— Remove substantial barriers to individual access to justice.

The present definition creates a significant barrier to justice, even for those who fall within it. An authoritative report on the operation of the DDA concluded: "Defendants in disability discrimination litigation have every strategic reason and encouragement to challenge the status of the claimant as a disabled person. This not only adds to the potential length and cost of litigation, but has a considerable psychological effect upon the willingness of a disabled person to mount or to continue litigation under the 1995 Act".[183]

Harmonising and Simplifying the Law—Adopting a Single Test of Objective Justification

13. The Commission agrees with Government that there should be a single test of objective justification for disability discrimination in employment and vocational training, goods, facilities and services, housing, education, private clubs, public functions and transport.

14. This will simplify the law in a way which strengthens protection against discrimination. Currently less favourable treatment in the areas of employment and education can be justified if the reason for the treatment is "material to the circumstances of the particular case and substantial". In the areas of goods and services, housing, private clubs, public functions and transport, the current law provides for a limited number of justifications both for less favourable treatment and for failure to make a reasonable adjustment where a reasonable opinion is held that one of the justifications applies. This is the case even if it can be shown that the belief was mistaken at the time.

15. The Discrimination Law Review Green Paper proposed replacing all the different justification tests which currently apply in relation to disability discrimination with the one that applies to indirect discrimination in relation to other grounds. This is that the conduct in question is a proportionate means of achieving a legitimate aim.

16. In employment, education and vocational training, an objective justification test would provide a higher threshold than the current test. Under the DDA at present it is simply too easy for employers to evade responsibility for what would otherwise constitute discriminatory actions. In *Heinz v Kenrick* (2000 IRLR144) the EAT stated that the threshold for the justification is "very low", "substantial" meaning "more than minor or trivial" (as specified in the statutory Code of Practice). They said: "This is not a conclusion we reach with enthusiasm but as the language of the domestic statute is clear, the remedy for the lowness of the threshold, if any is required, lies in the hands of the legislature not of the courts".

17. This issue has become of even more concern since the Court of Appeal decision in *Jones v Post Office* ([2001] IRLR384). That case involved a post office driver with diabetes who had won his claim of disability discrimination in the employment tribunal. The Court of Appeal overturned the decision, ruling that a tribunal is not entitled to find that the employer's reason was not material or substantial merely because, in their view, the medical evidence relied on by the employers was wrong.

18. The Court of Appeal stated that under the DDA, tribunals do not have a general power to decide whether the decision was correct, but are confined to assessing whether there was evidence on the basis of which the employer could properly take the decision.

19. The practical impact of the *Jones* decision is that disabled people have been prevented from bringing claims; have had to settle claims; or have had to withdraw claims which prior to *Jones* would have proceeded.

[181] *Compton v Bolton Metropolitan Borough Council*, Manchester, Case No. 2400819/00.
[182] *Gittins v Oxford Radcliffe NHS Trust* EAT/193/99.
[183] *Reform of the Disability Discrimination Act: Professor Brian Doyle, Working paper 4 for the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, University of Cambridge 1999.

20. In areas outside employment, a test of objective justification, whilst widening the circumstances in which discrimination can be justified, would also make it harder to justify discrimination.

21. We believe that this will provide both simpler and, in most legal situations, tougher protection from discrimination.

22. The effect would be to widen the scope for justification in relation to discrimination in goods, facilities and services, but tighten the level of scrutiny. The Commission believes that this would be helpful. The consequences of the relatively narrow scope for justifying less favourable treatment in relation to goods, services and housing became all too apparent in the *Malcolm v Lewisham Case*, the effect of which was for the House of Lords to overturn established case law and in effect remove the provision of "Disability Related Discrimination" from the Disability Discrimination Act.

23. It is right that those who refuse service, evict or provide a worse treatment to disabled people for a reason related to their disability should be put to a strict standard of proof. It is also correct that, given the breadth of either a "less favourable treatment concept" or indirect discrimination provision (which go beyond merely requiring identical treatment), that a range of other factors may need to be balanced against the interests of the disabled person, such as the supply of social housing.

24. The Commission proposes that rather than the proposed wording in the Discrimination Law Review Green Paper ("cannot show to be a proportionate means of achieving a legitimate aim") it would be far better if the statute itself stated that justification would only be possible where the treatment in question is "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". (This reflects the wording of EU Directives relevant to other forms of discrimination and should be the wording for services, clubs and premises justifications in relation to all forms of discrimination.) Necessity provides a high standard. If discriminatory provisions, criteria or practices are to be permitted this should only be on the basis that they are "necessary" to the operation of the business or service not merely that they are seen to be "a proportionate means of achieving a legitimate aim". The concern is that service providers will simply trot out broad legitimate aims, such as "health and safety", "maintaining profitability" "responding to customer demand" etc and that potential claimants will be deterred from challenging this because of the vagueness of the disproportionate means test, whereas now the defence the service provider is relying on has to be pinpointed.

Harmonising and Simplifying the Law—A Single Threshold for the Point at which the Duty to make Adjustments is Triggered

25. The Commission welcomes the Government's intention to establish a single threshold for the point at which the duty to make adjustments is triggered.

26. The duty to make reasonable adjustments arises in different circumstances according to whether the employment field, goods, facilities and services, housing or education is concerned.[184] The Commission agrees that a single threshold at which the duty to make reasonable adjustments is triggered would make it clearer to disabled people, employers and service providers what their rights and responsibilities are under the law.

27. The Commission believes this threshold should be where a disabled person experiences "substantial disadvantage". The Commission believes it should also apply in housing.

Disability Related Discrimination or Indirect Discrimination? What Next After the Malcolm Judgement?

28. In the *Malcolm v Lewisham* case, the House of Lords judgement ruled that:

- In DDA premises claims, a disabled person must compare their treatment with someone who is in the same or very similar circumstances to show that they have been treated less favourably for reasons relating to disability. For example, in Mr Malcolm's case, he would have to show that a non-disabled tenant or a tenant with a different disability who had sublet without permission was treated better and had not been, or would not be, evicted.
- A premises provider must know about the disabled person's impairment—and possibly the effects of it—to discriminate for reasons relating to disability.

29. The House of Lords decision in this case has made it more difficult for a disabled person to prove disability-related discrimination. The judgment means that for some types of disability discrimination cases the correct comparator for a disability-related discrimination claim is now effectively the same as for a direct discrimination claim.

[184] The duty in relation to goods, facilities and services etc is triggered when a policy, practice or procedure or a physical feature makes it "impossible or unreasonably difficult" for a disabled person to access the "service" in question; the duty in relation to the employment field and education has a lower "threshold" and is triggered when a provision, criterion or practice or a physical feature of premises places a disabled person at a "substantial disadvantage" in comparison with people who are not disabled (substantial in this context means anything which is more than minor or trivial).

30. Prior to *Malcolm*, the correct comparator for disability-related discrimination claims (as interpreted by the Court of Appeal in the case of *Clark v TDG Ltd t/a Novacold*) was someone to whom the disability-related reason for the treatment did not or would not apply. Once this was established, which was relatively easy to do, the case was decided on whether the treatment was justified. So, for example, in Mr Malcolm's case he would only have to show that tenants who had not sublet had been treated more favourably to establish a *prima facie* case of disability-related discrimination. The case would then be decided on whether the council had a valid justification defence.

31. The effect of the *Malcolm* judgment is that, in premises cases, the comparison for disability-related discrimination is now more narrowly defined. This narrower comparison and the requirement that a premises provider has to know of the disability—and possibly the effects of it—to discriminate for a reason related to disability means that the scope of the protection under this concept has been reduced and is the same as under direct discrimination.

32. It is not yet clear whether courts and tribunals will apply the *Malcolm* judgment in the other parts of the DDA. What remains to be seen is if the *Malcolm* comparator test and requirement that disability is known about may apply to services and schools education claims where, like the premises provisions as they exist now, the duty to make reasonable adjustments and disability-related discrimination are the only forms of unlawful discrimination, but where the justification defences available are broader than in the case of *Malcolm*. There are cases in the system currently which are argued on the basis that *Malcolm* should be limited to premises claims only.

33. There are strong legal arguments that *Malcolm* should not apply in the employment and post-16 education parts of the DDA where stand-alone, separate concepts of direct discrimination already exist. The basis for this argument is that Parliament cannot have intended to ascribe the same meaning to separate concepts of direct and disability-related discrimination (the latter of which is capable of justification whereas the former is not) in these parts of the DDA.

34. The House of Lords judgement goes against the policy intent of Government. Therefore, Government is expected to propose an approach in the Equality Bill to remedy the effects of the *Malcolm* judgement. The Office of Disability Issues will consult on its proposals in December 2008. The Office of Disability Issues had said that it will propose including a provision for indirect discrimination rather than disability related discrimination in the Equality Bill in order to achieve its aims.

35. At the time of writing, the Commission has not had the opportunity to consider the Government's proposals in full, or to discuss its position with stakeholders. It would therefore be premature to include a position in this initial submission. The Commission would however welcome the opportunity to provide further written or oral evidence on its position having had chance to develop its position.

Disability Related Questions in Employment

36. The Disability Rights Taskforce recommended in 1999 that disability related enquiries before a job is offered should be permitted only in very limited circumstances.

37. The Government rejected this recommendation. However, the Commission consider there is a clear and pressing need for this proposal.

38. The DDA is proving inadequate in addressing recruitment problems. Disabled people in DWP research identified recruitment as the most common source of discrimination.[185] Many employers still ask medical questions about applicants' disabilities prior to job interview and selection. This enables employers who wish to discriminate to simply reject disabled applicants at an early stage. It is extremely difficult to prove such discrimination. In any event some disabled applicants are discouraged by questions from even proceeding with their application. A recent call to the Commission's Helpline illustrates how health related information can influence what happens even after selection:

> "I have been offered a position within a government organisation. Since completing the health declaration they are making it awkward for me to start and have asked me to consider if the job is right for me and also belittled the job by telling me that they think I will be bored doing it. The lady said to me 'I will be honest with you, what is written on this health declaration concerns me, I need people who are going to come to work'".

39. The Commission believes that such questions prior to job selection should be prohibited. The Commission is concerned at the continued prevalence amongst disabled people of the view that employers routinely discriminate in the recruitment process. For example, 39% of mental health users in a MIND Survey felt that they had been denied a job because of their psychiatric history.[186] The fear of discrimination acts as a deterrence to disabled people applying for jobs. In the same survey, 69% of mental health users had been put off applying for jobs for fear of unfair treatment.

[185] Gewal, I, Joy, S, Swales, K, Woodfield, K, *Disabled for Life, attitudes towards and experiences of disability in Britain*, DWP2002.
[186] *Sticks and Stones* 1996 MIND.

These fears of mental health service users appear to be well justified. Glozier tested the attitudes of major UK companies to mental heath problems of potential employees. Two hundred personnel managers were asked to assess the employment prospects of two job applicants, based on vignettes identical except that one was diagnosed as having depression and the other as having diabetes. The applicant with depression had significantly reduced chances of employment.[187]

40. Although it is open to disabled people to challenge recruitment discrimination through the DDA, this is a very poor second best to reducing the actual incidence of discrimination in recruitment. The Commission agrees with the position adopted by the Disability Rights Taskforce and the Disability Rights Commission that a powerful way of achieving this would be to remove the opportunity for an employer to know that an individual has a disability prior to offering an interview, so removing the possibility that a prejudiced judgement is made. The Taskforce recognised that employers have legitimate needs to ask disability-related questions:

- when inviting someone for interview or to take a selection test, employers could ask if someone had a disability that may require reasonable adjustments to the selection process;
- when interviewing, employers would be allowed to ask job related questions, including if someone had a disability which might mean a reasonable adjustment would be required;
- for monitoring purposes; and
- in relation to the guaranteed interview scheme.

41. The Commission believes that good guidance based on a clear legal framework is the best way forward.

Disability Discrimination and the Armed Forces

42. The armed forces are the only employer to remain exempt from the Disability Discrimination Act. This exemption should be removed.

43. The Commission recognises the special nature of the armed forces and would not wish to see the armed forces having to accept as combat effective people who are not. However, disabled people in the armed forces should not be denied rights against unfair discrimination in employment. The Commission's helpline receives calls from service personnel seeking to challenge disability discrimination. For example, one caller alleged that he had been denied promotion in the army because of his diabetes, another was experiencing what he felt was discrimination because of his cancer. People with histories of conditions such as epilepsy (seizure free for two years) and psoriasis have called the Helpline to complain that they have been rejected by the armed services.

44. The objection that no disabled person can be effective in the armed forces appears to be based on an inaccurate and limited appreciation of the definition of disabled people.

45. Adequate safeguards can be provided to allow operational effectiveness to be maintained. Thus the Parliamentary Scrutiny Committee on DDA 2005 recommended that the armed services should be subject to the DDA and that a regulation-making power should provide for an exemption, as in the SDA, for discrimination for the purpose of ensuring the combat effectiveness of the armed forces.

Volunteering

46. The Commission urges the Government to prohibit discrimination in relation to volunteering which, as the Government recognises, makes a hugely important contribution to community cohesion and provides important routes into paid employment. This is an issue which applies equally to all strands of equality. The government should act to protect volunteers against discrimination and harassment, not just on the ground of disability but also on other grounds.

47. Many disabled people actively engage in volunteering, both for its own sake and as a step towards employment. Volunteering makes a massive contribution to the economy and promotes social inclusion and skills development.

48. The Commission makes available the DRC's voluntary guide *Guidance for Volunteer Opportunity Providers*.[188] However, it does not give disabled people enforceable rights.

49. At present the law regarding when volunteers count as being covered by discrimination laws is very complex. There is no explicit exclusion of volunteering but caselaw has clarified that volunteers are rarely covered by the employment provisions and it is unlikely that they would be protected by the current framing of goods and services provisions. Extending the protection of the law to volunteers would bring helpful clarification.

[187] Glozier, N. *The Workplace effects of the stigmatisation of depression*, Journal of Occupational and Environmental Medicine 40,1998.
[188] www.drc-gb.org/docs/Guidance_for_Volunteer_Opportunity_Providers

50. The Parliamentary Scrutiny Committee on DDA 2005 recommended that volunteers should be protected by the DDA. This can be done by inserting a provision in the goods, facilities, and services part, by defining volunteering opportunities as a facility. Age Concern's report *Age of Equality*[189] discusses how this can be framed.

Discrimination on Grounds of Association or Perception

51. The Equality and Human Rights Commission supported the successful case of *Coleman vs Attridge Law*. Ms Coleman's victory before the European Court of Justice has ensured that the UK's disability discrimination law provides protection on the grounds of someone's association (including caring responsibilities) with a disabled person in relation to direct discrimination and harassment in the employment sphere.

52. The judgement implicitly suggests that a person should also be empowered to bring a case of discrimination on grounds of being perceived to be a disabled person.

53. The Commission believes the judgment should be built upon in the Equality Bill, harmonising provisions in relation to disability with the other protected grounds, where British legislation covers both perception and association.

54. Individuals experience discrimination because they are falsely perceived to be disabled. As Sharon Coleman's case demonstrated, friends, family and carers can also suffer discrimination because of their association with a disabled person, not only in the employment sphere but in other areas, such as the bullying of the children of disabled parents in school, or barriers to accessing shops and restaurants for families with disabled children.

55. The Commission believes that it is right that such people should be protected from discrimination. In addition we believe that such a change to the law will be required under the proposed European Framework Directive on goods, facilities and services since, like the Employment Directive, it proposes to extend protection against any discrimination "on the grounds of" disability.

56.The Discrimination Law Review Green Paper argued that extending protection to those discriminated against on the basis of association and perception would not be "proportionate" as it would extend coverage to several million extra people. But the same point applies to race, religion and sexual orientation. The proposal is merely to extend the right of equal treatment—not the right to reasonable adjustments.[190] The Commission does not accept that this would risk diluting the effectiveness of the law in relation to disabled people themselves.

57. The Parliamentary Scrutiny Committee on the Disability Discrimination Act 2005 recommended that the law should prohibit direct discrimination and harassment against people who are associated with a disabled person or are perceived to be disabled.

Coverage of Transport

58. Currently all air and maritime services are exempt from the anti-discrimination provisions of the Disability Discrimination Act. This leaves a major gap in the legal protection, which the Single Equality Act should remedy. Voluntary codes for shipping and aviation have not worked, and the Single Equality Act needs to lift these exemptions.

59. There is extensive evidence about the problems in these sectors.

Leonard Cheshire's *Now Boarding: disabled people's experiences of air travel* (July 2007) found that of disabled travellers surveyed:

- 67% of disabled people experienced difficulties with seating on board their flights;
- 61% had difficulty boarding the flight;
- 37% experienced negative attitudes from staff on board flights and at airports;
- 25% said that booking was a problem; and
- 11% had to cancel or delay a trip because of problems accessing a flight.

"My friend's golf clubs are handled better than I am when I'm flying".[191]

60. Whilst the introduction of an EU regulation on the rights of passengers with reduced mobility will address some of these problems, coverage by the domestic disability discrimination law is still required to give full protection to disabled passengers. The regulations are unlikely to protect as wide a group of disabled people as the DDA since they apply only to "persons with reduced mobility". This is further described as people who need assistance. However, many disabled people do not need assistance, and nonetheless experience discrimination in air travel. For example, the group of passengers who were ejected from a flight

[189] Age Concern (May 2007) *Age of equality? Outlawing age discrimination beyond the workplace*.
[190] The reasonable adjustment requirement in the Directive is differently worded, and so the right to reasonable adjustment only applies to disabled people—not those perceived to be disabled nor associated with a disability.
[191] OPM Focus Group research for DRC 2007.

in 2006 solely because of their deafness are unlikely to be entitled to legal redress. Equally, someone with HIV or cancer who has no symptoms is unlikely to be covered. These individuals would probably fall outside the scope of the EU Regulation, but they are likely to be covered by the DDA.

61. In addition, the regulations do not offer the same flexibility as the DDA through the concept of reasonable adjustments.

62. The situation is likely to cause confusion for individuals pursuing cases, for example where some of the circumstances involve issues covered by the Regulation and where others are still covered by the DDA.

63. In relation to shipping, particular problems arise where some companies refuse to let guide dogs on board or do not let them out of the cars, with the result that some passengers with visual impairment either cannot travel or are forced to stay in the cars they are travelling in once on board.

Public Sector Duties

64. The Commission wishes to see a single duty according equal coverage of all groups and which works effectively across Britain's 44,000 public authorities.

65. The key strength of the current equality duties is that it places the onus on public authorities to promote equality pro-actively, rather than waiting for individuals to take action against public authorities. This is particularly the case relating to the design and delivery of policies and services, where the likelihood of legal action by an individual is non-existent. The Commission is clear that the proactive nature of the duty should be re-emphasised in the Bill.

66. The Commission feels that the specific duties should be built around what the Government Equality Office have termed "action based principles". The Commission goal is to ensure the development of evidence-based and action orientated set of specific duties. This should be underpinned by transparency, with public authorities required to demonstrate that they are operating in a fair and open way.

67. The Commission proposes that the emphasis should be on outcomes, objective setting, action planning and evidence-gathering. This will enable the development of a simplified public duty.

68. The Commission is not advocating the retention of the current requirement for public authorities to produce Equality Schemes. The Commission does not believe that Equality Schemes represent the most effective means of enabling public authorities to deliver substantive improvements in outcomes. A combination of prioritisation, action planning and reporting through the mainstream policy and corporate performance framework of the authority may be more effective.

69. There are key aspects of the current specific duties where the principles underlying the duties ought to be developed or extended to drive improvements in outcomes. These include:

- A duty to publish objectives and priorities for action, and to implement them and report against progress.
- Equality Impact Assessment.
- Involvement and effective consultation.
- Reporting on progress.
- Inspection and regulation.

70. A duty to publish objectives and priorities for action, and to implement them and report against progress: The public authority should publish, in its business plan or other public document, or in a separate action plan if preferred, its commitments to action on equality, and report against them in its main annual report or separate document.

71. Involvement and effective consultation: Consultation and involvement are crucial to local accountability and to ensuring the local authority understands the local variations in issues and outcomes. The Commission believes that involvement and consultation should form explicit aspects of prioritisation, action planning and equality impact assessment requirements of the new duty.

72. Equality Impact Assessments: Equality impact assessments (EIA) are a vital tool which have helped to identify and tackle institutional inertia which the Macpherson report sought to highlight. EIAs help public authorities to ensure that their policies and services meet the needs of different communities while addressing differential outcomes instead of accepting "one size fits all" public services as the norm. The Commission believes the principles underlying the purpose of EIA need to be re-stated in particular:

- An emphasis on outcomes and action.
- Focusing on evidence and data sources.
- Emphasising the need to build EIAs into mainstream policy development.
- Underlining that EIAs should be sharp and focused appraisals of existing and potential impacts.
- Emphasising the role of involvement in policy making.
- Stressing the importance of using the process to identify opportunities to improve policies as well as for risk management.

73. Reporting Requirements: Public authorities should be required to regularly report on their progress in respect of the duty. These reports should be explicitly reflect their organisational priorities and the content of their action plans.

74. Inspection and Regulation: The Commission believes that while inspection and regulatory bodies are presently covered by the general and specific duties, the differential performance of such bodies to date means that it is necessary to explicitly set the expectations of the duty requirements upon such bodies. The Commission is keen to see the introduction of a specific duty on inspection and regulatory bodies to inspect relevant public authorities for their performance on equality.

75. Duties on Secretaries of State: The Commission would also like to see the Single Equality Duty develop the principles that underpin the current Secretary of State reporting duty (Disability Equality Duty). The requirement for Secretaries of State to report on progress across their policy sector and produce proposals for co-ordinated action to address shortcomings appears to have driven improvements in data collection and analysis, and may help to strengthen co-ordinated activity across different departments in the future.

76. The Commission would also like to see Secretaries of State being given a direction making power (that could also be stipulated as a duty) to set out priority national outcomes which should be taken into account by public authorities, when setting their own priorities for action. These would be set every three years in conjunction with the Comprehensive Spending Review and PSA and LAA process. The targets would draw on the evidence made available by the EHRC Triennial Report and the relevant statistics on the most significant disparities in equality outcomes for each group, and the relevant gaps for groups facing multiple disadvantage. There is also the possibility to set national outcome targets on the basis of socio-economic disadvantage, in addition to equality mandate areas. For example, the Secretary of State for Health may require health services to focus on the uptake of ante-natal and neo-natal services by low-income women of Pakistani and Bangladeshi origin.

Transparency

77. The Commission supports the use of transparency measures as a solution for achieving greater fairness. In welcoming proposals for particular public bodies to publish equality data, the Commission has pointed out that the collection of these figures will only be of value if the gaps exposed are analysed and tackled through systematic action.

78. In addition, the Commission considers that rather than waiting for a review of equality outcomes five years on from the Bill, there is a case for legislating immediately, in areas such as publishing equality and diversity data if businesses are requested to do so by their shareholders, and appointing a senior staff member to be accountable for performance on equality.

79. The Commission wants to work with businesses to identify the right data to be collected and reported on and specifically proposes that the data captured should be relevant, tailored to the capacity of the organisation to gather it, relatively simple to obtain and collate, and designed to get at real outcomes rather than merely describe processes and procedures.

80. The Commission also is hoping to see a new power in the Equality Bill enabling it to issue a formal notice to an organisation requiring it to provide specific data from that it is already collating. Although the Commission believes the primary purpose of the data is to remain the empowerment of shareholders, customers and the general public to hold institutions to account.

A "Kite Mark"

81. The Commission has said it would be pleased to contribute to the Government's plans to develop a kite mark system as proposed in *A framework for a fairer future*.

Age Discrimination in Goods, Facilities and Services

82. The Equality Bill will make it unlawful to discriminate against adults aged 18 and over because of their age when providing goods, facilities, services and carrying out public functions. The specifics of the new law will be set out in secondary legislation. The legislation will make exemptions for the differential provision of goods or services for people of different ages where this is justified. In other words, there is no intention to prevent service providers from offering age-specific goods and services, for example, free bus passes for the over 60's and discounted rail travel for young people and so on.

83. The Government considers tackling age discrimination will be a long-term challenge and a transition period is anticipated before these laws are brought into force, with specific reference to their coverage of health and social care. In a recent written Parliamentary statement the Minister for Care Services announced the Government's plans to set up an advisory group in December 2008 and to consult on its proposals in 18 months time.

84. The Commission has expressed the view that the extension of age discrimination protection: "should cover everyone, including those under 18", although this is not currently a view shared by Government who have made their intention clear that protection will not extend to services for children.

85. The Commission is looking forward to the Government honouring its commitments to outlaw age discrimination in the provision of goods facilities and services by building a timetable for implementation into the Bill which ensures both that service providers and those who will enjoy new rights know when the changes will come into play and to ensure that momentum is not lost.

Enforcement

86. The Commission welcomes many enforcement measures proposed in the Government's response to the Discrimination Law Review such as:

- allowing employment tribunals to make wider recommendations in discrimination cases, to benefit the wider workforce and prevent further discrimination in the future. This is one area covered by the July 2008 dispute resolution consultation launched by BERR;
- to further consider developing a systematic method of disseminating learning from tribunal judgments. It is confirmed that tribunal judgments will be available or searchable on the employment tribunal service's website;
- although the introduction of equality tribunals or specified courts to hear discrimination were rejected, it is proposed that appropriate training will be made available to all judges hearing discrimination cases as well as making provision for expert assessors to advise judges in cases of discrimination across all protected grounds;
- to promote the use of Alternative Disputes Resolution to resolve disputes fairly and speedily without burdening the courts, although this will not replace the need for access to redress in the courts;
- to further consider multiple/intersectional discrimination and representative (group) actions as possible heads of claim. Multiple discrimination would allow for a claim of unfair treatment suffered as a result of a combination of protected characteristics ie suffered as a consequence of being a black woman. No provision will be made for representative actions until the Civil Justice Council's recommendations in its review of collective redress mechanisms has been fully considered;
- the role of Ombudsmen to hear complaints is also under review. It is anticipated that the EHRC will work with the Ombudsmen to ensure they are effectively equipped to deal with discrimination complaints; and
- to support the role of Trade Union Equality Representatives by building on previous initiatives but not providing a similar statutory footing as union learning representatives; safety representatives or shop stewards.

87. In addition, the Commission would like to become one of the designated bodies capable of bringing representative actions in discrimination claims.

88. The Commission wants the Equality Bill to legislate to equip it with a simpler, more proportionate, risk-based, flexible tool to promote equality in the private sector alongside its existing inquiry and investigative powers.

The Commission's Position on the Draft EU Directive on Discrimination in Relation to Goods, Facilities and Services

89. Under the current EU legal framework, prohibition of discrimination on the grounds of disability applies only to employment, occupation and vocational training. The current draft EU directive on equal treatment between persons irrespective of disability, religion or belief, age and sexual orientation outside the labour market would, if passed, extend these rights to the sphere of goods and services. The Commission therefore strongly supports the draft directive, and would like to see a strong European anti discrimination framework in place which complements the rights enshrined in the UN Convention and the DDA.

90. It is important to enshrine one standard of protection across the EU, particularly given the mobility of British people (and other nationalities) in the EU. We are keen to ensure that if a British Disabled person moves to live in another EU Member State, they should have at least the same minimum levels of protection as domestically, and *vice versa* when people from other Member States move to Britain.

91. In line with these objectives, there are some areas of the draft Directive where EHRC will be seeking greater clarity or additional protections. With respect to disability specifically, these are:

- It is important that the scope of protection covered in the directive is sufficiently wide to cover those areas where discrimination is most prevalent, for example education and housing. The Commission is therefore keen to see the current intended scope of the directive, which encompasses goods and services in the areas of housing, education and transport, retained.

— Although the Directive generally prohibits discrimination in education, there is an exception for special educational needs provision (ie discrimination and harassment in SEN would not constitute unlawful discrimination). There appears to be no objective justification for this exemption and we believe that disabled pupils and those with SENs should have the same protection as any other pupil.

— As with the EU's Employment Framework Directive, there is no definition of disability offered in this draft directive. The recitals only refer to the UN Convention which offers a relatively restrictive definition of disability if taken as the baseline for protection. Adding a clause to the recitals which makes it clear that disability includes those with chronic and/or long-term health conditions would rectify this.

— The directive requires service providers, including in education, to make reasonable adjustments for disabled people, however the current wording is open to broad interpretation, and therefore potential evasion. The Commission believes that the intention and meaning behind some of the provisions relating to the duty to make reasonable adjustments would benefit from greater clarification to ensure legal certainty, and consistency with the approach in the DDA.

— The draft Directive as currently worded states that matters relating to marital or family status and reproductive rights, including adoption rights, are outside the scope of the Directive. In the UK, potential discrimination on the basis of marital status, family and reproductive rights is covered by both anti-discrimination provisions and the Human Rights Act. The Commission therefore favours removing this exemption from the directive to bring EU law more in line with protections offered domestically.

— Although the directive covers four potential grounds for discrimination (with gender and race already covered in EU law), there is no provision for bringing multiple discrimination claims. In reality discrimination can occur on the basis of more than one ground and so the Commission favours a form of redress which can cover multiple grounds.

Access to Work—Making it Fit for All

92. The Commission welcomed the announcement in the Welfare Reform Green Paper of a doubling of funding for the Access to Work scheme. The Access to Work scheme has consistently provided a clear return on investment to the Treasury (£1.88 for every £1 spent) and for many has been the pivotal factor in their getting in, getting on and staying in work.

93. Further measures to improve the provision of Access to Work:

— Reduce bureaucracy and save costs by introducing degrees of self-assessment, in particular for long term users of Access to Work, especially where it is clear that the basic need for Access to Work support is unlikely to change.

— Review the adverse impact of different timescales and decision making processes for funding individual Access to Work requests in order to inform baseline standards across the country.

— Place greater control in the hands of Access to Work users by introducing a formal appeals procedure, also aimed at creating fairer and more even decision making.

— Ensure voluntary organisations led by disabled people, including those proposed for each local authority area by 2010, can compete on quality, not just cost, to provide Access to Work support.

— Actively and specifically publicise Access to Work to disabled people, employers and intermediaries as a key plank in the Government's efforts to reduce the numbers of disabled people that are out of work.

— Access to Work should be made available to people with mental health problems to support them in overcoming the barriers they face in securing and staying in employment.

— It should be expanded further and could be partially rolled into the expansion of individual budgets.

— Access to Work procedures should be adjusted to allow the scheme to fund support for individuals without involving the employer where this is practical and is the individual's choice. This may help address issues of perceived employer stigma around mental health conditions.

— Access to Work might be provided in the form of "credits", based on an insurance approach or a "call out" service allowing people to draw on it when required. For example a person with a mental health condition may be able to take up a new job or maintain an existing one by securing out-of-hours support, mentoring, counselling or stress management. (Again, this might be achieved via partial integration with individual budgets).

— Access to Work could be used to pay for in-work job coaching and also in paying for temporary cover during short, intermittent absence from work due to either illness or accessing training or support.

— Access to Work does not currently support individuals to sell themselves to prospective employers ie it is not perceived as part of the individuals "capital" whereby they are able to assure employers that the adjustments Access to Work brings come with the package.

— Access to Work does not aid individual progression and can act as a barrier given that the assessment is at the point of job entry or the onset of an impairment or health condition and not part of an ongoing "getting on" package of support.

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25. Memorandum submitted by Association of British Insurers

The ABI is the voice of the insurance and investment industry. Its members constitute over 90% of the insurance market in the UK and 20% across the EU. They control assets equivalent to a quarter of the UK's capital. They are the risk managers of the UK's economy and society. Through the ABI their voice is heard in Government and in public debate on insurance, savings, and investment matters.

1. Executive Summary

1.1 The insurance industry is committed to treating people fairly and providing cover at a fair price and on reasonable terms. Insurers are opposed to discrimination in society, and do not restrict the availability of insurance on the basis of gender, race or sexual orientation.

1.2 Our submission will focus on the use of age when calculating risk, which are appropriate in insurance because:

— it helps ensure that the insured pays a fair price for the risk they pose;

— it can act as a proxy for other risks, keeping the underwriting process simple and the cost of insurance low, and making the purchasing process less intrusive for consumers than other approaches; and

— it encourages insurers to develop innovative products.

1.3 People's needs change as they age: notably, they may have fewer financial obligations and dependents, they may retire from work, and their health may worsen. Insurers develop products to meet these changing needs and currently offer a wide range of products designed to meet the needs of all age groups, including older people. Maintaining this ability to specialise and target particular markets is key to a thriving, healthy insurance market.

1.4 The insurance industry is concerned about the lack of knowledge about access to motor and travel insurance for older customers. While there are many insurers serving this market, some older customers do not always know how to find cover. The ABI is looking at how to help customers.

1.5 The ABI is concerned that legislation to restrict the use of age in pricing products would have negative unintended consequences for all consumers, including elderly consumers, by making products more expensive. Restrictions on the use of data sources would make it difficult for insurers to use all relevant information when pricing risk. An obligation to publish aggregated data would place a burden on industry without providing consumers with particularly useful information. Insurers and actuaries use information that changes over time and must therefore use judgment when underwriting the risk of future events, and not only rely on historical data.

1.6 Legislation on this issue is currently under consideration in both the UK and Europe, running the risk of gold plating and possible conflicts between European and domestic law that would need to be fixed during transposition. The timetable for primary and secondary legislation must be carefully considered.

2. The Use of Age in Insurance

Age as a risk factor

2.1 Insurance policies are priced according to the level of risk posed—generally, the higher the known risk, the higher the premium.

2.2 The effect of age on risk differs between products; for example, older people are considered better risks by household insurers than younger people and thus they will often pay lower home contents premiums. In other areas where risk increases with age, eg travel insurance, premiums will be higher for older customers.

2.3 In some products, age is used as a proxy for other risks such as general health and mobility. Using age as the core risk factor simplifies the underwriting process: it can significantly lower the cost of the product; may enable a wider range of organisations to distribute the product; and can be less intrusive for customers than alternative approaches to calculating risk. These savings can then be passed onto consumers through lower prices.

2.4 In other products such as annuities and life assurance, age is the major determinant of life expectancy and is therefore an essential factor in pricing these contracts.

Age limits

2.5 Some insurers impose minimum and maximum age limits on particular products. Such age limits are justified for a number of reasons.

2.6 First, some products would not be viable without age limits; if the product could be purchased by customers of any age, the typical premium would increase so significantly that it would become unaffordable for many. Health cash plans are an example of this. These low-cost plans pay cash sums towards the cost of a wide-range of treatments and age limits on the purchase of the plan are needed to keep the cost of the product low for all customers. Policyholders are often on low incomes and the policies have the benefit of paying premiums that are kept the same throughout the life of a policy, helping to fund claims in later life. If customers were able to purchase health cash plans much later in life than the other customers, they would pay premiums for a much shorter period and, due to more costly and more frequent claims, push premiums up for everyone.

2.7 Secondly, some insurers do not collate actuarial data or rely on expertise to underwrite higher risks. The use of age limits allows insurers to enter the market, increasing competition, without the benefit of detailed actuarial data for all ages. Customers benefit from increased competition in the market, which ultimately drives down prices.

2.8 Thirdly, age limits allow insurers to specialise and offer innovative products that are tailored to the needs of particular age groups. For example, telematics-based insurance for young drivers charges more for night-time driving when the risk of an accident is particularly high for this age group. There are also a number of insurers who specifically cater for older customers.

2.9 The UK has a highly sophisticated insurance sector with a wide range of specialist products.

Age bands

2.10 Some insurance products set premiums that reflect the typical risk posed by individuals in a particular age band.

2.11 The width of the age band will differ between products. Where detailed underwriting procedures are involved, eg in motor insurance, age bands are more likely to be relatively narrow—one or two years in size. In other products the bands might be wider. Wider bands reduce the cost of underwriting; these savings are passed onto the customer in the form of lower premiums. Simplified underwriting also encourages more distributors, increasing the accessibility and availability of the product. This is particularly true in travel insurance.

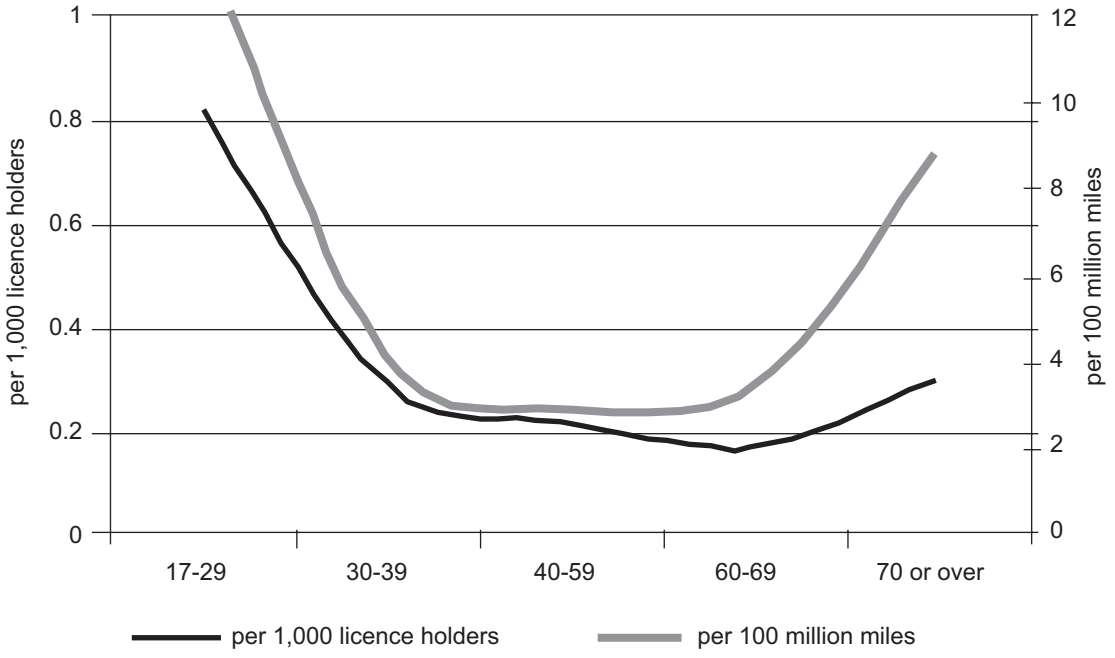
The use of age in motor insurance

2.12 The likelihood of a motorist making a claim against their motor insurance policy, and the probable level of that claim, changes according to age. ABI research shows the average cost of a claim by a 60–64 year old driver is £1,170, while the average claim by someone aged over 80 is almost 50% more expensive, at £1,716. The same research found that drivers aged over 70 are 72% more likely to be killed or seriously injured than people aged between 60 and 69.[192] Accordingly, an older driver will pay more than a middle-aged driver. However, older drivers pay less than the youngest drivers whose claims tend to be higher still.

[192] *Staying Active—Staying Insured*: A report from the ABI. March 2007.

Chart 1

DRIVERS KILLED OR SERIOUSLY INJURED PER 100 MILLION MILES AND PER 1,000 LICENCE HOLDERS (ABI CLAIMS DATA)



The use of age in travel insurance

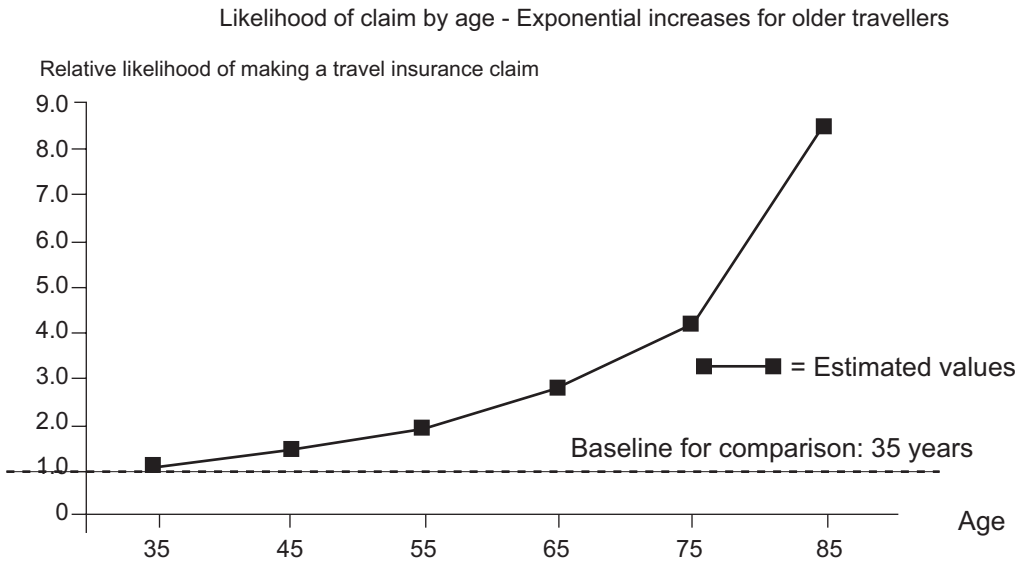
2.13 In the UK there is a strong and competitive market for travel insurance that has resulted in a large majority of people (86%) travelling with insurance.[193] As a voluntary product, its primary function is to cover the potentially very high cost of a customer needing emergency medical treatment or repatriation following accident or illness while abroad.

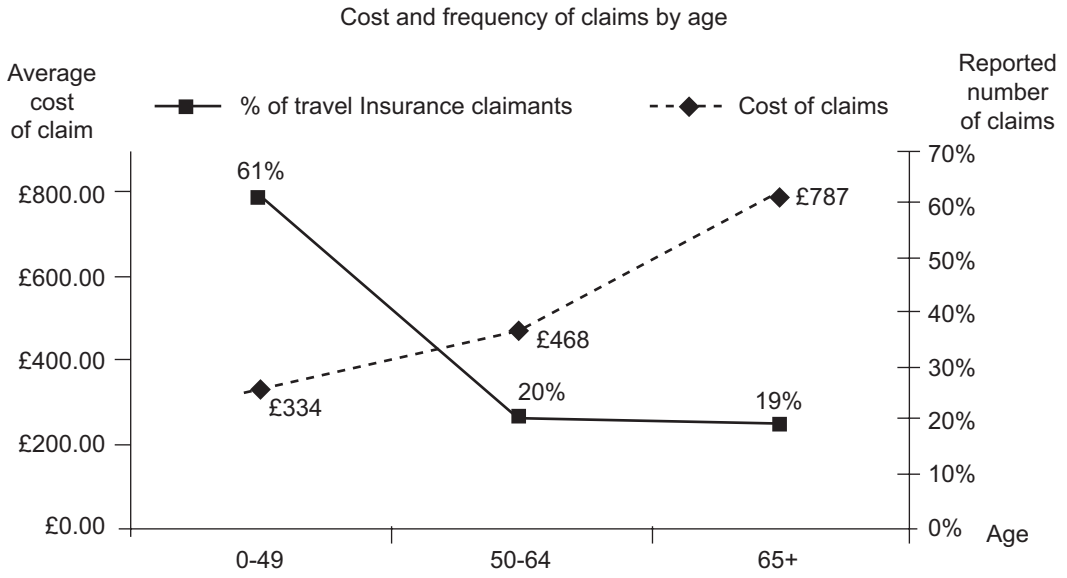
2.14 Due to the nature of the product, fewer risk factors will be considered and age is typically used as a proxy for health. Ipsos MORI research for the ABI found that over-65s are three times more likely to make a travel insurance claim than those aged 35, and people over 85 years old are eight times more likely to make a claim. Medical expenses largely drive the cost of these claims, which make up a third of total claim costs. Compared with under-50s, claims made by people aged over 65 are nearly three and a half times more expensive.

[193] Travel Insurance Market Report. *Defaqto*. February 2007.

Chart 2

LIKELIHOOD, COST AND FREQUENCY OF TRAVEL INSURANCE CLAIMS BY AGE
(ABI IPSOS MORI)





3. Forthcoming Legislation

Question: *Does the Equality Bill incorporate the provisions of the draft Directive?*

3.1 There are two significant pieces of legislation expected on equalities. In the European Union, the Commission has published a draft Directive that aims to ensure that consumers are not discriminated in the provision of goods and services. The draft Directive is likely to be amended by the Council of Ministers. In the UK, the Single Equalities Bill is due to be published shortly, with secondary legislation on financial services to follow. We have significant concerns with the wording of the Directive, and we are lobbying the EU institutions to improve the text. So we would not agree that the Equality Bill should incorporate all the provisions in the draft Directive.

Question: *What are the implications for transposition of a new EU Directive for UK law?*

3.2 The ABI is concerned that equalities legislation would create two sets of transition costs for industry within a short period of time if secondary legislation is passed in 2010 and transposition of the European Directive follows shortly afterwards. These closely aligned timetables could also result in legislation being under consideration simultaneously in Brussels and Westminster, raising the risk of gold plating and possible conflicts between the legislation.

4. European Directive & the Disability Discrimination Act (DDA)

Question: *Is the draft EU directive welcomed?*

4.1 Notwithstanding our concerns about the timing of the legislation, the ABI recognises the European Commission's efforts to ensure that consumers are not discriminated against in the provision of goods and services through the proposed European Directive. Any legislation should be light touch to maintain a thriving, healthy insurance market that enables firms to specialise and target particular markets. Otherwise it will stifle innovation and reduce consumer choice.

Question: *What is the draft EU Directive in goods, facilities and services proposing?*

4.2 Included in this Directive is a special clause for financial services, which recognises the need to differentiate between consumers in the fields of age and disability factors in the assessment of risk when developing and pricing insurance policies. However, we have concerns about the wording of the clause, which we believe restricts unnecessarily the data sources we can use to assess risk.

Question: *How could the duties in Goods, Facilities and Services of the DDA be built on to deliver systemic change?*

4.3 Comparisons can be drawn with some aspects of the DDA to show where improvements could be made in several areas of the draft Directive.

Data Sources

4.4 If consumers are to continue to benefit from access to fairly priced insurance it is necessary that insurers be allowed to differentiate using a range of sources. Actuarial and statistical pricing techniques work well in the mass market where there is plenty of data and statistical credibility. However, many companies will have eligibility criteria which exclude unusually high-risk customers—for example an 18-year-old wanting motor insurance for a sports car or an 85-year-old wanting travel insurance for a skiing trip. By definition, data for such risks will be sparse. Insurers also specialise within certain segments of the market and will not have data relating to the mass market, other insurers will not employ actuaries or use actuarial data in pricing their products but instead will use previous claims experiences to price their products.

4.5 If they cannot refer to this information, insurers may have a diminished view of the risk and the cost of providing cover to that consumer would increase. In an extreme situation, some insurers may not be able to provide policies and consumers may face a reduction in the range and scope of insurance products available to them.

4.6 The DDA requires all decisions to be based on relevant information or data available at the time and used to form the basis of an underwriting manual. There is no definition of "reasonable", and insurers must adopt a commonsense approach until precedents have been set through test cases. The interpretation of relevant information or data takes into account the range of sources used by insurers. This includes actuarial or statistical data; medical research information; and medical reports about an individual. It would be sensible to adopt a similar approach for any legislation relating to age.

4.7 It should also be recognised that for long-term "forward looking" contracts, such as annuities and life assurance, providers need to make actuarial assumptions about future changes to life expectancy. Therefore it is essential that providers are not restricted to making pricing decisions on the basis only of historical data.

Member States' Discretionary Power

4.8 By using the terms "Member States may permit . . .", the insurance clause gives Member States discretionary power on whether to permit proportionate differences in treatment, as an exception to a general rule of equal treatment. The inclusion of this option means that there could be problems with future European Court of Justice (ECJ) jurisprudence. The ECJ tend to take a restrictive interpretation of cases based on an exception to a general rule. For example if a case came up in the UK, the ECJ would think that the ability for insurers to use age as a factor needs to be read in the context of a general rule of equal treatment. We do not think this should be expressed as an exception in the insurance clause.

Publication requirements

4.9 The British insurance industry has had experience with requirements to publish data following the implementation of the EU Gender Directive 2007.[194] We believe there is no consumer benefit from the publication of this data. It is not possible to draw any useful conclusions about an individual's premium from the information published.

4.10 Furthermore, insurance companies take account of many factors other than age and disability when calculating premiums. These factors will vary between each type of policy, but may include expenses and commission; underwriting practices; medical records; lifestyle; location and social group; age; postcode; usage; no-claims discount and type of vehicle. Therefore, if insurance companies are required to publish data based on the data they relied on in the assessment of risk (for example age data) this will not provide any constructive information to a consumer. Again this is due to the variety of data insurers rely on when pricing their products.

4.11 If a Directive went to the extent of requiring insurers to publish the actual data they used to assess risk, serious competition problems would ensue. The data that insurers use to assess risk, often based on confidential claims experience, is a prime tool of competition between insurers. Competition between insurers would be undermined if a publication requirement were to be interpreted as requiring insurers to publish all their proprietary data on the subject. Furthermore, policyholders would not receive fair and equal treatment if insurers could not use all the data available to them.

Question: *How can it be made easier for disabled people, carers and pensioners to bring and pursue cases in GFS?*

4.12 Under the DDA insurers must be able to provide evidence to show that an underwriting decision was justified at the time it was made when asked to do so. A challenge can be made at any time, either before or after the start of the policy. This approach enables insurers to demonstrate that their underwriting philosophy and documented claims process is in line with the law if it becomes necessary.

4.13 The ABI would prefer the DDA approach in favour of publication requirements since it would ensure that consumers receive relevant information if they challenge an underwriting decision.

Age or disability as "key factors" in the assessment of risk

4.14 The use of "key factors" in the assessment of risk in the insurance clause needs to be clarified. Insurers use a variety of factors that reflect the frequency and cost of insurance claims. These factors are then used to determine the price and cover of insurance policies. This approach ensures that all customers are treated equitably according to their actual risk, rather than cross subsidising between customers.

4.15 The use of the word "key" lends itself to mean that insurers must prioritise the factors they use and would restrict insurers' ability to assess risk fairly. It might be more preferable to use the words in the Gender Directive and refer to the use of age or disability as a determining factor.

5. Conclusion

5.1 Insurers are at their most competitive when the premiums they charge are appropriate to cover the risk posed, but no higher than necessary. This encourages firms to price risks accurately, while keeping the cost of underwriting the risk as low as possible. Insurers respond to this challenge in different ways depending on the relative simplicity or complexity of the product, or the demographic of the product.

5.2 This market-based approach is effective at meeting consumer needs and treating them fairly. Any restrictions on insurers' use of age to determine premiums or other age-related practices would risk pushing the cost of insurance up for all consumers and reducing customer choice.

November 2008

26. Memorandum submitted by UNISON

UNISON is Britain and Europe's biggest public sector union with more than 1.3 million members. Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include frontline staff and managers working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector. Over 70% of our members are women; many are low paid or work part time. We organise more black workers than any other organisation and have actively contributed to key debates on tackling racism and promoting community cohesion.

[194] This prohibits gender-based differences in insurance, but offers Member States the option to allow gender-based differences provided insurers publish the data they use to assess the risk.

UNISON is pleased to offer its views to the above consultation. We have had, from our creation in 1993, an embedded autonomous structure for under represented groups (disabled, black, women and lesbian, gay, transgender and bisexual, young and retired) members. This extends to all levels of our structures. Nationally we have a bespoke structure of disabled members who advise the union on policy matters, it is unique in that it deliberately involves members who are disabled and black, lesbian gay bisexual and transgender, women and Deaf people (who's first language is British Sign Language). Women make up two thirds of UNISON's membership; our members were involved in this consultation.

We welcome the Equality Bill's intention to simplify legislation, extend protection to other disadvantaged strands and strengthen enforcement. We believe the following measures should be included in legislation.

Disability

1. We do not believe it is necessary to have a definition of a disabled person within future legislation but that the model contained within existing provision on race and gender should be used ie that the claim of discrimination should bear witness to the disability status of the claimant. To protect some disabled people from discrimination but not others because their impairment is less significant only serves to create a hierarchy that perpetuates discrimination of a vulnerable section of our society; our vision for the Bill is one that recognises the social model rather than the medical model which perpetuates the notion that disabled people are citizens broken by their medical condition.

2. We embrace and welcome the proposal for an EU Equality Directive and view this as a genuine opportunity to promote social and economic mobility for under represented and disadvantaged citizens of Europe. We believe that all groups should enjoy protection in terms of goods, facilities and services.

3. Retain the key principles of the public authority equality duties on disability, gender and race, with new provisions introduced on grounds of sexual orientation, gender reassignment, religion and belief, age and for people with caring responsibilities.

4. Continue to promote disabled people into public life and introduce new measures that are relevant and proportionate for other under-represented groups.

5. Develop practical schemes to enable people to remain economically active. This includes expansion of the current Access to Work Scheme (AtW), child care support such as affordable and locally accessible child care, extended rights to request flexible working and training programmes to assist in particular the BME community's skills base and career potential.

6. Promote the AtW Scheme through national and local media.

7. Provide AtW support to unemployed disabled job seekers.

8. Simplify the process for getting AtW.

9. Increase funding through Individual Budgets so that disabled people can have greater control in their lives, but not to do so at the expense of workers who are on poor pay and conditions, including training and career opportunities.

10. Recognise the logistical barriers of including AtW in Individual Budgets as set out in the Social Policy Research Unit findings.

11. Develop systems that support disabled people to manage their own care packages.

12. Improve building design standards.

13. Strengthen the enforcement of legislation by making it easier for people who experience multiple layers of oppression (such as disabled Bangladeshi women) to challenge discrimination; we feel this can be best achieved by (a) expanding local resources under the auspices of the Equality and Human Rights Commission and, (b) giving courts and Employment Tribunals more powers. We welcome the commitment in the Equality Bill to address multiple discrimination.

14. Ensure training and learning opportunities are fully accessible so that disabled people can compete in the labour market rather than fail under a conditionality welfare system.

15. Accept that there will be a minority of disabled people who will not be able to be economically active and make provision for their dignity and welfare.

16. Include provision for disability leave in order that people who need time off work for disability related absence are not subject to punitive employer policies on capability and sickness absence procedures.

17. Include rehabilitation leave so employees who become disabled are enabled to remain economically active whilst adjustments are being set in place.

18. Include provision for and protection against disability related hate crime.

19. Include the provision for protection from discrimination by association.

The *Coleman* case in the European Court of Justice reinforces the prohibition of discrimination by association, and as such provides a clear role for the UK government in ensuring that carers' (many of whom are women) rights are protected in the same way that the existing duties provide protection on the grounds

of race, disability and gender. In addition, we would stress that the discrimination faced by Sharon Coleman in caring for a disabled child could also apply to someone caring for an elderly relative, or with other caring responsibilities. UNISON believes that this should apply to goods, facilities and services, as well as in the field of employment.

20. Introduce professional standards and licensing of service providers such as Braillists, lip speakers, sign language interpreters, personal assistants etc.

21. Maintain the current arrangements for the roles of the Equality and Human Rights Commission as the watchdog and enforcement agency on equality and the role of the Office for Disability Issues as an advisor to government departments on disability issues.

22. We are concerned about the judgement in the *Lewisham vs Malcolm* case and view the House of Lords' decision as one that will cause great difficulty for disabled people and their advocates to challenge discrimination. The House of Lords decision will make it extremely difficult for a disabled person to prove disability discrimination. This can not be what Parliament intended in drafting the DDA, and this is supported by the decision in the *Clark vs TDG Ltd Novacold* case. We would urge that the concept of disability related discrimination (indirect discrimination) is included in the Equality Bill and that the requirement to provide a comparator is not included. Our workplace representatives are already finding their negotiating opportunities have diminished since the judgement and that employers are hardening their position. The definition of discrimination in the Equality Bill should be one that provides greater remedies against discrimination and one that enables our workplace representatives the opportunity to resolve matters with employers easily and speedily.

Other

23. Recognise the valuable role played by the voluntary sector in providing support directly to disabled people, as an employer of disabled people and as a provider of services to disabled people by ensuring that funding is available through statutory services to support their viability. We discourage the expansion of the private sector in providing services to disabled people; no system based on profit can ultimately serve the best interests of disabled people's rights. Introduce a benefit system that meets the real costs associated with the additional cost of disability.

24. Provide a fully integrated, affordable and accessible transport system that gets disabled people, carers and people on low incomes to and from work.

25. Demonstrate commitment to the recognition of British Sign Language as the fourth indigenous language of the UK by improving communication opportunities between Deaf and hearing people by introducing British Sign Language into the National Curriculum as a language option.

26. Introduce disability rights as a core part of citizenship learning for young people.

27. Increase the stock of life-time homes to respond to anticipated age related impairment.

28. Ensure care packages are transferable geographically to enhance job-mobility.

29. The public sector should act as an exemplar for equality issues, both for service users and service providers. Furthermore, good procurement practice can extend the influence and range of high equality standards wherever public money is spent. If procurement is not to lead to a race to the bottom for quality and employment standards then good practice by public authorities and stronger regulation, including of the procurement process, must be put in place. Equality issues must be considered from the early stages of the process right through to performance monitoring of the contract. Of primary importance is the understanding of the equality outcomes, not just the processes followed. We agree with the Women and Work Commission who said "procurement in both public and private sectors should be used to encourage diversity and equal pay practice". In the absence of (or even alongside) a private sector equality duty, public procurement will be an important lever for the promotion of equality within the private sector. We recommend that the new legislation should make this explicit. This reflects the recommendation from the Equalities Review which called for "a specific requirement for public bodies to use procurement as a tool for achieving greater equality".

Carers

30. The Women and Work Commission Report 2006 *Shaping a Fairer Future* identified the impact of caring responsibilities as one of the prime causes of the gender pay gap. Women carers particularly are sidelined into low paid, part-time work to fit in with caring responsibilities, often below their skill level.

31. The Commission estimated the cost to the UK economy of under-using women's skills as £23billion, whilst the pay gap for part time women workers stands at 36%.

32. Failure to act will inevitably result in further discrimination cases being lodged with the courts, adding to the backlog which already exists and which is now bringing the employment tribunals system to a standstill.

33. It is essential that the requirement to carry out Equality Impact Assessments (EIA) on policies and procedures continues to be included in the Single Equality Duty. The inclusion of carers in the new legislation would then provide a mechanism and a prompt for employers to consider, whilst carrying out assessments, whether the needs of carers have been taken into account and whether there is inherent discrimination in the systems which the employer operates. For example, employers should identify and take positive steps to discourage a reliance on the long-hours culture whilst ensuring that staff choosing part-time and/or flexible working options, particularly to meet caring responsibilities, are not penalised.

Older People

34. We are concerned that the remit of inquiry makes reference to opening up opportunities in employment for pensioners rather than older people. UNISON is aware that there is a public debate being undertaken with regard to older workers remaining in the workplace for longer but believes that this should be a personal decision for each individual. This language reinforces the assumption that in the future people of pensionable age will have to work.

35. UNISON believes that the arguments used to justify positive action for other under-represented groups in the workplace apply equally to older people. Identical treatment may result in formal equality, but cannot suffice to bring about equality in practice. There is a duty on public authorities to promote equality as a core objective of all their activities and this should be applied to other employers.

36. With regard to equality in Goods, Facilities and Services (GFS), UNISON has previously raised the fact that insurers and banks use age as an actuarial factor to assess the risk profile of customers where it may not be relevant. The directive only states that the Commission intends to initiate a dialogue with financial service providers, together with other relevant stakeholders, in order to exchange and encourage best practice. We would welcome this but see no evidence of any firm outcomes as yet. *The Framework for a Fairer Future—The Equality Bill* refers to the establishment of a working group to help identify where age discrimination exists in the provision of financial services and the possible impact of legislation in this area. UNISON believes that the Equality Bill should include measures to ensure that age criteria are not used to restrict or deny access to GFS without any objective assessment or justification. Age must not be used as criteria to deny access to GFS where it is irrelevant, or as a proxy for a different characteristic which can be individually assessed, such as health or capacity, unless this can be objectively justified.

November 2008

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27. Memorandum submitted by Discrimination Law Association

The Discrimination Law Association

1. The Discrimination Law Association ("DLA") is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others and of the necessity for the complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

2. The passing of the Disability Discrimination Act 1995 ("the Act") marked a major milestone in the securing of rights for disabled people. The Act has undoubtedly made a major difference to disabled people in employment situations—particularly in enabling retention, as a result of the obligation to make reasonable adjustments. The number of employment tribunal claims relating to disability discrimination has steadily increased. The latest employment statistics (see http://www.employmenttribunals.gov.uk/Documents/Publications/AnnualStatictics0607.pdf) indicate that 5,533 employment tribunal claims claiming disability discrimination were lodged in 2006/2007, although only 3% of disability claims were successful at tribunal (the same percentage as those alleging race discrimination)—many of course settle before trial.

3. There have been some decisions which have had a major impact on the way in which the legislation has worked, not merely in the courts but also "on the ground"—in the workplace. These include in particular *Archibald v Fife*—where the expansive nature of the reasonable adjustment duty was made clear—and—prior to *Malcolm*, which will be discussed later—*Clark v Novacold*, which made clear that disability discrimination is different, and that the focus in cases where treatment was related in some way to disability was whether an employer could justify it or not.

4. The *Malcolm* case has caused serious concerns amongst discrimination practitioners—not just because of its potential legal effects (in particular, rendering the UK government in breach of its duty to effectively transpose the European Employment Framework Directive) but because of the message that it sends out about disability rights and the DDA (in particular, comments as to a refusal of service in a café to a guide dog owner because of the dog, rather than any disability related reasoning).

5. This submission will answer those questions under the headings posed in the Work and Pensions Committee press notice that the DLA feels qualified to deal with.

6. However, at the outset, we wish to raise the issue of the definition of disability. Although a question not posed by the Committee (other than in the context of the *Coleman* decision) the definition is nevertheless critical to any examination of disability equality legislation. At present, unless the definition in the DDA is met—or an individual can rely upon the European Employment Framework Directive—there can be no claim under the DDA.

7. Ever since the DDA was passed there has been a strong body of criticism about its definition of disability on the basis that it derives from the medical model, focusing as it does on the functional limitations of an individual.

8. The social model of disability identifies "disabling barriers" rather than "impairment" as the problem to be tackled. Disabling barriers are the attitudinal, economic, and/or environmental factors preventing certain people from experiencing equality of opportunity because of an impairment or perceived impairment. The term "disability" is used to describe a social experience. A disabled person might say, therefore, "My impairment is the fact that I can't walk; I am disabled by the fact that the local authority building is accessed only via a flight of stairs". By contrast the medical model focuses on impairment as being the cause of limited opportunities and life chances. The social model not only provides the foundation for the modern disability rights movement, but also provides the basic premise for any law prohibiting disability discrimination.

9. The present definition of disability can cause considerable difficulties for Claimants. In particular, where it is unclear whether or not an individual meets the definition—and this is relatively common—they will be "put to proof", which will usually mean an extensive witness statement explaining what they can and cannot do; an expert medical report; and a hearing at which the claimant will be cross examined. This is a costly and often distressing experience.

10. The definition is particularly problematic for people with mental health issues, given the requirement that the effects of an impairment must be "long term" (ie likely to last or have lasted for more than 12 months). If, for example, an individual has depression for two months; they no longer have depression; but an employer refuses to employ/promote them because of this, there is nothing that they can do under the current Act.

11. It is our view that new equality legislation should reflect the social model of disability, focussing not on the individual's impairment but on the reasons for treatment and/or barriers placed in the way of disabled people.

12. We would suggest that the definition of disability should be one which give protection from discrimination to everyone who has (or has had or is perceived to have) an impairment without requiring the effects of that impairment to be substantial or long-term—as proposed by the Disability Rights Commission.

13. In addition, whilst the definition of "persons with disabilities" in the UN Convention is not ideal, it is certainly an improvement upon our current definition and the government will need to consider its implications when ratifying the Convention.

How can the Equality Bill open up opportunities in employment, particularly for disabled people, carers and pensioners?

14. The equality bill provides an opportunity to positively encourage the employment of disabled people, carers and pensioners, not merely by tackling the difficulties with the current legislation, but also by expanding on opportunities for positive action; by creating an effective single equality duty; and by full and effective use of procurement. These issues are expanded upon below.

How should the Equality Bill respond to the decision in the Malcolm case in respect of disability rights in employment?

15. The decision in *London Borough of Lewisham v Malcolm* has had a major impact on claims brought under the Act.

16. Whilst it is true that the majority if not all employment cases involve a failure to make reasonable adjustments; and that this together with the expanded definition of harassment means that the legal effects in employment are likely to be limited, the *Malcolm* decision nevertheless causes difficulties in the employment arena.

17. In addition, the reasonable adjustment duty can be a cumbersome when dealing with a "one off" act (such as dismissal) and there may also be time-limit issues, given that a claim based on a breach of the duty must be brought within three months.

18. Whilst there are cogent legal arguments as to why the decision should not apply in the employment context, we are nevertheless aware of claims of disability related discrimination having to be abandoned as tribunals apply the decision in the employment context. This is particularly problematic in recruitment cases, where the duty to make adjustments, which would otherwise be relied upon, is only applicable where an employer knows or ought reasonably to be expected to know, that an individual is disabled and is likely to be affected in that way. In such cases, there will not be a duty to make reasonable adjustments and so there will be no basis on which an individual can bring a claim.

19. In addition to the practical effect in the employment tribunal, it is also the case that the principle of disability related discrimination placed the obligation on an employer to justify any treatment related to a disabled person's disability. This was a very effective tool for claimants and trades unions to use in changing the behaviour of employers towards disabled employees.

20. Now, unless a claim falls within the narrow confines of direct discrimination, the onus is on the employee to identify reasonable adjustments that might be made—ie a provision criterion or practice placing them at a substantial disadvantage.

21. This shift may affect the behavioural changes of employers that the DDA has undoubtedly contributed to.

22. There are two further issues to be considered in relation to *Malcolm*: firstly, the effect it has had upon the government's compliance—or otherwise—with the employment framework directive; and secondly, what should ideally be done to remedy its effects.

23. The provisions of the DDA in its current form as it relates to employment are intended to comply with Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. This was made explicit in the process that led up to the amendments made by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003 No 1673): see the explanatory note.

24. The Directive does not have a concept of disability related discrimination. However it does have a concept of indirect discrimination.

25. The view taken by the Secretary of State when making the 2003 regulations was that by having a provision to be understood in the sense of *Novacold* and a reasonable adjustment provision it was not necessary to also have any provision dealing with indirect discrimination.

26. If reasoning in *Malcolm* is applied in the case of section 3A the basic premise for this argument has disappeared.

27. The second issue is that of what to do to ensure that the parliamentary intention as expressed in Baroness Hale's opinion in the Lords in *Malcolm* is fully represented in any future legislation.

28. Whilst indirect discrimination is an option—and we have not yet had an opportunity to consider the very recently published government consultation on introducing indirect disability discrimination to deal with the *Malcolm* consequences—we do have concerns as to its ability to plug the gaps left by *Malcolm*.

How should the government improve protection of carers in equality legislation, following the decision in the Coleman case?

29. Whilst a decision is awaited in *Coleman* as to whether or not the DDA can be read so as to be compatible with the decision of the European Court of Justice, it is our view that whatever the outcome, the legislation should make coverage of discrimination by association explicit.

30. In addition, the legislation should also cover those who are treated less favourably because of a perception that they are disabled. This is in order to give full effect to the words of the directive which prohibits less favourable treatment "on grounds of" disability.

31. We would also point out, however, that the decision in *Coleman* means only that direct discrimination and harassment based on association with a disabled person must be prohibited under domestic legislation. It does not address the matter of flexible working—and in particular, it does not provide carers with a right to reasonable accommodation, which may be necessary in order to ensure their effective participation in the workplace. Specific measures—such as a right to flexible working, or a duty to make reasonable adjustments—should be considered for such workers.

How could the duties in goods facilities and services of the DDA be built on to deliver systemic changes?

32. The goods facilities and services provisions—and in particular, the fact that the duty to make reasonable adjustments is anticipatory in nature—have the potential to drastically improve the lives and social participation of disabled people. The Court of Appeal decisions in *Roads* and *Ryanair* emphasised the importance of these duties and also the aim of the Act itself.

33. However, it is not difficult to see on any high street the number of service providers who have failed to comply with the reasonable adjustment duty specifically in relation to physical features. One of the reasons for this must lie in the fact that—particularly in comparison to employment cases—very few goods facilities and services cases have been brought and this in our view relates in part to the procedure and venue for such claims (on which, see below).

34. In any event, relying upon individuals to bring about systemic change through individual litigation places a heavy burden upon disabled people who, in many instances, experience discrimination on a daily basis which it would be time consuming and exhausting to challenge on each and every occasion.

35. Whilst the disability equality duty should address this to a great extent in the public sector, there is no such obligation at present in the private sector.

36. It is our view that consideration should be given to a radical reconsideration of the duty to make adjustments in relation to physical features. In particular, accessibility standards, such as those drafted under the Americans with Disabilities Act, enforceable by a local authority inspectorate, may provide greater certainty and remove the burden of ensuring an accessible environment from individual disabled people.

What is the draft EU Directive in GFS proposing and what are the implications for transposition of the new EU Directive for UK law?

37. The directive will as presently drafted have a number of significant implications for domestic legislation. In particular, it will necessitate:

- the introduction of the concept of indirect discrimination to disability discrimination legislation;
- the introduction of a concept of harassment for a reason relating to disability in services and premises;
- changes to the housing provisions (expanding the duty to make reasonable adjustments);
- expansion of the duty to make adjustments in relation to transport and education; and
- shifting of the burden of proof.

Is the draft EU directive welcomed?

38. The draft directive is extremely welcome and it is particularly positive that it is a single directive extending to all the grounds, and not disability alone, as was mooted at one point. It is important that there is consistency and coverage across all the discrimination grounds.

39. Whilst it is extremely positive that there will be some consistency of approach across Europe in relation to disability discrimination, there are nevertheless some areas of the directive which are of concern.

40. These are in particular:

- no addressing of the definition of disability;
- the relatively broad justification for discrimination by insurance providers;
- no requirement to provide alternative methods of service;
- effect of Article 4(3) that the directive is without prejudice to European community and domestic rules covering goods and services; and
- no mention of accessibility of manufactured goods.

41. In addition, there is no protection for multiple discrimination, a subject to which we will return below.

Does the equality bill incorporate the provisions of the draft directive?

42. There is very little detail in the public domain as to what the government is intending to address in the bill and it is not clear at present to what extent the equality bill will incorporate the provisions of the draft directive. It is clear though that in relation to disability the government is not proposing to introduce at present provisions which would transpose the draft directive as it stands.

How can it be made easier for disabled people, carers and pensioners to bring and pursue cases in GFS?

43. There is a paucity of goods and services cases litigated. This is in our view not surprising, given the procedural difficulties which bringing such a case in the county court give rise to. In particular, cost at the outset for issuing a case; the fee attached to an allocation questionnaire; the possibility of a claim being listed in the fast or multi-track, meaning that the Claimant risks the possibility of considerable costs being awarded if they do not succeed in their claim, and delay.

44. It is clearly critical that disabled people—and indeed anyone bringing a discrimination claim— are able to enforce their rights under the equality legislation. The DLA recommends that the following be carefully considered:

(a) The use of specialist institutions, such as ombudsmen, to investigate, conciliate and/or recommend resolution of discrimination cases. ACAS can no longer provide this kind of specialist support and consideration must be given either to properly funding ACAS or a similar body to carry out this kind of function for both employment and non-employment cases. The DLA considers that mediation or conciliation is particular relevant to non-employment cases, where the relationship between the provider of goods, services, housing, education is often a continuing one, so that early resolution is extremely important. In non-employment cases the compensation to be awarded at the end of formal litigation will rarely be proportionate to the delay that such litigation inevitably incurs.

(b) Consideration of the benefits/disbenefits of specialist equality courts or tribunals rather than the current system under which employment related discrimination is litigated in the ET and non-employment related discrimination (where the same is outlawed) is justiciable in the county court

Should discrimination by association extent to GFS?

45. When the draft Directive is finalised, there would be a need for explicit protection against discrimination by association.

46. However, there are in any event sound reasons for such treatment being prohibited by the legislation.

47. As was said in the Advocate General's opinion in *Coleman* "directly targeting a person who has a particular characteristic is not the only way of discriminating against him or her; there are other, more subtle and less obvious ways of doing so. One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them but third persons who are closely associated with them and do not themselves belong to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they too, affect the persons belonging to suspect classifications".

48. In the interests of consistency coherence and equality we would recommend that discrimination on the basis of association—and indeed perception—be prohibited under the goods, facilities, and premises provisions.

What are the implications of the Malcolm case and how should the equality bill take these into account?

49. It is our view that the equality bill must include provisions to remedy the effects of *Malcolm* across the full scope of the bill, including areas outside the field of employment. Whilst there are reasons for distinguishing *Malcolm* in the context of employment (and indeed post-16 education) it is very difficult because of the drafting of the provisions to make such cogent arguments in relation to goods facilities and services.

50. In addition, in premises cases it is perfectly clear that courts are bound by the *Malcolm* decision, and, as the duty to make adjustments is much more restrictive in premises, there are not the same options for mitigating the effects of *Malcolm* as there are in employment, goods and services and education.

51. It is our experience that premises cases have had to be abandoned in light of *Malcolm*—for example, where a disabled person has failed to pay rent because their depression has resulted in their failing to complete a housing benefit form, then they will no longer have a basis on which to resist any possession proceedings brought against them on this basis.

52. It is important, however, to ensure that objective justification applies in order to avoid the situation raised in *Malcolm*, where the justification provisions were so restrictive that landlords were left with no means of evicting an individual, pre-*Malcolm*, where, for example, arrears arose for a reason relating to disability.

How effective are the provisions in Part 3 of the DDA on buying selling and letting?

53. Apart from the issues raised by *Malcolm*, we have limited experience of the duty to make adjustments in the housing field. And in fact we are unaware of these provisions having been used widely at all.

54. It is clear however that they are restrictive when compared to the expansive reasonable adjustment provisions in relation to goods facilities and services.

55. Of particular note is the fact that there is no anticipatory duty to make adjustments. In addition, there must be an individual request for the adjustment, and specific other conditions must apply before the duty is owed.

56. We would suggest that, again in the interests of consistency and in order to make the provisions as effective as possible, the premises duties to make reasonable adjustments should be made anticipatory in nature. Given that the steps to be taken are limited in any event by what is "reasonable", this should not impose an undue burden upon landlords and would result in more effective removal of barriers to disabled people's participation.

How could a disability equality duty in the public sector be built upon within a Single Equality Duty? Is a single duty desirable? Will there be unintended consequences for disabled people or disability rights?

57. The equality duties have been used as the basis to challenge a number of public authority decisions, and the courts have been particularly receptive to arguments about their nature. In the context of disability, for example, the case of *R (on the application of Chavda and Others) v Harrow London Borough Council* was particularly useful in reinforcing the need for local authority councillors to be aware of the duties and to ensure their application when making decisions about budgets for social care.

58. There are at present three different equality duties and with the intention to introduce duties in respect of religion or belief, age and sexual orientation, it is important that there is a strong, coherent framework for these duties. This is particularly the case with the specific duties which, whilst extremely important in providing a "plan" for what an authority is to do, have confused some local authorities because of their differences.

59. It is important, however, that the key elements of a disability equality duty are preserved within a single duty—in particular, the duty to have due regard to the need to take steps to take account of disabled people's disabilities, even where that involves treating them more favourably. This has been particularly effective in reinforcing the reach of the reasonable adjustment duty, and in promoting substantive, as opposed to formal, equality.

60. The other elements of the disability equality duty—equally important—ie harassment, public participation and positive attitudes are equally important as regards the other equality grounds, and these should be reflected in a single duty.

61. It is equally important, however, to address the nature of the bodies to whom the duties apply. While the public sector is given greater responsibility to promote and achieve equality in carrying out its functions, wider governmental policy is encouraging a significantly increased role for private and voluntary organisations to carry out the functions of public authorities at every level. This inevitably raises concerns not only regarding how public services will be provided but also about how private and voluntary sector providers operate as employers of staff. Applying statutory equality duties to public authorities using the definition of "public authority" contained in section 6 of the HRA 1998 will not necessarily bring a private or voluntary sector body fully within the reach of the statutory equality duties as such duties will apply to bodies that are not "pure" public authorities ("hybrid authorities") only when they are carrying out "functions of a public nature" and only in respect of such functions.

62. Firstly, not all functions of a "hybrid authority" will be functions of a "public" nature. Important amongst possible "private" functions will be the role of employing staff. Secondly, this definition leaves untouched the private or voluntary sector body's activities which are clearly not functions of a public nature. For example, a company with a contract to build/manage a prison will be a public authority in respect of much of what it does in managing the prison but probably not for its role in the construction of the prison and certainly not in its other activities, for example providing security guards for banks and other insurance companies. Wholly outside any statutory "public equality duty" role are private companies which have contracts with public authorities to carry out works or to supply goods PPP and PFI schemes involve a complex matrix of contractors, some of whom may, for some aspects of the scheme, come within the definition of "public authority", but some, probably most, will not.

63. It is critical in the DLA's view that this be addressed in a single equality bill.

How could procurement be made a more effective lever for equality outcomes?

64. The experience under the Race Relations Act demonstrates that more is needed generally to ensure that public authorities, especially central government departments, fully embrace and implement their positive duty to promote equality. In particular, despite comprehensive guidance prepared by the CRE in 2003, and subsequently by the DRC, and EOC, that illustrated how at each stage of the procurement process, a public authority should, and could, while complying in full with the requirements of EU law, take their race equality duty into account, there is very little evidence of this occurring. CRE guidance illustrated that the race equality duty was relevant not only to contracts involving the provision of services to the public but also internal services and purchases of certain types of goods and work. Critical, and of general concern, are the ways in which, through procurement, a public authority can secure improvements in equality of opportunity within the contractors workforce.

65. In the absence of (or even alongside) a private sector equality duty, public procurement is a critical lever for the promotion of equality within the private sector. Whilst the general duty as framed in the RRA, the DDA and the Equality Act 2006 should be sufficient to ensure that the equality duty is exercised in relation to procurement, we would recommend that the new legislation should make this explicit. This appears to be necessary to overcome the hesitation by public authorities, which, in turn, is based in part on the extremely cautious approach of the Office of Government Commerce (OGC). A clear statutory duty to apply equality considerations to all public procurement should overcome the problems that have arisen due to the reluctance of the OGC to recognise procurement as a "function" of public authorities.

Private Sector Duties

66. The DLA recommends specific consideration of the introduction of a private sector duty across all grounds and activities. This duty should not replicate the public sector duty but should recognise and accommodate the different sizes, structures and forms of accountability of private sector organisations.

67. In particular, to require employers to review and report periodically upon the potential impact of employment policies and practices upon equality of opportunity, to take appropriate remedial action to eliminate any identified or potential adverse impact, and to make reasonable accommodation where necessary would in our view be steps which whilst not imposing a significant burden on employers would assist in securing equality in the private sector. Most employers will know the gender and age of members of their workforce but it can be assumed that a smaller proportion in the private sector retain that kind of information in relation to ethnicity or disability. The DLA would therefore recommend a statutory requirement to monitor the composition of workforce, leaving it to the Secretary of State to determine:

(a) the precise level of the monitoring obligation to be borne by particular sizes of employer; and

(b) the grounds or the factor that are monitored (with a power to add to but not delete grounds already currently monitored).

68. There should perhaps be a duty, in addition to the monitoring duty, to publish the results on a periodic basis. For companies this could form part of their normal annual reports. There is already provision in the Companies Act 2006 for listed companies to report on workforce matters and for regulations to extend both the range of companies with such duties and the content of such reports. The EHRC should have the power to call for these data comparable to powers exercisable by the Health and Safety Executive, allowing a fixed period for them to be supplied. A failure to supply the data can be dealt with in broadly the same way as contemplated by section 32 of the Equality Act 2006 in relation to public authorities.

69. Pay audits are also particularly important, given the extensive pay gap which remains between men and women.

Access to Work

How can Access to Work better support people with mental illness and fluctuating illnesses?

70. DLA has particular concerns about the delays often experienced in obtaining assistance through Access to Work and the detrimental effect that this can have on a disabled person's attempt to remain in employment, or to take up employment.

71. DLA is also of the view that Access to Work should be used to better support people with mental health conditions and fluctuating conditions. At present, AtW is still largely considered in the context of physical disabilities. Many individuals with mental health conditions are unaware that they could receive assistance through AtW to start work or to obtain advice and support in overcoming barriers in employment. Given that individuals with mental health conditions are the most socially excluded group of people, all efforts must be used to retain them in employment or to get them back into work.

72. The starting point would be to ensure that AtW advisers are live to the issue of mental health and fluctuating conditions as conditions to which AtW can assist. Further publicity is required (ie through free publications which should be widely available) to demonstrate how AtW can assist. Examples include:

- assist in the cost of re-training individuals who have had periods of absence from work through mental health problems. Retraining would address the effect of "deskilling" and would focus on rebuilding confidence and esteem;
- provision of training in "soft" skills to assist in relationship building and communication skills;
- job specific training;
- training for colleagues and managers to help them to reintegrate the individual back to work, and to break down barriers and stigma surrounding mental health issues at work;
- where an individual suffers with an anxiety condition, AtW could pay for transport to/from work where use of public transport poses a barrier;
- provision of office space where an individual is unable to work in an open office environment due to mental health condition; and
- provision of work facilities at home where flexibility is required.

To what extent can Access to Work be included within individualised budgets?

73. DLA understands that AtW within individual budgets is currently being piloted and we await the outcome of the pilot schemes. Clearly, if AtW was to form part of the individual budget, individuals with mental health conditions and fluctuating conditions would need to be aware that they have access to AtW in the first place—see above.

How does disability fit in a single equality act?

74. A single equality act harmonising and "levelling up" provision across the grounds is clearly desirable. It is important that particular attention is paid to the inconsistencies in current disability legislation—the differing trigger points for the duty to make reasonable adjustments and the different approaches to justification being just two examples—and that these are addressed. It is also important that where necessary—for example, in relation to disability-related discrimination—a different approach is taken—harmonisation should not come at the expense of effective disability legislation.

Should the social model or medical model apply for disability?

75. We have set out above, in our introduction and also in relation to the definition of disability, why it is our view that the social model of disability should underpin any legislation prohibiting disability discrimination.

Multiple/Intersection Discrimination

76. Whilst a question has not been raised as to this, it is nevertheless important in our view to address a current gap in the legislation in relation to what is often termed "multiple discrimination".

77. This relates to the impact of the current provisions on people who suffer from discrimination on more than one ground. Such discrimination may be *additive* (a disabled woman whose employer discriminates on the grounds of sex and disability will be doubly disadvantaged by her combined disability and sex), or it may be *intersectional* (a disabled woman whose employer discriminates *only* against disabled women, but not against non-disabled women or disabled men will be uniquely disadvantaged by her combined disability and sex). Multiple discrimination (whether of the additive or intersectional variety) can be experienced by disabled women, elderly men or women, Asian women, Black men, lesbian women, and by those defined by reference to extensive grounds (Muslim women of South Asian extraction, for example, or British born young Black men).

78. Additive discrimination is open to challenge under current domestic law as long as those subject to it can fulfil the normal standards of proof in relation to each of the grounds of discrimination which they allege. But domestic law fails to address multiple discrimination when it takes the intersectional form. In *Bahl v Law Society*, for example, the claimant (an Asian woman) alleged that she had been discriminated against *as a Black woman*. A tribunal, finding in her favour, declared that she had been treated less favourably *as a Black woman*. (She was, in fact, the first Law Society office holder who was not *both* white and male). The Employment Appeal Tribunal ([2003] IRLR 640) overturned the tribunal's decision, Elias

J ruling that the tribunal erred in law 'in failing to distinguish between the elements of alleged race and sex discrimination'. The Court of Appeal ([2004] IRLR 799) upheld the EAT's approach, ruling that the tribunal had failed:

> to identify what evidence goes to support a finding of race discrimination and what evidence goes to support a finding of sex discrimination. It would be surprising if the evidence for each form of discrimination was the same… In our judgment, it was necessary for the [employment tribunal] to find the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it was making the inference which it did in favour of Dr. Bahl on whom lay the burden of proving her case.

79. Had Dr Bahl been either white or male, the first instance decision would have been immune from interference given the tribunal's finding of less favourable treatment in relation to a number of incidents and the inference permitted from such treatment and a difference in sex or (but not, it appears, *and*) race. As it was, Dr Bahl's claim had to be made by reference to white women and Black male comparators (actual or hypothetical) and could (in the former case) readily be defeated by evidence relating to the employer's non-discriminatory treatment of either group.[195] Such evidence would not, of course, disprove discrimination against Black women as Black women.

81. Similar issues arise in relation to indirect discrimination.

82. The Single equality act should ensure that action can be taken on the basis of a combination of prohibited grounds ie on intersectional discrimination.

November 2008

28. Memorandum submitted by Terrence Higgins Trust

Executive Summary

Significant barriers still remain which affect the decision of people living with HIV to remain in or return to work. THT would like to see included in the Equality Bill:

- Measures taken to end the inclusion of irrelevant health related questions on recruitment forms, or requirements that prospective employees undertake medical assessments where the findings will not impact on their ability to do the job.
- An explicit provision to protect against associative disability discrimination.
- A Single Public Sector Equality Duty to help to protect people using public services from discrimination or harassment.

1. Introduction

1.1 Terrence Higgins Trust (THT) is the largest HIV and sexual health charity in the UK, with offices in England, Scotland and Wales. It offers a wide range of services to people living with, affected by and at risk of HIV or sexual ill health.

1.2 Due to advances in treatment, most people living with HIV can now expect to lead largely normal and productive lives and for many, work is an important part of staying healthy and active.

1.3 However, HIV differs from most chronic medical conditions due to the high levels of stigma and discrimination people living with the virus still face. For many even the fear of discrimination creates significant barriers to finding work and the Equality Bill provides an opportunity to reassure them that they will be supported to cope with any problems they may face.

1.4 This submission will focus on THT's areas of expertise in supporting people living with HIV to remain in or re-enter the workplace to propose changes we would like to see included in the Equality Bill.

2. Associative or Perceived Disability Discrimination

2.1 Following the ruling by the European Court of Justice in the case of *Coleman v Attridge Law*, we urge the Government to include provisions to protect people from associative disability discrimination in the Equality Bill. In the case of HIV, which continues to be a highly stigmatised condition, THT continues to take calls from people who are discriminated against because they are friends, family, or carer to someone with the virus. We believe that the rights of these people should be explicitly stated.

[195] Though note that on the facts of the instant case there would have been no actual women or Black comparators.

2.2 We would also welcome an extension of provisions to end discrimination by association to goods, facilities and services. We believe that HIV discrimination in all forms and settings is unacceptable, and the Government has a duty to protect people from it.

2.3 We also believe that discrimination on the grounds of association with transsexual people should be prohibited under the new Act.

3. Irrelevant Health Related Questions in Recruitment

3.1 Currently, it is legal for employers to ask a wide range of questions about a job applicant's medical history when they are recruiting, whether or not the answers will have any real bearing on the applicant's ability to undertake the specific job applied for. Additionally, employers often require a wide ranging medical examination or assessment which goes far beyond what may be needed for the job.

3.2 These "blanket" medical enquiries often deter otherwise excellent candidates who may be unwilling to disclose conditions such as HIV which, if properly treated, are unlikely to impact on their ability to do the job. Equally, a good candidate may well not want to lie about their condition if asked directly since this could be used against them if discovered or disclosed at a later stage. HIV, in particular, is a condition which in many cases may not affect someone's ability but which is highly likely to affect many employers' willingness to hire them, out of simple ignorance and prejudice.

3.3 Employers often do not realise that their employment procedures are deterring able applicants. Questions such as "How many days sick leave have you taken in the past 12 months", routinely appear on recruitment forms, despite the fact that they provide little useful information to the prospective employer. In THT's experience even seemingly innocuous questions like these can act as a deterrent to applicants.

3.4 Limiting employers' ability to ask superfluous or irrelevant health-related questions would benefit not only people living with HIV but those living with a range of disabilities, and is ultimately in the best interests of employers. We would encourage the Government to use the Bill to highlight this issue and provide advice and guidance to employers on how to modify their recruitment practices to avoid deterring able candidates with long-term conditions.

4. A Single Public Sector Equality Duty

4.1 We support the creation of a Single Public Sector Equality Duty making the elimination of discrimination and harassment and promoting equality a legal duty of public authorities. THT routinely supports people living with HIV that have faced discrimination or harassment at the hands of Public Sector employees. Many of these cases could have been easily avoided if the staff had communicated to them a basic understanding of HIV and the needs of people with the virus.

4.2 For example, we recently supported someone in residential care who, when her HIV status became known, was told that she would have to leave her nursing home immediately because she posed a danger to the health of other residents. Similarly, a recent study in London found that around half of people living with HIV who had suffered prejudice or discrimination in the preceding six months said it had been at the hands of a medical professional. As the numbers of people living with HIV continue to increase and more people live into retirement and old-age they will increasingly rely on public services and we believe a Single Public Sector Equality Duty is vital to help ensure the quality of their interactions and care.

5. Conclusions and Recommendations

5.1 Significant barriers still remain which affect the decision of people living with HIV to remain in or return to work. THT would like to see included in the Equality Bill:

- Measures taken to end the inclusion of irrelevant health related questions on recruitment forms or requirements that prospective employees undertake medical assessments where the findings will not impact on their ability to do the job.
- An explicit provision to protect against associative disability discrimination.
- A Single Public Sector Equality Duty to help to protect people using public services from discrimination or harassment.

November 2008

29. Memorandum submitted by Trade Union Disability Alliance

Introduction

1. The Trade Union Disability Alliance (TUDA) brings together disabled trade unionists with affiliated branches and trade unions from across the trade union movement to move forward on issues affecting all disabled trade unionists.

2. TUDA welcomes the Committee's inquiry into the proposed Equality Bill and the opportunity to submit written evidence.

Key Issues

- The Equality Bill provides an opportunity to make it easier to address discrimination against disabled people.
- We welcome the proposal for an EC Equality Directive which would help address non-employment areas across Europe. The Government needs to anticipate the new obligations in the Equality Bill.
- The Government needs to ratify the UN Disability Convention as soon as possible and without reservations or interpretive declarations.
- Our priorities for the Equality Act are:
  - A comprehensive definition of discrimination that effectively addresses inequality and structural disadvantage of disabled people.
  - Extending protection to those associated with disabled people
  - Preserve existing rights of disabled children in education.
  - Retain the key principles of both the general and specific disability equality duties.
  - Extend the Public Sector duty to the private and voluntary sector.
  - Strengthen the enforcement of the legislation.
- Maintain and extend the Access to Work Programme.
- Monitor the implementation of the Equality Act.

An Equality Bill is needed

3. Despite the Disability Discrimination Act disabled people still experience vastly unequal outcomes:
   - 21% of disabled people aged 16–24 have no qualifications whatsoever, compared to 9% of non-disabled people of the same age—a 12% gap.
   - Disabled young people are 40% as likely to go into higher education aged 18 as non-disabled 18 year olds.
   - Although the number of disabled pupils participating in higher education has since increased year on year—the gap has continued to widen as participation by non-disabled people has grown much more rapidly over the same period.
   - Only half of disabled people are in work compared with over four fifths of the non disabled population.

4. The legislation has been further weakened by the *Malcolm* Judgement and the current legislation is not easy to enforce.

The International Context

5. The UN Convention is a chance to strengthen the rights of disabled people but the UK Government needs to sign and ratify both the Convention and Protocol without delay or reservations.

6. Of particular concern is the intention signalled by Ministers to place an interpretive declaration and to reserve on article 24, thus reneging on the principles of inclusive education.

7. We also welcome the European Commission's proposal for a non-discrimination directive, however this is likely to be passed after the Equality Bill and therefore the Bill needs to anticipate the directive by including things such as protection from discrimination and harassment because of association with a disabled person.

Defining Discrimination

8. TUDA is very concerned by the *Malcolm* Judgement in the House of Lords which appears to have removed disability related discrimination. The following example was given in the House of Lords judgement:

> A blind person with a guide dog enters a restaurant. The restaurant has a no-dogs policy, and the owner refuses to make an exception for the guide dog.
>
> *Before Malcolm*: the blind person is compared to a person without a dog. The person without a dog would not have been barred from the restaurant. Therefore less favourable treatment has taken place.
>
> *After Malcolm*: the blind person is compared to another person with a dog (not a guide dog). That person would also have been barred. Therefore no less favourable treatment has taken place (although there may still be failure of duty to make reasonable adjustment).

9. The current text of the EC Directive outlaws indirect discrimination and welcome the Government's intention to outlaw indirect discrimination through the Equality Bill. However, we do not believe that this will overcome the *Malcolm* Judgement.

10. The only solution to *Malcolm* is to remove the requirement for a comparator and provide that:

> "A person would discriminate against a disabled person where he carries out an act which disadvantages that person for a reason connected with their particular disability, and which cannot be justified as being a proportionate means of achieving a legitimate aim."
>
> Before a justification could apply the employer/landlord etc must have complied with the reasonable adjustment duty.

11. We also believe that to establish disadvantageous treatment there should be no requirement to know about the individual's impairment.

12. We welcome the Government's proposals around the use of substantial disadvantage as a trigger for the duty to make reasonable adjustment and to introduce an objective justification for disability-related discrimination (and not have one for direct discrimination, harassment or reasonable adjustment duty).

Association with a Disabled Person

13. The *Coleman v Attridge* case brought in July 2008 to clarify the purpose of the Directive 2000/78, confirmed that the principle of equal treatment enshrined in the Directive in that area applied not to a particular category of person (ie a disabled person) but by reference to the grounds mentioned (ie for reason related to disability). Protection therefore extends to individuals who are victims of discrimination because they are associated with a disabled person. We believe that the Equality Bill should explicitly include this form of discrimination by association.

14. We are also disappointed that the Government is not proposing to cover perceived discriminatiion in the Bill and ask the Government to reconsider this issue. Section 146 of the Criminal Justice Act 2003 already protects those who are vicitims of hate crimes because of perceived discrimination.

Education

15. We would like clarification as to whether the existing rights relating to disabled children for the DDA and Special Eductional Needs and Disability Act (SENDA) will be retained.

16. Whilst we welcome the work that the Government has started to stop bullying of disabled children in schools we believe that disability equality training should become a compulsory part of the national curriculum. This can be addressed, for example, as part of the national curriculum subject of Citizenship education with a clear emphasis on disablity equality. If disabled and non disabled children can grow up in harmony alongside each other as much progress will be made again for disability equality as all the recent legislation.

17. We are very concerned that Ministers have signalled an intention to renege on their commitment to the principles of inclusive education. The DCSF's position that emerged following the 2001 SEN amendment to the Disability Discrimination Act has been that all children can be educated in mainstream. We urge the Government to ratify the UN Convention in full, including article 24 on education. Parental choice cannot limit disabled children's essential human rights.

Public Sector Duty

18. Our support for the new public sector duty is conditional upon strand specific duties being retained, for instance taking account of people's disabilities even where it means treating a disabled person more favourably.

19. We welcome the support in the Government response to the consultation to *Framework For Fairness* for the General Duty but would like a similar reassurance for the specific duty.

20. We urge the Government to retain the current characteristics of the general duty ie. mainstreaming of equality, proactive approach, transparency, accountability and involvement of disabled people.

21. The public duty should be extended to cover the private and voluntary sectors where disabled people remain the victims of discrimination.

22. We also believe that disability equality would be enhanced if the anticipatory duties that cover the provision of goods, facilities and services, the exercise of a public function, the use of transport vehicles, private clubs and education were extended to cover employment and occupation, qualification bodies and provison of housing.

Enforcement

23. We believe that the ability to enforce the DDA is currently limited because of the cost of bringing a case (particularly for non-employment cases) and because of the limited powers of courts and tribunals.

24. The Government's proposals to improve enforcement including raising awareness amongst the judiciary are welcome. The additional power of employment tribunals to order changes to policies, practices and procedures are welcome but we also believe that tribunals should be given the power to order reinstatement and reingagement in discrimination cases.

25. We also call on the Government to reconsider its rejection of the recommendation of the former equality comissions, the UK Review of Anti Discrimination Legislation and the Parliamentary Scrutiny Committee of the Disability Discrimination Act 2005 for goods, facilities and services and education cases to be heard by employment tribunals.

Access to Work

26. TUDA notes that the funding for Access to Work will be doubled from £69 million to £138 million—but only by 2013, much of the notional increase will therefore be eaten up by inflation. We need a bigger budget to expand to jobseekers as well as volunteers and to restore to Government Departments.

27. A major barrier to disabled workers moving off benefit into work is the lack of Access to Work provision for jobseekers. For example, the Government's Access to Work scheme will provide taxi transport to allow a disabled person to travel to and from their workplace, but will not provide taxi transport to allow a disabled person to travel to and from the Jobcentre or other employment agencies. They will pay for a reader to support a visually impaired or print impaired person within the workplace, but not to read job advertisements. They will provide a support worker to help a disabled person in their work, but not in their job-seeking. They will pay for a laptop computer with speech recognition to enable a disabled person to work, but not to apply for jobs.

28. While some alternative provision does exist through the Jobcentre Plus system and contracted specialist agencies, disabled jobseekers report that this is entirely and wholly inadequate. It is also extremely unhelpful to have one system for jobseekers and another one for workers. It is essential to extend the Access to Work scheme to disabled jobseekers before any real impact can be made on the number of people claiming Incapacity Benefit.

Delays in Access to Work Provision

29. Throughout the country, disabled workers also report significant delays in the provision of support via the Access to Work scheme once they enter employment. This can result in job offers being withdrawn without this being in breach of the DDA, and certainly affects employers' decisions to employ disabled workers in the future once they have experienced the delays with one employee. When support is put in place it is often inadequate, and workers may wait years before appropriate support is finally provided.

30. If Access to Work provision is extended to jobseekers, this will reduce the number of workers affected by delays in providing support once a job offer has been received, as many workers will already have the support structures in place that they need. However, the system still needs to be streamlined to ensure that all disabled workers are enabled to start work with adequate and appropriate support in place within four weeks of a job offer being received. It is unrealistic to expect an increase in the number of disabled people obtaining work and coming off Incapacity Benefit until this has happened.

Inadequate Information about Access to Work

31. The most relevant information about the Access to Work scheme for disabled jobseekers is the availability of ongoing grant funding for support workers and taxis to work, together with grant funding for specialist equipment such as ergonomic seating and laptop computers. Once in the possession of this knowledge, Incapacity Benefit claimants can begin to make an informed decision about whether they are able and ready to return to the workforce.

32. However, publicity for Access to Work concentrates on the provision of advice for employers and employees and does not advertise these grants at all, and so there is little awareness of the extent of the provision that is actually available. Similarly, Jobcentre staff seem generally unaware of the assistance available through Access to Work, and even the specialist Disability Employment Advisers assigned to disabled jobseekers are often more or less ignorant about how Access to Work actually operates in practice. Often workers report that they would never have become unemployed in the first place if they had been aware of the Access to Work provision available to them.

33. Information about the extent of the assistance available through the Access to Work scheme needs to be made available to all disabled workers and jobseekers. All Jobcentre staff need to receive training on Access to Work in order that they can advise their clients correctly. Disability Employment Advisers need access to further training and more detailed information. Only then will Incapacity Benefit claimants be in a position to make an informed decision about their suitability for work.

34. The remit of Access to Work should be expanded to include rights to support when needed by people with fluctuating conditions; and right to temporary staff cover, for instance for someone with a fluctuating mental health condition who needs time off. This would reduce the employer's anxiety about taking on someone who might require above-average sickness leave—just as support to install lifts removes employer anxiety about the costs of employing someone requiring major access improvements.

Social Model Definition of Disability

35. The UN Convention promotes a paradigm shift in thinking about disabled people. This involves a shift from objects of "care" and medical concerns to subjects of rights.

> "The Convention marks a 'paradigm shift' in attitudes and approaches to persons with disabilities. It takes to a new height the movement from viewing persons with disabilities as 'objects' of charity, medical treatment and social protection towards viewing persons with disabilities as "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society."
>
> http://www.un.org/disabilities/default.asp?navid = 12&pid = 150

36. Whilst not specifically defined, disability is recognised as being created by barriers in society. Accordingly, the UK law needs to move to a social model definition of disability, along the lines proposed by the DRC last year. The present definition is an insult, perpetuating prejudice and stereotypes through a law which should protect against discrimination. It creates an enormous, in some cases insurmountable, obstacle to disabled people seeking protection against discrimination. Employers will often focus on trying to prove that someone is not entitled to a reasonable adjustment rather than make simple changes to help them do their job. We have members who have suffered days worth of cross-examination about their psychiatric impairment and paid out hundreds of pounds in medical reports—simply to establish an entitlement to fair treatment. This is not right—nor is it effective in enabling disabled people to get and keep work.

Monitoring

37. We believe that it is important to make sure that it is essential that the EHRC and the Office for Disability Issues monitor the implementation of the Single Equality Act. The publication *Monitoring the Disability Discrimination Act* provided a good illustration of the barriers to effective implementation of the Disability Discrimination Act.

November 2008

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30. Memorandum submitted by Housing Law Practitioners Association

About HLPA

The Housing Law Practitioners Association (HLPA) is an organisation of solicitors, barristers, advice workers, independent environmental health officers and others who work in the field of housing law.

Membership is open to all those who use housing law for the benefit of the homeless, tenants and other occupiers of housing. HLPA has existed for over 10 years. Its main function is the holding of regular meetings for members on topics suggested by the membership and led by practitioners particularly

experienced in that area, almost invariably members themselves. The Association is regularly consulted on proposed changes in housing law (by primary and subordinate legislation and also by other means such as relevant codes) by the relevant Departments, chiefly the DCLG.

The Chair, Vivien Gambling, is an experienced housing specialist and a solicitor at Lambeth Law Centre. Although the Association is London based, the membership is countrywide. The Association is also informally linked with similar Housing Law Practitioners Groups in the North-West, South Yorkshire and the West Midlands.

Membership of HLPA is on the basis of a commitment to HLPA's objectives. These objectives are:

— To promote, foster and develop equal access to the legal system.

— To promote, foster and develop the rights of homeless persons, tenants and others who receive housing services or are disadvantaged in the provision of housing.

— To foster the role of the legal process in the protection of tenants and other residential occupiers.

— To foster the role of the legal process in the promotion of higher standards of housing construction, improvement and repair, landlord services to tenants and local authority services to public and private sector tenants, homeless persons and others in need of advice and assistance in housing provision.

— To promote and develop expertise in the practice of housing law by education and the exchange of information and knowledge.

The HLPA Law Reform Working Group has prepared this response. This group meets regularly to discuss law reform issues as they affect housing law practitioners. The Chair of the group reports back to the Executive Committee and to members at the main meetings which take place every two months. The main meetings are regularly attended by over one hundred practitioners.

1. These submissions are restricted to the single issue of the impact of the House of Lords decision in *Lewisham LBC v Malcolm* (EHRC Intervening) [2008] UKHL 43; [2008] 3 WLR 194. HLPA urges the Committee to recommend that their Lordships' decision be reversed by the Equality Bill so that the definition of "disability related disability" formulated by the Court of Appeal in *Clark v Novacold Ltd* [1999] ICR 951 (Novacold) be reinstated on a statutory basis. We restrict these submissions to the impact on housing law and, in particular, possession proceedings.

2. The practical problem in *Malcolm* arose from the limited defence available in s.24(3) of the Disability Discrimination Act 1995 (DDA). This will be addressed by the objective test of justification that is proposed for the Equality Bill. This would achieve the outcome sought by Baroness Hale of Richmond in *Malcolm* (at [61]):

> "There is little doubt what the sensible answer to the issues in this case would be. It would be to enable, in the first place the Council, and in the second place the court to balance the competing interests. On the one hand, there is the public interest in the proper use of social housing, which means that local authorities should not be required to continue to supply a home to a person who no longer needs it and merely wishes to make a profit out of it, or indeed to a person who will never be able to comply with the conditions of the tenancy. On the other hand, there is the right of people with disabilities to be treated as equal citizens, entitled to have due allowance made for the consequences of their disability. This, in essence, is the result which the Equality and Human Rights Commission would like us to be able to achieve."

3. In the Appendix, we analyse why the decision of the majority in the House of Lords does not represent what Parliament intended when passing the DDA. Since March 1999, the law has developed on the basis of the definition of "disability related discrimination" as formulated by Mummery LJ on *Novacold*. The positive achievements of the last 9 years would be lost if *Malcolm* is not reversed. The House of Lords in *Malcolm* have largely restricted the reach of "disability related discrimination" to direct discrimination. This is not sufficient to secure equality for disabled people.

4. The *Novacold* formulation of "disability related discrimination" has worked well outside the premises provision. The problems in connection with the premises provisions are caused solely by the limited defence of justification which is to be found in s.24(3) DDA and which will be cured by the objective test of justification which is to be implemented in the Equality Bill.

5. HLPA does not seek to address the merits of the decision in Malcolm. The trial judge had held that Mr Malcolm had not established the necessary causal connection between the sub-letting and his disability. Their Lordships considered that the trial judge had been entitled to come to that decision. The factual situation was unusual. It is unlikely to be one that is repeated.

6. The more common situation where the premises provisions are likely to come into play is in possession proceedings where there is a causal connection between the decision to evict and a disability within the tenant's household. HLPA gives two examples:

(i) Eviction on grounds of rent arrears where the arrears are related to a disability. The tenant may have a mental health problem which impacts upon their ability to claim housing benefits. Alternatively, a tenant with learning difficulties may find it difficult to read standard letters relating to arrears.

(ii) Eviction on grounds of nuisance where a tenant has a child who is autistic or has learning difficulties; or, a tenant with a hearing impairment who has visitors who need to shout to attract the tenant's attention.

7. HLPA believes that any such eviction should be justified so that the tenant with disabilities is not treated less favourably than other tenants. The same should apply regardless as to whether the tenant has security of tenure or whether the landlord is a local authority, a registered social landlord or a private individual. These factors would all be relevant to the issue of justification, but justification should be required in all cases where an eviction is related to a disability within the household.

8. HLPA recognises that a duty to make reasonable adjustments may arise in the above situations. A landlord may need to change their practices in respect of the tenant with learning difficulties, either by visiting the tenant or providing him with an Easy Read statement. The tenant with a hearing impairment may need a flashing light as an alternative to a door bell. However, under the premises provisions the duty to make reasonable adjustments only arises if a request has been made. It is not anticipatory as in the goods and services provisions. Further, there is no obligation for a landlord to remove or alter a physical feature to make any reasonable adjustment which would alter the physical characteristic of the premises (see the Disability Discrimination (Premises) Regulations 2006, SI 2006 No.887).

9. HLPA does not believe that it would be sufficient to introduce the concept of indirect discrimination to disability discrimination law. To do so would merely create further uncertainty in the law. The DDA was passed in order to change the attitudes and behaviour of employers, landlords and other service providers. It was recognised that a novel approach was required. The DDA was not intended simply to secure that disabled people are treated in the same way as other people who do not have their disability. It was rather intended to secure that disabled people are treated differently in order that they can play as full a part in society whatever their disabilities.

10. Any new concept of indirect discrimination would put an undue burden on a disabled person to identify a neutral provision, criterion or practice. S/he would then need to show that that provision, criterion or practice had a disparate impact upon people who share that individual's characteristics.

11. These technical requirements would not be required were the *Novacold* formulation of disability related discrimination to be reinstated together with an objective defence of justification. This would focus the minds of all landlords on the need to consider what proactive steps are required to achieve equality of treatment for disabled tenants. This would encourage the change of approach of the type that the DDA was originally intended to achieve in 1995.

APPENDIX

THE DEVELOPMENT OF THE MEANING OF "DISABILITY RELATED DISCRIMINATION"

A1. The difficult issue of construction which the House of Lords were required to address in *Malcolm* arises from the definition of "discrimination" to be found in s.24(1) DDA. A person discriminates against a disabled person if "for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply" and he cannot show that the treatment in question is justified.

A2. When the DDA was first enacted in 1995, provisions for employment (Part II) and goods facilities services and premises (Part III) all contained the same novel approach to discrimination. There was no concept, as in the Sex Discrimination Act 1975 and the Race Relations Act 1976, of direct and indirect discrimination. Rather there was what might broadly be described as disability-related less favourable treatment and, in relation to employment and goods facilities and services, discrimination by failing to comply with the duty to make reasonable adjustments.

A3. The first case under the DDA relating to the definition of discrimination to be considered by the Court of Appeal was *Novacold* involving discrimination under Part II, namely an employee who was dismissed due to absence from work on grounds of sickness. Mummery LJ noted (at 959A–F) that although the general aims of the Act are clear and commendable, the language in which the detailed implementation of them is expressed is not easy to interpret or to apply to particular cases. The exercise of interpretation is not facilitated by familiarity with the pre-existing legislation prohibiting discrimination on the grounds of sex (Sex Discrimination Act 1975) and race (Race Discrimination Act 1976). Unlike the earlier discrimination Acts, the DDA does not draw the crucial distinction between direct and indirect discrimination on specified grounds; it provides a defence of justification to less favourable treatment which would constitute direct discrimination and be without such a defence under the earlier Acts. Neither does it replicate the express requirement of the 1975 Act (section 5(3)) and the 1976 Act (section 3(4)) that, when a comparison of the cases of persons of different sex or persons of different racial groups falls to be made, the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

A4. One consequence of these differences is that the terms "discriminate" and "discrimination" are not used in the Act in the same sense as in the earlier Acts. Mummery LJ noted that in Part II "discrimination" is defined as less favourable treatment which is not shown to be justified; if the less favourable treatment of a disabled person is shown to be justified it is not "discrimination" within the meaning of the Act. This is

to be contrasted with the 1975 Act and the 1976 Act under which a person directly "discriminates" against another if, on the specified ground of sex or race, he treats that other less favourably than he treats or would treat other persons. Justification does not enter into it. Such treatment can never be shown to be justified.

A5. In *Novacold*, the applicant had soft tissue injuries around the spine as a consequence of a back injury at work. He was absent from work for a long time as a result of his injuries, and he was eventually dismissed when his medical advisers could provide no clear idea of when it would be possible for him to return to work. The reason for his dismissal was found to be that (at p.981b):

> "….he was no longer capable of performing the main functions of his job and that his absence was continuing and that [Novacold] needed somebody to perform the role that he was performing."

A6. The employment tribunal held that an employee who was absent for such a long time for a non-disablement reason would have been treated no differently in these circumstances, and that there had therefore been no unlawful discrimination on grounds of disability. The Employment Appeal Tribunal agreed with this general approach, holding that the tribunal had correctly adopted the identity of the comparator who was unable to fulfil all the requirements of his job, but whose inability was not related to disability as defined by the job.

A7. The Court of Appeal disagreed. It placed emphasis not so much on the phrase "for a reason which relates to the person's disability" as on the later phrase "to whom that reason does not or would not apply". Mummery LJ (with whom Beldam and Roch LJJ agreed) explained how the contrary argument was put on behalf of the employee (at 962D):

> "His argument is that 'that reason' refers only to the first three words of the paragraph—'for a reason'. The causal link between the reason for the treatment and the disability is not the reason for the treatment. It is not included in the reason for the treatment. The expression 'which relates to the disability' are words added not to identify or amplify the reason, but to specify a link between the reason for the treatment and his disability which enables the disabled person (as opposed to an able-bodied person) to complain of his treatment. That link is irrelevant to the question whether the treatment of the disabled person is for a reason which does not or would not apply to others. On this interpretation, the others to whom 'that reason' would not apply are persons who would be capable of carrying out the main functions of their job. Those are the 'others' proposed as the proper comparators. This comparison leads to the conclusion that the applicant has been treated less favourably; he was dismissed for the reason that he could not perform the main functions of his job, whereas a person capable of performing the main functions of his job would not be dismissed."

A8. After reminding himself that the statute had to be construed according to its legislative purpose, and saying that the approach of the lower tribunals was a natural one in the historical context of discrimination legislation, Mummery LJ continued (at 963B):

> "But, as already indicated, the 1995 Act adopts a significantly different approach to the protection of disabled persons against less favourable treatment in employment. The definition of discrimination in the 1995 Act does not contain an express provision requiring a comparison of the cases of different persons in the same, or not materially different, circumstances. The statutory focus is narrower: it is on the 'reason' for the treatment of the disabled employee and the comparison to be made is with the treatment of 'others to whom that reason does not or would not apply'. The 'others' with whom comparison is to be made are not specifically required to be in the same, or not materially different, circumstances: they only have to be persons 'to whom that reason does not or would not apply'."

A9. The meaning of discrimination in the context of s.24(2) of the DDA was considered by the Court of Appeal in *Manchester City Council v Romano & Samari* (DRC Intervening) [2004] EWCA Civ 834; [2005] 1 WLR 2775 (Romano) at [37]–[47]. The Court held that a landlord seeking to evict a mentally ill tenant on grounds of nuisance needed to justify the eviction. Brooke LJ (at [37]) noted that ss. 5, 14 (both of which are now incorporated in section 3A, which was substituted by the Disability Discrimination Act 1995 (Amendment) Regulations 2003, SI 2003/1673), 20, 24, 28B and 28S are all concerned with explaining the meaning of "discrimination". He noted that each of these sections contained the same basic definition of "discrimination", although some of them contained a secondary definition (which was absent from s.24). He further noted that the justification defence was different in some cases. He later considered (at [47]) whether it might be possible to interpret the basic definition differently in S.24. However, since the statutory language was identical and a justification defence was provided, he concluded that it would be inappropriate to do so. The Court of Appeal was bound by the decision in *Novacold*. He concluded (at [55]), that if a landlord wishes to obtain possession for a breach of a tenancy agreement that has been committed for reasons relating to a disabled tenant's disability, he will have to show that his action is justified on one of the grounds identified in section 24.

A10. Brooke LJ had particular regard to the "guide dog" example that had been considered by Mummery LJ in *Novacold*:

> "[45] A blind person with a guide dog might be denied access to a café because no dogs are allowed in the café. But the reason why he has a guide dog relates to his disability, and a café owner denying him access would have to provide justification for this policy in his case (at 964F):

> "On the employer's interpretation of the comparison to be made, the blind person with his guide dog would not be treated less favourably than the relevant comparator, that is 'others', to whom that reason would not apply, would be sighted persons who had their dogs with them. There could not therefore be any, let alone *prima facie*, discrimination. But the Minister specifically stated that this would be a *prima facie* case of disability discrimination, ie less favourable treatment, unless justified. It could only be a case of less favourable treatment and therefore a *prima facie* case of discrimination, if the comparators are 'others' without dogs: 'that reason' for refusing access to refreshment in the cafe would not apply to 'others' without dogs."

A11. Brooke LJ noted at [46] that Mummery LJ had continued at pp.964–5:

> "A waiter asks a disabled customer to leave the restaurant because she has difficulty eating as a result of her disability. He serves other customers who have no difficulty eating. The waiter has therefore treated her less favourably than other customers. The treatment was for a reason related to her disability—her difficulty when eating. And the reason for her less favourable treatment did not apply to other customers. If the waiter could not justify the less favourable treatment, he would have discriminated unlawfully."
>
> "It is clear from this example that the comparison to be made is with other diners who have no difficulty in eating and are served by the waiter, and not with other diners who may be asked to leave because they also have difficulty eating, but for a non-disability reason, eg because the food served up by the waiter is disgusting. This interpretation of section 20(1) provides support for Mr Clark's interpretation of section 5(1). The reason for his dismissal would not apply to others who are able to perform the main functions of their jobs; he has been treated less favourably than those others. He was dismissed for not being able to perform the main functions of his job. The 'others' would not be dismissed for that reason."

A12. The meaning of discrimination was further considered by the Court of Appeal in *Richmond Court v Williams* [2006] EWCA Civ 1719; [2007] HLR 22: a case involving the lessor's refusal to consent to the installation of a stair lift. Richards LJ (at [41]), suggested the following approach:

> "It seems to me that section 24(1) of the 1995 Act requires one (i) to identify the treatment of the disabled person that is alleged to constitute discrimination, (ii) to identify the reason for that treatment, (iii) to determine whether the reason relates to the disabled person's disability, (iv) to identify the comparators, namely persons to whom the reason does not or would not apply, and (v) to determine whether the treatment of the disabled person is less favourable than the treatment that is or would be accorded to the comparators. That is the approach laid down in *Clark v Novacold Ltd* [1999] ICR 951 and in *Manchester City Council v Romano* [2005] 1 WLR 2775."

A13. Since the decision in *Novacold*, the DDA has been amended a number of times. As a result of some of those amendments, the concept of "direct" discrimination, which cannot be justified, has been introduced into the DDA in Part II (employment and occupation) and Part IV (most of further and higher education). Whilst the concept of direct discrimination has been introduced, the concept of "disability related" discrimination, which can be justified, has been retained.

A14. It is in this context that the approach in *Novacold* was considered by the Court of Appeal in the case of *O'Hanlon v Revenue and Customs Commissioners* [2007] ICR 1359. The case concerned a claimant who suffered from clinical depression and was a disabled person for the purposes of the Disability Discrimination Act 1995. She had lengthy absences from work, mainly due to her disability but some for unrelated sickness. During these absences she was paid in accordance with the employers' sick pay rules, under which an employee received full pay for a maximum of six months in any 12-month period, half pay for a further six months subject to a maximum of 12 months in any four-year period, and thereafter the pension rate of pay. The claimant made a complaint of disability discrimination, claiming both that the failure to pay her full pay for all disability-related sickness amounted to disability-related discrimination under section 3A(1) of the 1995 Act and that the employers had failed in their duty under section 4A to make reasonable adjustments, to counter the disadvantage she suffered under the sick pay rules, for the purposes of section 3A(2). In relation to the claim under section 3A(1), the employment tribunal found that the claimant was not treated less favourably by the employers than others because of her disability, and that, in any event, such discrimination would have been justified, as the cost of changing the sick pay policy and the potential difficulties it would create would be excessive. The tribunal also found that, although the claimant was placed at a substantial disadvantage by the operation of the sick pay rules, the employers, in facilitating the claimant's return to work by reducing her hours and transferring her to a location where commuting would be easier, had taken reasonable steps to prevent the rules having that effect and, accordingly, were not in breach of the duty referred to in section 3A(2). The Employment Appeal Tribunal dismissed an appeal by the claimant. The Court of Appeal dismissed the appeal. It was held, inter alia, that in respect of the claim for disability-related discrimination pursuant to section 3A(1), once the tribunal had found that increasing sick pay was not an adjustment a reasonable employer would be required to make for the purposes of section 4A(1), so that the objective test for imposing the duty did not apply, the more subjective test of justification required by section 3A(3) was satisfied, given that the same failure to provide full pay lay behind both claims; and that, accordingly, the claims by reference to both section 3A(1) and (2) failed.

A15. In considering the scheme of the DDA in the employment context, Hooper LJ adopted what the EAT had to say about the three kinds of disability (at [23]):

"20. Section 3A identifies three kinds of disability discrimination. First, there is direct discrimination. This is the situation where someone is discriminated against because they are disabled. This particular form of discrimination mirrors that which has long been found in the area of race and sex discrimination. As with other forms of direct discrimination, such discrimination cannot be justified. Here, where all employees are subject to the same rules irrespective of their disability, there can be no basis for a claim of direct disability discrimination and none is alleged.

21. Second, there is disability related discrimination: section 3A(1). This is in some respects similar to indirect discrimination found in other discriminatory legislation, but there is no requirement here that the discrimination should have a disparate impact on the disabled as a body. It is enough that the employee is treated less favourably for a reason related to his or her particular disability. This form of discrimination can be justified. However, justification can only be established if the employer shows that the reason for the treatment is both material to the circumstance of the particular case and substantial: section 3A(3).

22. Third, there is the failure to make reasonable adjustments form of discrimination in subsection (2). Here, the employer can be liable for failing to take positive steps to help to overcome the disadvantages resulting from the disability. However, this is only once he has a duty to make such adjustments. That duty arises where the employee is placed at a substantial disadvantage when compared with those who are not disabled."

A16. The same approach to discrimination would apply in the further and higher education provisions, albeit with some differences, some of which are addressed further below.

A17. In *O'Hanlon*, Hooper LJ revisited the guide dog example used in *Novacold*:

"85. ….. Mr Jeans submits that the appeal tribunal is wrong both in respect of less favourable treatment and substantial disadvantage. He accepts that Mummery LJ in *Clark v Novacold Ltd* [1998] ICR 951 reached the right conclusion because what was in issue in that case was dismissal. He submits that Mummery LJ was wrong in his guide dog example. The blind man is placed at a substantial disadvantage in comparison with persons who are not disabled but he is not treated less favourably than the owner would treat others to whom the reason does not apply. The comparator is the dog owning customer wishing to enter the cafe with his dog. The dog owning customer is not allowed in and therefore the blind dog owning customer is not being treated any differently. Citing a passage of the speech of Lord Rodger of Earlsferry in *Archibald v Fife Council* [2004] ICR 954, at [36], he submits that one cannot identify a single class of persons who are not disabled for the purposes of comparison. Miss Williams refers to what she submits is a contrary passage in the speech of Baroness Hale of Richmond, at [64]. Mr Jeans submits that to compare in this case the employee absent from work because of a disability with other employees who are not absent makes no sense. The comparison must be with employees who are absent from work because of a non-disability related sickness.

86. In my view the appeal tribunal is right for the reasons given by the appeal tribunal.

87. I would however wish to add few words about the blind man with his dog example. Given that this is an employment case I shall assume that a blind employee cannot work in the employer's premises without the assistance of his guide dog and that the employer has an absolute rule No dogs. Applying section 3A(1) the tribunal can, in my view, properly approach the case by going through the following questions:

Q1. What has the employer done? A. He has refused to allow the blind employee to come to work.

Q2. What was his reason for refusing to allow the blind employee to come to work? A. Because the blind employee insisted that he would not come to work unless he was accompanied by his dog.

Q3. Was his insistence on being accompanied by the guide dog related to his disability? A. Yes.

Q4. Would the employer have refused to allow other employees to come to work if they did not insist on being accompanied by a dog? A. No.

88. In the light of the last answer, the employer is treating the blind employee less favourably than he treats the other employees to whom the reason for not allowing the blind man to come to work would not/does not apply.

89. The effect of Mr Jeans's submissions is that question 4 should be worded: Would the employer have refused to allow any employees to come to work with a dog? The answer to that question being Yes, Mr Jeans submits that the blind person is not being treated less favourably.

90. In my view my question 4 more nearly approaches the test laid down by Mummery LJ in *Clark v Novacold Ltd* than the question formulated by Mr Jeans. In any event it produces what, in my view, most people would believe to be the correct answer to the problem discussed by Mummery LJ. The same reasoning can be applied, even more easily, to section 4A."

A18. In Part III, there remains no concept of direct discrimination. Rather disability-related discrimination operates—potentially including direct discrimination, but subject to justification. To interpret disability-related less favourable treatment in the context of the premises provisions in a more narrow a way than that in *Novacold* had the effect of introducing a concept of "direct" discrimination into these provisions—and one which would be subject to justification.

A19. The definition of disability-related less favourable treatment has also featured in school education cases (where there is no concept of direct discrimination). In *McAuley Catholic High School v C and Others* [2003] EWHC 3045 (Admin), the Administrative Court considered an appeal from the decision of the Special Educational Needs and Disability Tribunal (SENDIST). The case concerned a boy with autistic spectrum disorder who had been temporarily excluded from school as a result of this behaviour and whose parents had appealed against this exclusion to the SENDIST. The SENDIST held that there had been discrimination, and that the appropriate comparator for the purposes of disability-related less favourable treatment was someone who was not disabled and who behaved properly. The school appealed. Silber J held at paragraph 45:

> "I consider that when the legislature introduced, as is common ground, provisions for discrimination in education which are identical to those which had been in force in the discrimination in employment provision in the same Act, they intended that both sets of provisions should be construed in the same way. After I had reached that conclusion, I came across Lord Reid's relevant comment:
>
> > 'Where Parliament has continued to use words of which the meaning is settled by decisions of the court, it is to be presumed that Parliament intends the words to continue to have that meaning.' (See *London Corp v Cusack-Smith* [1955] 1 All ER 302 at 314, [1955] AC 337 at 361.)
>
> Thus, the comparator should be selected in education discrimination claims in the same way as the courts had established that they should be chosen for employment discrimination."

A20. *Novacold* has also been referred to in the context of goods and services. In the case of *R (Longstaff) v Newcastle NHS Primary Care Trust* [2003] EWHC 3252 (Admin), Charles J considered s.20 DDA (discrimination in goods and services) in relation to a decision made by a PCT on whether or not a plasma substitute could be made available to a haemophiliac who refused plasma derived Factor VIII products:

> "[57]……It is important to remember that as explained in *Clark v Novacold* [1999] ICR 951 (at 959C and 964B) the DDA does not draw the distinction between direct and indirect discrimination on specified grounds and was drafted in such a way that indirect as well as direct discrimination can be dealt with under the statutory test.
>
> [58] The crucial part of the statutory test in both s. 5 (which was the relevant section in *Clark v Novacold*) and s. 20 (the relevant section here) is that: 'an employer/provider of services discriminates against a disabled person if (a) for a reason which relates to the disabled person's disability he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply'. The true construction of that phrase is dealt with in *Clark v Novacold* (see 961H to 965D)."

A21. The concept of disability-related less favourable treatment in relation to premises must, should be interpreted consistently throughout the DDA, and as demonstrated in the cases set out above. Support for this approach is found in all the statutory Codes of Practice produced by the Disability Rights Commission.

A22. Baroness Hale of Richmond, in her dissenting judgment in *Malcolm*, revisited the parliamentary history to demonstrate that the *Novacold* formulation reflected the intention of Parliament:

> "78. The Bill as introduced provided that an employer discriminated against a disabled person if for a reason related to the disability, 'he treats him less favourably than he treats or would treat others who do not have that disability' (clause 4(1)(a)). A service provider discriminated if 'he treats him less favourably than he treats or would treat other members of the public' (clause 13(1)(a)). The original Bill did not contain anything about premises. These clauses were moved in standing committee in the House of Commons, and the Bill as amended adopted the formula that a person discriminated if 'he treats him less favourably than he treats or would treat others who do not have that disability' (clause 18(a)). There matters stood until Report stage in the House of Lords. Then the Minister of State, Department for Education and Employment, Lord Henley, moved a series of amendments to substitute the words 'to whom that reason does not or would not apply' for the words 'who do not have that disability' in what became section 5(1)(a) and section 24(1)(a), and 'others to whom that reason does not or would not apply' for the words 'other members of the public' in what became section 20(1)(a).
>
> 79. The history alone is enough to indicate that Parliament did not intend the comparison to be with someone who did not have the disability. For what it may additionally be worth, it is clear from Lord Henley's speech in the House that a change of substance and not just of wording was intended (*Hansard (HL)*, 18 July 1995, col 120):
>
> > 'Currently the comparison is with the treatment of a person who does not have the disability in question. For example, there may be two employees who cannot type—one because of arthritis and one (who is not disabled) because he has never been taught. Both would argue that he is not treating the disabled person less favourably than someone without that

> disability. He is treating all people who cannot type in the same way. That argument may well succeed and the person with arthritis would have no ground for complaint, even though the employment was refused for a reason relating to disability. Amendment No. 21 would ensure that the comparison is made with people to whom the reason in question does not apply. It correctly reflects the need to show that the treatment was for a reason relating to the disability and not necessarily the mere fact of disability. Thus if the employer is rejecting people who cannot type he will be treating more favourably those who can. The person with arthritis who did not get the job can show that he or she was treated less favourably than the person with typing abilities who did. The employer may well be able to justify that treatment... But at least the disabled person would have to be given the consideration due under the Bill.'

These amendments were welcomed in the House of Lords. A similar explanation was given in the House of Commons when it was invited to agree to the Lords' amendments: *Hansard (HC)* 31 October 1995, cols 118-9. This was Parliament's final and considered response to questions raised during the passage of the Bill.

80. This confirms that the construction chosen by the Court of Appeal in *Clark v Novacold Ltd* was indeed the construction which Parliament intended. There is nothing to suggest that, when Parliament changed all three provisions at the same time, so that they had all the same wording, it was intended that they should have different meanings. The fact that they were all changed at the same time (and that one of them had previously been different from the other two) suggests that they were all intended to have the same meaning. The history also explains why there are three different provisions defining discrimination in exactly the same way. It may well be that Parliament had not understood that the narrow scope for justification in relation to services and premises would give rise to the problems we face in this case. But in the light of the Parliamentary history, I do not think that it is possible, either to hold that *Clark v Novacold Ltd* was wrongly decided or to distinguish it on the ground that the same words mean something different in the context of employment. They must mean the same throughout, however inconvenient the result may now appear to be.

81. In reaching this conclusion I believe that I am faithfully following the intention of Parliament. I am sorry to be disagreeing with your Lordships, but even more sorry that the settled understanding of employment lawyers and tribunals is to be disturbed as a result of your Lordships' disapproval of *Clark v Novacold*. That decision has stood unchallenged for nine years and has not, so far as we are aware, caused difficulty in practice. Furthermore, Parliament has since legislated on the basis that it is correct."

November 2008

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31. Memorandum submitted by Citizens Advice Bureau

Introduction and Summary

1.1 Citizens Advice is the national body for Citizens Advice Bureaux (CABx) in England, Wales and Northern Ireland. The CAB service is the largest independent network of free advice centres in Europe, with 430 main bureaux in England, Wales and Northern Ireland providing advice from over 3,300 outlets, in high streets, community centres, health settings, courts and prisons. In 2007–08 bureaux in England and Wales advised around 2 million people with new or ongoing problems and dealt with 5.5 million enquiries in total. Of these, over 22,000 concerned discrimination issues.

1.2 Our service is committed to equality and inclusion. A culture of equality is important to the modern economy, as we rely on outward facing workforce and diverse skills base. Although the UK has come a long way on equality, figures on the gender pay gap, the employment rate for ethnic minorities, and work opportunities for disabled people show that discrimination is still faced by some groups. We therefore welcome the forthcoming Equality Bill which we see as an opportunity to encourage employers and public services, especially DWP, to raise their game in working to eradicate all forms of unfair discrimination.

1.3 We welcome this inquiry, and we would particularly like to highlight the following issues which we think need to be addressed by the DWP policymakers in light of the Equality Bill.

- There are unfair age related discrimination issues in the benefits system, for example where people who are younger get paid less.
- Some of the most prominent gender related poverty and inequality issues are not being appropriately tackled—for example women and pensions and poverty (although the lower pension age is being removed gradually).
- CAB evidence shows that sometimes DWP delivery systems are insufficiently sensitive to different cultural needs, and the needs of vulnerable users, for example with contacting Jobcentre Plus.
- Initiatives to increase disabled peoples' participation in the labour market such as the "Access to Work" programme need to be strengthened and mainstreamed.

— The welfare reform agenda needs to better address the links between discrimination, dependency and disadvantage.

— Given that the Equality Bill will introduce new pro-active duties on the public sector, it is vital that DWP takes a lead in delivering an equality agenda through Change Programmes which put the different needs of its customers at the heart of the benefits system and the Government's welfare to work strategy.

2. Equality in Employment

How effective has DWP been in achieving equality in employment, how would it have to change to achieve greater equality in employment?

2.1 We welcome the progress that has been made by the DWP towards achieving greater equality in employment, as evidenced by the Department meeting its targets for employment in areas with high ethnic minority populations—helping 96,300 people find work. Indeed, we note there has been a 1.7% increase in the ethnic minority employment rate. However, the widening gender pay gap and exclusion of vulnerable groups, and public perceptions of discrimination in the workplace, demonstrates that there is still much work to do.

2.2 Disabled people in particular continue to experience very high levels of discrimination in the workplace. In 2005, the Chartered Institute for Personnel and Development (CIPD) found that 33.1% of CIPD members excluded people with a history of long-term sickness or incapacity, even though such policies certainly leave employers very exposed should a disappointed applicant use the Disability Discrimination Act against them.[196] The gap between the employment rate of disabled people and the overall employment rate is 26.8%.[197] Certain impairment groups face more significant barriers and have a lower employment rate, including individuals with a mental health condition at 20% and people with a learning disability at 25%.[198] And where disabled people and those with long term ill-health do find work, they face high levels of hostile and negative treatment in the workplace according to new research published by the Equality and Human Rights Commission.[199]

2.3 The main DWP initiatives for increasing labour market participation of disabled people and those with other disadvantages are linked to the welfare reform agenda. Citizens Advice supports the Government's view that many people currently on very low income through benefits would prefer to work if they could find employment that paid them enough to leave life on benefits. However, if Government are serious about empowering people to work, it needs to look very closely at the current structure of earnings limits, benefit tapers, linking rules and run-on arrangements, to ensure that as many disincentives to work as possible are removed from the system. Moving into work can be an extremely difficult decision and there is often no certainty that individuals will be any better-off financially. The examples below illustrate this point.

> A disabled CAB client in Greater Manchester found that his family would be worse off financially if his wife took up a job offer of 30 hours a week at the minimum wage. His wife received Carer's Allowance for looking after him, but would lose this and other benefits if she returned to work. The client would lose his income support and mortgage interest payments as well as having to pay some council tax. As a result, the total family income would be considerably lower than if the client's wife continued to care for him full-time. The CAB adviser stated "this means that the client finds himself in the poverty trap and there is no incentive to seek employment". Instead, the family continued to struggle on a low income, incurring considerable debt and threatened with having to sell the family home.

2.4 The apparent reduction in the numbers of disabled people working within the DWP, both in actual numbers and as a percentage, also causes us concern. We consider that it will be necessary to evaluate the total number of disabled people being employed, not simply the number of assessments or adjustments made, or the amount of money spent on them, as not all impairments and conditions require physical adaptations to be made and not all adaptations or adjustments cost money.

2.5 Thirdly, we do not consider that DWP has been particularly effective in engaging employers over welfare to work. Employers have a central role to play in these reforms, and in supporting people to secure and retain work. We are therefore disappointed that engagement with employers is still missing from the DWP'S welfare reform agenda, and believe that this lack of real involvement threatens the whole agenda.

[196] CIPD (Summer/Autumn 2005) *Labour Market Outlook*.
[197] Labour Force Survey 1998–2006.
[198] Labour Force Survey 2005.
[199] *Work fit for all—disability, health and the experience of negative treatment in the British workplace* EHRC Nov 2008.

How can the Equality Bill open up opportunities in employment, particularly for disabled people, carers and pensioners?

2.6 An important element of the Bill is the permission to use "positive action" to end cycles of inequality and to redress disadvantage. This should hopefully encourage employers to recruit under-represented groups into organisations or to develop talent within under-represented groups in a workforce through specific training or programmes. Not being able to take under-representation into account when it comes to choosing between equally qualified candidates can be problematic for some services. However, we would be disappointed if "positive measures" encouraged by the Bill are limited to the fast tracking to training of under-represented groups from an equally qualified pool. This is aimed specifically at police forces. It would not apply to most employers who recruit directly to vacant positions. So to encourage positive action, the Bill should provide for a statutory Code of Practice which spells out what kinds of steps would be legal, and examples of good practice. The Bill will also contain "transparency measures" to better monitor the workplace.

2.7 With respect to carers, we think it is important that they are covered within the scope of the Bill. Many carers would like to be able to combine paid work with their caring responsibilities, but find themselves caught in a "tax-credit trap". Carers do not benefit from the 16-hour rule that applies to working tax credit for disabled people. Instead they have to work a minimum of 30 hours a week in order to benefit from working tax credit. Many carers cannot combine this amount of work with their caring responsibilities. But with no financial support for working fewer hours, many carers find they may be better off not working and claiming Carers Allowance. In addition, for carers finding suitably remunerative employment is not enough—it also needs to be flexible enough to enable them to combine paid work with their caring responsibilities, and there has to be high-quality, affordable, flexible alternative care available locally for the person they care for. The Equality Bill may not tackle these issues directly, but it will provide an incentive and framework for DWP policymakers to address the issue of carers' exclusion from the labour market.

How should the Equality Bill respond to the decision in the Malcolm case in respect of disability rights in employment?

2.8 The effect of the *Malcolm* case is that employers may only have duties to make a "reasonable adjustments" where employers either know, or could reasonably be expected to know, that an employee has a disability and is likely to be placed at a substantial disadvantage. This effectively takes away any anticipatory element of reasonable adjustments, excludes any concept of indirect discrimination, and has made it far more difficult for a disabled person to establish a case of disability-related less favourable treatment.

2.9 The difficulty with the *Malcolm* decision is that disability-related discrimination worked well in the labour market, where it could be justified by a "reasonableness" test. On the other hand, it has proved very difficult to prove cases on the basis of the more recently introduced principle of direct disability discrimination. Hence, in equating disability-related discrimination with direct discrimination, the House of Lords has effectively neutralised the disability-related discrimination concept in the labour market.

2.10 This places great pressure on the reasonable adjustments duty which has also worked well in the labour market but, until now, in conjunction with disability-related discrimination. In the past, it has been typical for claimants to win on both disability discrimination and the reasonable adjustment duty. This will not always be the case. For example:

> A North East Wales CAB's client had been on long-term sick leave for eight months before he was dismissed by his employer. The client argued that his dismissal was unfair and discriminatory and that his employer should have made reasonable adjustments which would have allowed him to return to work. The Employment Tribunal reached the decision that the client had been unfairly dismissed, but given the House of Lords decision in *Lewisham v Malcolm* [2008] UKHL 43, the client's claim of disability-related discrimination could not be considered as having any merit. The client's claim for reasonable adjustments was also dismissed by the Tribunal. The Tribunal however held that the client had been unfairly dismissed. This is paradoxical as he might well have won his case on grounds of disability related discrimination prior to *Malcolm*. Hence the case is taken out of disability policy and into the realms of general employment policy.

2.11 There is therefore a danger of a significant gap developing in disability employment equality law. We consider that the Equality Bill should redress this either by including a concept of indirect discrimination and placing less emphasis on the identification of appropriate comparators or by resuscitating the concept of disability-related discrimination but in a fashion which restores the concept to its position prior to *Malcolm*. It is also essential that the reasonable adjustment duty is retained.

How should the Government improve protection of carers in equality legislation, following the decision in the Coleman case?

2.12 Citizens Advice were especially heartened by the recognition of carers' rights in the *Coleman* case, in which the European Court of Justice upheld the earlier opinion of the Advocate General that treating employees less favourably because of their association with a disabled person was unlawful under European discrimination law. We are also heartened by the Employment Tribunal decision of 26 November which allowed private sector claimants, such as Mrs Coleman, to be able to proceed with cases of discrimination and harassment on the basis of associative discrimination. However this tribunal decision could be subject to appeal and, in any event, we consider that, in order for this judgment to be properly reflected in UK law, either European Communities Act Regulations or the Equality Bill should include a "discrimination by association" provision.

2.13 However, there are wider implications from the *Coleman* judgment. The Employment Equality (Age) Regulations 2006 also restrict claims of discrimination to those who have been discriminated against on grounds of their own age. It seems clear from the *Coleman* judgment that the principle of "associative discrimination" should apply to age discrimination also. If this is the case, carers of dependent children should not be discriminated against on grounds of their children's age (unless it is justified to do so), for example in family leave provisions.

2.14 Citizens Advice therefore considers that the Government's determination to exclude protection for carers from the Single Equality Bill fails to recognise the increasing need of such protection. Instead of having a patchwork of rights under disability and age discrimination statutes, it would be preferable if a proper system of anti-discrimination protection for carers was put in place.

3. Equality in Goods, Facilities and Services

How could the duties in Goods, Facilities and Services of the DDA be built on to deliver systemic change?

3.1 In contrast to the DDA provisions affecting employers, providers of public goods, facilities and services have an anticipatory duty to the disabled population. We agree that it is important that the duty to make reasonable adjustments should not just arise when a disabled person wants to use a service; otherwise reasonable adjustments may be used as a cop-out for compliance with general equality duties or absolute legal requirements. This principle should be extended to other areas through the single equality duty. However, existing duties only require public bodies to have "due regard" to the need to eliminate unlawful discrimination and promote equality; this merely requires a body to consider the need to promote equality within a context of competing priorities, rather than to take any action.

3.2 We would therefore hope to see a much stronger formulation in the general duty, which should be framed in a way that is outcome focussed, setting out the aim of the duty and a requirement to take necessary and proportionate steps to fulfil the duty.

3.3 As discussed above, the concept of disability related discrimination has been effectively neutralised across the DDA, including in relation to goods, facilities and services. As in employment, this outcome places great pressure on the reasonable adjustment duty, even though the duty is anticipatory in relation to goods, facilities and services cases.

3.4 Therefore, we consider that disability related discrimination should be resuscitated but on a labour market model whereby it can be justified by an open test of justification rather than a closed list of exceptions as presently set out for GFS. In the alternative, an indirect discrimination concept could be introduced. It is already proposed by the Government Equalities Office that the employment definition of indirect discrimination should be applied to goods, facilities and services under other strands. It would be essential to have the employment definition of indirect discrimination applied to goods, facilities and service in disability cases.

What is the draft EU Directive in GFS proposing and what are the implications for transposition of a new EU Directive for UK law? Is the draft EU directive welcomed? Does the Equality Bill incorporate the provisions of the draft directive?

3.5 Citizens Advice welcomes the draft directive, and is satisfied that the European Commission has produced a proposed Framework Goods & Services Directive (FGSD) across all four grounds originally identified in the Framework Employment Equality Directive 2000 (FEED). We note that the Commission has relied heavily on the provisions of the FEED, together with those of the Race Directive 2000, which covers goods and services, education, etc, as well as employment and the Gender Goods & Services Directive 2004, which covers goods and services.

3.6 The UK government have identified several areas where our current domestic legislation would not meet the requirements of the proposed directive, in particular that there are no provisions for indirect disability discrimination, and no explicit provisions on harassment in relation to disability, religion, belief or sexual orientation outside the employment area. Ensuring that the requirements of the Directive are incorporated in the Equality Bill would, in our view, strengthen the legal obligations for anticipatory general access for disabled people.

3.7 Citizens Advice has supported some amendments to the draft directive. These include:

- Reference to additional human rights instruments in the Preamble to the draft directive, including the UN Convention on the Rights of the Child and the UN Paris Principles on national human rights institutions.
- Explicit coverage of multiple discrimination between strands.
- Explicit reference to transport as an example of goods and services.
- Strengthening the ability of NGOs to act in their own name on behalf of named complainants.
- Reference to public procurement as means of achieving objectives of the directive.

How can it be made easier for disabled people, carers and pensioners to bring and pursue cases in GFS? Should discrimination by association extend to GFS?

3.8 Firstly, we would renew our call for the inclusion of a provision on representative actions in the Equality Bill. However, we also need a wider review on redress mechanisms for discrimination claims concerning goods, facilities and services. Whilst employment tribunals have developed considerable experience and expertise in matters relating to discrimination in employment, far fewer goods, facilities and services discrimination claims are brought before the county courts, so accordingly there is less discrimination expertise and case law (in the broadest sense) to indicate to firms what the law means in practice. This has resulted in unpredictability and decisions of variable quality. We would also welcome a broad provision for discrimination by association extended to GFS.

What are the implications of the Malcolm case and how should the Equality Bill take these into account? How effective are the provisions in part 3 of the DDA on buying, selling and letting?

3.9 Further to comments above on the *Malcolm* case, we welcome the DWP Office for Disability's consultation on addressing the issues arising out of the *Malcolm* case and the commitment to intend to base protection for disabled people on the concept of indirect discrimination.[200] The Equality Bill should include a provision that requires a duty holder to fulfil the duty to make reasonable adjustments before that duty holder can seek to objectively justify indirect discrimination. In most cases, disabled people can rely on the duty to make reasonable adjustments to challenge disability-related discrimination. However, this solution does not apply universally and it is less likely to assist in cases involving premises, because managers of premises are not under a duty to make reasonable adjustments in anticipation of the requirements of a disabled person. Instead, they only have to respond to a request for adjustment. The Equality Bill should seek to address this inconsistency. Alternatively, a resuscitated version of "disability related discrimination" could be introduced.

4. The Public Sector Equality Duty

How could a Disability Equality Duty in the public sector be built upon within a Single Equality Duty? Is a Single Duty desirable? Will there be unintended consequences for disabled people or disability rights?

4.1 The Disability Equality Duty (DED) was a bold attempt to address the reactive nature of the legal protections and to make these legal protections more pro-active. As suggested above, we see significant benefits to strengthening the duty and extending it to all grounds under a single duty. We regularly see cases in which public bodies are failing in their duty to meet the needs of disabled customers. Such cases not only raise issues about DDA compliance, but more general issues about fairness and access for customers with special or different needs. For example:

> A North-East Wales CAB advised a client, a single, white woman who meets the definition of having a disability under the Disability Discrimination Act 1995, and relies upon the assistance of a carer for many day to day needs. The client had been recommended by her GP to participate in water-based activities as part of her therapy and sought to access a swimming pool operated by the local authority. Both disabled individual and their carer were charged the full price for pool entry, despite the fact that the carer entered not as a customer but as an essential support to the disabled person. The bureau considered the policy to be discriminatory as it makes it impossible or unreasonably difficult for disabled individuals who require a carer to enjoy the facility as it imposes additional costs. Consequently the client (and others in a similar situation) was unable to fully

[200] *Improving Protection From Disability Discrimination* Consultation DWP November 2008.

benefit from local services. The Local Authority was reluctant to take seriously its obligations under the DDA and to abide by its own Disability Equality Scheme. However, through the bureau's efforts the Local Authority changed its policy and practice.

4.2 There are some 42,000 organisations that come under the DED, so it is important to encourage them to change their policies, not just to avoid discrimination but to promote equal opportunities and fairness. The Equality Bill is an opportunity to improve on the existing duties through the operation of a single equality duty. However, the duty needs to be robustly framed; it would be a lost opportunity if specific reasonable adjustment duties currently in place were to be replaced with non enforceable principles. So the specific reasonable adjustment duties should remain in place, supported by the general duty.

4.3 There will clearly be a lot of work to do to achieve compliance with the public sector duties, so the monitoring and enforcement mechanisms need to be robust, particularly in being able to strike down blanket policies which may breach not only a particular provision, but also the public sector duty. For example:

A CAB in Sussex reported the case of a dyslexic client who was going to Jobcentre Plus to attend three-monthly interviews but had his wife accompanying him to help with form filling and reading documents. Although this had not caused any problem in the past they were informed that a management decision was now in effect preventing overcrowding in the summer holidays. Therefore relatives and friends of clients had to wait outside. Though it was a very hot day and there was clearly plenty of available seating space in the air conditioned office, the client's wife and daughter had been forced to wait outside. And despite his protests, the staff were totally impervious and the client had to attend the interview on his own in a deeply distressed and aggravated state. He was not able to fully understand the interview and the decision to which he agreed to, namely to apply for a minimum of one job a week and provide evidence of this. He would not have agreed to this had his wife been present. The management decision took no account of his impairment and was aggravated by totally inflexible and uncaring staff who seemed incapable, or unwilling, to accommodate the client's needs.

Has the Disability Equality Duty been effective in promoting equality in the public sector, including local government?

4.4 The DED has only been operational for two years, so it is genuinely difficult to identify evidence and to draw conclusions about its effectiveness to date. Disability Equality Schemes require public bodies to gather and analyse data and other evidence relating to disability equality in accessing services, and the Equality and Human Rights Commission should lead on aggregating this evidence base, reviewing the evidence from disability equality impact assessments and making cross-sectoral comparisons.

What is the evidence in the DWP Secretary of State's report on the success of the Duty in his department? How does the Department fare in promoting equality and tackling discrimination?

4.5 We welcome the fact that the DWP has led the way in Government on developing an integrated equality scheme.[201] Our concern though is that the DWP do not sufficiently prioritise equality issues in the policymaking process, and specifically in the design and delivery of the benefits system. For example, the DWP leads for Government on age equality policy, and on older people and the ageing society strategy, yet there continue to be age differentials in the benefit system. In our view, these are the key issues on which this Select Committee inquiry should be focused, especially:

- Age differentials in the benefit system.
- The experience of black and ethnic minority communities in using the benefit system.
- Ensuring equality in delivery by addressing the access needs of disadvantaged and vulnerable groups, such as those with mental health conditions.

Age differentials in the benefit system: Lower personal allowances for under 25s

4.6 Citizens Advice has long highlighted the inherent unfairness of a system that pays a lower rate of benefit based solely on age. For example, differentials in personal allowances for income support and jobseekers allowance mean that a young person aged 18–24 will get £47.95 whilst those aged 25 + get £60.50. The same differential applies to lone parents under 18 (£47.95) and over 18 (£60.50). The design of these benefits assumes that young people will be living at home, or will be otherwise financially supported by their parents.

4.7 Bureaux regularly see young people living independently who are struggling to get by on much reduced benefit amounts, despite there being no difference in living costs:

A CAB in the West Midlands saw a 23-year-old client struggling to pay for the basic costs of living. He lived in local authority accommodation, and received housing benefit, council tax benefit and industrial injuries benefit. He was waiting for a JSA claim to be processed. The bureau adviser

[201] *Department for Work and Pensions Race, Disability and Gender Equality Schemes 2008–11.*

noted that the Money Advice Trust self-help pack, *Dealing with your debt*, suggests allowing £35–45 a week for each adult for housekeeping costs, and yet their client only received £44.50 a week. If the client was aged 25, he would be entitled to £56.20 each week, even though his circumstances would be no different, and this extra money would relieve a lot of pressure for the client. The adviser commented that the younger age group might have even more need of the additional money as they are more likely to be moving out of their parents' home and setting up their own home.

A CAB in Tyne and Wear saw a 21-year-old woman who had been made redundant and discovered that, despite working for the last five years and paying National Insurance contributions all the while, she could only claim the reduced rate of JSA and that the local housing allowance rules meant that she had a shortfall in her rent of £6 a week. This was because she was only entitled to the single room rate of HB although she was renting a one-bedroom flat. She was very worried about getting behind with the rent, particularly as winter was approaching and her fuel bills would use up a lot of her income. She was worried that falling behind with her rent would lead to eviction.

4.8 This situation is compounded by lack of entitlement to working tax credit for under-25s (unless they have a child or are disabled):

A CAB in Suffolk saw a 21-year-old client who was really struggling to manage on her limited income. She was living on her own in social housing and worked 31 hours a week. She had two jobs, both working with children, at the minimum wage. She was paying full rent and council tax, although the adviser estimated that she might have been entitled to housing benefit of approximately £1 a week. If she were 25 or had a child she would be able to claim working tax credit, an additional £45.08 a week, increasing her income from £148.43 to £193.51 a week. The adviser was unable to see how a young person's living expenses would be any different at 25 than 21.

Age differentials in the benefit system: Single/shared room rent

4.9 Since the introduction of the local housing allowance in April 2008, the Single Room Rent has been renamed the Shared Room Rate (SRR). The SRR restricts the amount of housing benefit a single person aged under 25 can receive to the average rent for shared accommodation. As a result, many young people face huge shortfalls between their HB and their rent, driving many into rent arrears and homelessness and making private landlords reluctant to let to this age group:

A CAB in Suffolk saw a 20-year-old who had had to move back in with his parents because he could not find anywhere affordable to live, despite their not wanting him to live with them. He was dividing his time between his parents' house and staying with other family and friends. He had the opportunity to move into a flat, which had a market rate of £450 a month. The bureau adviser established that the local single room rent was £257.80 a month. The local reference rent for a person over 25 was £435 for a one-bed flat. The adviser noted that if the client had been 25 he could have taken this property and got housing benefit for it. As it was, it was almost impossible for young people in the area to find somewhere for the single (shared) room rent.

4.10 Since its inception 11 years ago, the SRR has been deeply controversial and subject to sustained criticism for increasing the risk that young people will face poverty, debt and homelessness, so making it more difficult to find and sustain employment. The resulting social exclusion creates a legacy of disadvantage that can last for years.

4.11 The SRR predated this Government and indeed was introduced in the face of strong opposition at the time. Much has changed since, and it does not now sit easily with the recent changes to end discrimination on the grounds of age.

4.12 Under the local housing allowance, the way in which housing benefit is calculated and paid has changed. The change is intended to support the wider welfare to work agenda. Abolishing the under 25s shared room rate restriction in the Local Housing Allowance would contribute to this agenda as well as being consistent with the broader benefits simplification programme.

Age differentials in the benefit system: Attendance allowance

4.13 The payment of attendance allowance (AA) to disabled older people recognises their need for extra financial support. However, alongside the poor rate of take up (estimated at only 40–60%), and the lack of help provided with daily living costs such as help with cleaning and shopping, older people suffer discrimination because AA, unlike disability living allowance for people of working age, has no provision to help with mobility costs.

4.14 We consider that AA should be enhanced to cover these shortcomings and should be mainstreamed to ensure that all recipients of a basic state pension would be regularly reminded that they could apply to have their pension enhanced in the light of additional needs.

Age differentials in the benefit system: women and pensions

4.15 Many women, carers, disabled people and people with varied work patterns currently qualify for much less than the full basic state pension because they have incomplete National Insurance records. This accounts for much pensioner poverty. Pension provision, and security in old age, is of huge importance to our clients, many of whom are on low incomes or have interrupted work histories. Many current pensioners visit Citizens Advice Bureaux (CABs) because they are unable to make ends meet—many are not claiming all of the means-tested benefits that they are entitled to. Many older people feel very strongly that the state pension should be adequate to live on and that they should not have to apply for means-tested benefits.

4.16 There is a gender aspect to the provision of care and pensioner poverty. Women in their 40s are the age/sex group cited to be least likely to be contributing to a private pension. The peak age of caring is between 45 and 64, when one in four people provide care. Caring responsibilities and inadequate pension provision are part of a pattern that is linked to childcare and other barriers to pension provision faced by women.

4.17 Citizens Advice has welcomed the introduction of the Pensions Act 2007, which will go a long way to recognising in particular women's and carers' contributions to society and begin to ensure that they do not suffer poverty in retirement. A number of measures will help women and carers to build pension entitlement and reduce reliance on means-testing in the future, including:

- reducing the number of qualifying years for the full Basic State Pension to 30. This will mean that women and carers with disrupted contribution records can still build up entitlement to a full Basic State Pension;
- equalising the state pension age at 65 for both men and women by 2010;
- removing the first contribution condition. This will mean that someone who has never worked, because of the nature of their caring responsibilities, can still qualify for a full Basic State Pension;
- introducing a new Carer's Credit for people caring for 20 hours a week or more for someone who is severely disabled. This should mean that thousands more carers are eligible for a full Basic State Pension and State Second Pension; and
- introducing personal accounts with employer contributions. This should help people on a low income to build up entitlements.

BME Experience of using the benefit system

4.18 CABx have found that claimants from ethnic minority communities can experience a poor service quality from the outset. Failure of Jobcentre Plus staff to assist claimants with English language difficulties in completing application forms is the most frequent issue reported to us by CABx about clients from ethnic minority communities. Bureaux frequently report clients being advised by local office staff to visit their CAB for help with completing the form or they are simply told that there is no help available. For example:

> A CAB in Yorkshire reported that a lone parent who was an asylum seeker obtained exceptional leave to remain in the UK. Her native language was Tigrianian, but she can speak, write, and read in English and understand simple matters if people speak clearly. She lived in NASS accommodation until March 2008 when she got leave to remain but did not get advice about claiming child tax credit. At her previous accommodation in another town, she had been claiming income support and child benefit. After moving in July 2008, her IS was stopped and she needed to make a new claim. Three times she went to the local Jobcentre to complete the IS claim, but they had no translation service and the issue was never resolved, nor was she told how to get help with the problem. She has not been able to complete her new claim until seeking advice from the CAB.
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> A CAB in North London reported that a man who was born in Austria and spoke German and Turkish had great difficulties claiming jobseekers allowance. His English was poor, so when he phoned the claims line, he could not understand any of the questions he was asked on the phone . . . in fact he could understand nothing. So he went back to the Jobcentre and he was told to go to the CAB. The CAB gave him a letter to take back to Jobcentre requesting an interpreter and referring to the Jobcentre Service Standards. However, the Jobcentre told him to use their internal phone and finally had to go into the street and ask a passer buy to help him use the phone inside the jobcentre by interpreting for him. The client was completely bewildered by how he could claim any benefits or get any advice at all about how he could feed and look after his family in the UK and what his rights are and any help to find employment.
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> A Merseyside CAB reported that a Portuguese woman with limited English went to the local Jobcentre to claim benefits because she was pregnant. Because of her limited understanding of English, the Jobcentre referred her to the CAB to assist with benefits claim instead of arranging interpreter facilities themselves. As a result the client had a long wait at Jobcentre and another long wait at CAB office.

4.19 Other reports show a lack of cultural sensitivity or understanding of language barriers. CAB advisers have reported experiences that further emphasise that Jobcentre staff did not adequately appreciate the difficulties in navigating the complexities of the benefit system by claimants whose first language is not English:

> A CAB in Kent reported that a Chinese man had been self-employed for 10 years but gave it up and had five months off work while looking for a new job. He did go to the Jobcentre but failed to sign on as (a) his wife was working and (b) he was handed a large wad of papers and as he cannot speak or write English was a bit overwhelmed. No one explained to him that by signing on he would have kept his national insurance contributions intact by them being credited to him while he was on JSA. Now he was unable to work through illness and his claim for incapacity benefit had been turned down because he did not have enough contributions.
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> A CAB in the West Midlands reported that a Kuwaiti man who had been granted asylum in the UK was sent a cheque for £558.49 which related to backdated income support whilst he was awaiting his asylum application. The client tried to pay this cheque into his Post Office card account but he was told that he could not do this as the maximum amount that can be paid into the account by cheque was £300. The client was told that he had to get two cheques to split the £558.49. Despite promises by the Jobcentre, he had not received the two cheques, and because of his poor English, he had had great difficulty in getting access or telephoning the Jobcentre. He had asked the Jobcentre if his friend could act as an interpreter and this was refused.

4.20 Such cases suggest that improved training for Jobcentre Plus staff would help to ensure that clients were offered access to interpreters and assistance with their claim forms at the outset. Ideally, staff should be proactive in ensuring that the claimants understand what the problem is, when any information is lacking or inconsistent on the claim. Training for medical services doctors on the needs of ethnic minority communities should also be continually improved and monitored.

Failure to provide interpreters for appeal tribunals

4.21 CABx have also expressed concern that clients with language difficulties have not been provided with interpreters at appeal tribunals. This has either resulted in a loss of appeal or at the least a delay in the resolution of the dispute:

> A CAB in North London reported that an Asian man appealed the decision to refuse him disability living allowance in August 2007. The hearing took eight months to arrange. The original hearing was set for 7 December 2007, but was adjourned at the request of the client because he had difficulties obtaining representation. A further hearing date was set for 6 March 2008. However, this hearing was also adjourned, as a result of the Tribunals Service interpreter not turning up to the hearing. It is the responsibility of the Tribunals Service to provide the services of an interpreter, and in this case they failed to do so. The hearing was adjourned until 14 April 2008, when it took place and a decision was made.

Failure to understand the needs of asylum seekers

4.22 CABx regularly report that there is a lack of awareness of the special needs of asylum seekers who have faced transition from support by the National Asylum Support Service to eligibility to support under the benefits system:

> A CAB in West London reported that a Croatian refugee with indefinite leave to remain was unable to read and write as she had had no formal education. She also spoke no English. The client applied for jobseekers allowance, but her claim was suspended as the Jobcentre found she was not "actively seeking work". The Jobcentre insisted that she had to speak to three to four employers per week to meet this rule but this was impossible for the client as she could not read advertisements or speak to employers on telephone. The client was very isolated and did not seem to have been offered any useful assistance or been put in touch with any relevant agencies that might be able to assist her. At the time she sought advice, the client was living on £20 per week given to her by daughter.
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> A CAB in North London reported that an Iraqi national who was granted indefinite leave to remain in February 2007, had applied for incapacity benefit in May 2007 because he suffered from depression. The client sought advice in March 2008 because he had not got any payment, and the Jobcentre were unable to help him. The CAB discovered that he was not getting incapacity benefit because he did not have any national insurance contributions. In this situation, he should have been told by the Jobcentre to apply for income support instead. In the meantime he had been living on £35 a week from the Refugee Council.

Equality in delivery

4.23 Citizens Advice has long had concerns about the ability of Jobcentre Plus to deal sensitively, and appropriately, with their most vulnerable customers. This has been particularly true since the introduction of telephone-based systems as the "preferred method" for claiming benefits. Our 2007 report, *Not getting through* highlighted the almost complete lack of service available to people who were not able to use the phone, either because they had a learning disability or speech impediment, or because English was not their first language.

4.24 At the time, bureaux reported that the changes had caused significant disruption and hardship for thousands of benefit claimants. The most vulnerable claimants—homeless people and people with mental health, learning or other disabilities—suffered the worst as local office support decreased and alternatives to phone contact were refused. As we noted, in introducing a telephone system to suit the majority of claimants, Jobcentre Plus failed to ensure ready access to benefit services for claimants unable to use the phone, or without suitable access to a landline.

4.25 In response to sustained criticism, Jobcentre Plus introduced their Accessing Jobcentre Plus Customer Services programme across the network in June 2008. New guidance on dealing with vulnerable claimants was issued to Jobcentre Plus staff in October 2008, outlining the personal situations and circumstances that might help define a person as "vulnerable", and outlining the additional support they might require. Citizens Advice has welcomed this, and will continue to monitor their impact. There is still some way to go to ensure that all vulnerable claimants receive an appropriate service from Jobcentre Plus:

> A South London CAB saw a 50-year-old client who was very frustrated at having been turned away from a local Jobcentre Plus office, even though he had an appointment. He had a chaotic lifestyle, living sometimes with his father and otherwise sleeping rough. He had been unfit for work since April 2008. He had been refused income support, and had appealed. He claimed again, and was given an appointment at his local Jobcentre Plus. He turned up on time but was sent away, despite the official agreeing that there was an appointment showing on the computer. The official told him this was because "we don't do appointments". This was at odds with the commitment that all Jobcentre Plus offices would be able to make face-to-face appointments for clients who need them from the end of June 2008.
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> A Kent CAB reported that a man who was unable to work as the result of a severe stroke, whose wife gave up work to look after him, had applied for a transfer to specially adapted accommodation. Suddenly suitable accommodation came up, but the client and his wife only had two weeks to move in, or they would lose it. So they moved using their regular benefit income to pay for the moving costs as the Jobcentre told them it would be 8–10 weeks before a community care grant application could be processed. Their new home had no cooking or refrigeration facilities, limited furnishings and no carpet and the clients had no money to buy them. The former was serious as the wife, who had diabetes, required a regular diet of properly cooked food. The wife applied to the Jobcentre for a crisis loan but was told that such claims were now centred at Lowestoft and she should apply by phone. She tried the appropriate number for four days before coming to the bureau but constantly got an engaged signal. The CAB told them that they could make a written application and downloaded the relevant form from the DWP website.

How is success measured, and what are the challenges around monitoring and self-declaration of disabilities and caring responsibilities?

4.26 Comprehensive monitoring should be carried out, but there needs to be a clear purpose to the data collection, for example, for improving outcomes for service users or staff. In order to make data collection consistent, measuring instruments need to be developed to chart the effectiveness of equality schemes in a consistent manner. Public bodies should therefore implement robust systems for monitoring equality around employment and service delivery to improve inclusivity.

4.27 We have argued for inspection-based enforcement of compliance with equality duties. This works for example with the regime associated with the National Minimum Wage. The public service inspectorates could have a role in working directly with EHRC on equality on monitoring equality duties, enabling the Commission to issue compliance notices.

How could procurement be made a more effective lever for equality outcomes? What are the good practice examples in the public, private and voluntary sectors? How can guidance on procurement improve at EU and national level to make procurement a more effective lever for equality outcomes?

4.28 We do not intend to comment on the questions relating to public sector procurement procedures. However, we welcome the policy innovation that the Equality Duty will require public bodies to tackle discrimination and promote equality through their purchasing functions. Clearly another route towards ensuring the best reach for public sector equality policy and maximising equality outcomes in the private sector is through contracts between the public sector and the private sector. The inclusion of equality as criteria within the public sector procurement process will undoubtedly be a powerful incentive for private

and voluntary sector providers to put in place equality policies. This practice, established in response to the public sector equality duty, should be encouraged and strengthened. £160billion is spent by the public sector on private sector contracts every year, so this is a powerful tool to drive up standards in the private sector.

5. Private Sector Commitment and Support, Guidance, Advice and Information for Employers

Is an Equality Duty on the Private Sector workable?

5.1 The idea of introducing positive equality duties in the private sector was rejected by the discrimination law review as entailing a "significant regulatory burden", and instead policy makers have adopted a voluntary approach. We agree that equality duties on the private sector, particularly small businesses, would be unworkable. However, we would like to see the Government take a more ambitious approach both to action by the private sector; and to promoting good practice across all sectors. We routinely come across cases of discrimination in the private sector both in employment and goods and services cases. For example:

> A disabled client with a substantial hearing impairment and communicating through a British Sign Language Interpreter visited a CAB in North East Wales after having been unable to fully access the advice services of her bank. The client had been a customer of the bank for a number of years, although mostly corresponding with them in writing through a BSL interpreter. The client had received an appointment with the bank for which she was refused the services of a BSL interpreter, leaving her therefore unable to make any informed decisions regarding her account.
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> A CAB in Staffordshire saw a client who informed them that he had witnessed employment discrimination by an agency. First, the agency had not paid him holiday pay though he thought it was due to him. He also advised that the agency would refuse to take on black workers because they could not complete a writing test, though there were people in some workplaces who did not complete such a test. Also, by speaking to some colleagues, notably from Poland, he learnt that some got their jobs by paying a fee to the employer (up to £500). Finally, he added that the housing could be supplied by the employer, who requested a deposit and then would put 10 to 15 workers in one house.

What can be done in the realm of light-touch regulations, guidance and advice to promote a culture change in the private sector for all those subject to discrimination? What more could be done to support SME's to achieve greater equality for disabled people?

5.2 There are a wide range of tools, which fall short of the statutory duty approach, including fiscal incentives such as tax credits for "good" employers from a diversity perspective. Such measures have been used to encourage employers to invest in workforce development and management and similar tools could be used to bring greater compliance with equality and discrimination legislation, and broader public policy goals.

5.3 A key option that should be considered is the role of market regulators, such as the FSA, Ofcom, Ofgem, OFT and local trading standards services in improving fair treatment and equality standards in the private sector, both in consumer and employer markets. The Equality Bill should include a statutory role for the Commission for Equality and Human Rights in working with regulators, and introduce equality and fairness indicators as part of their regulatory criteria and functions. This, in effect, is the model of co-regulation.

6. Access to Work

How can the Access to Work scheme better enable people to obtain, stay and progress in work? What impact has there been on disabled people's entry to and progress in employment in central government departments since the Access to Work scheme was withdrawn? What would be the impact if the withdrawal was extended across the public sector? How can Access to Work better support people with mental illness and fluctuating illnesses? To what extent can Access to Work be included within Individualised Budgets?

6.1 The Access to Work scheme has proven to be very popular with those disabled people who use it, but is little known by employers or other disabled people. The scheme needs better promotion, to ensure that both employers and employees are aware of the financial help that is available to pay for adaptations and additional costs. The Royal National Institute for the Blind has calculated that every £1 spent on Access to Work brings in £1.70 to the Treasury, in terms of income from tax and national insurance. On this basis, we would press hard for Government to take this opportunity to increase spending rather than withdraw funding from Access to Work.

6.2 The timeliness of Access to Work provision has been a major problem though. There is currently an unacceptable delay in assessments and/or the provision of equipment. Disabled people, providers of specialist employment services and employers need to be confident that the necessary aids and adaptations will be in place in order for them to start working on their first day of employment.

6.3 For many people, their needs are likely to be similar across a number of workplaces. It should be possible for an assessment to be made of a person's likely adaptation/equipment needs whilst they are looking for a job, so that a disabled person can take an appropriate package with them into the workplace, which could then be modified as that particular job demands. At the very least, it must be possible for Access to Work assessments to be completed before the job starts.

6.4 Citizens Advice would therefore like to see the introduction of standard processing times for securing assessment and support from Access to Work. This would help to address the issue of timeliness.

6.5 Secondly, employers must have clear information about what constitutes reasonable adjustments under the Disability Discrimination Act, and support to implement these. Many small employers believe, often wrongly, that the costs of employing a disabled person may be prohibitively expensive. Employers need a better understanding about what support is available from Access to Work and how to access this. It is also vital to emphasise that Access to Work shouldn't be restricted to filling the gaps in employer's duties under the DDA.

6.6 Citizens Advice is concerned that increasing employer contributions risks penalising those employers who do employ disabled people, rather than sharing the cost amongst all employers and society at large. We would be concerned if increased costs were to lead to fewer disabled people being employed. This might be less of a concern if there was a radical shift in employer attitudes to employing disabled people but, given the current reluctance amongst employers, we would be concerned that increased contributions would simply result in even lower employment rates amongst disabled people.

6.7 As regards the "withdrawal" of Access to Work, our understanding has always been that it is not so much a case of the DWP abandoning the scheme, but rather a policy that it should be mainstreamed across departmental budgets. However, monitoring needs to take place to ensure that this is happening, and we are concerned that a lack of policy co-ordination may leave the scheme withering. And as to meeting the future costs of the scheme, whilst we agree that the public sector should take the lead, we would be very concerned if an expectation that public bodies would carry 100% of the cost of equipment/adaptations led to a reduction in the numbers of disabled people being employed. In principle, the public sector should be taking the lead in employment policy and practice with regard to employing disabled people. However, in a tight financial climate it is difficult to see where Whitehall Departments, local authorities and other bodies will find the necessary resources.

6.8 Disabled people have regularly told us that effective Access to Work funding is vital to their employment opportunities. Changes in social care have also resulted in many more disabled people receiving self-directed support, for example individual budgets. So there is a clear need to further explore the potential relationship between the individual budget principle and employment.

7. Single Equality Act

How does disability fit in a single Equality Act?

7.1 We consider that disability should fit symetrically with the other strands. For example, there is no concept of indirect discrimination in current protection for disabled people. Consequently, everyone except disabled people are protected from terms and conditions in contracts which have a greater impact on that group than on everyone else and cannot be objectively justified ("indirect discrimination"). Fairness and simplicity require that disabled people should be given the same protection in employment and in accessing services. This would mean that, rather than every individual having to ask for reasonable adjustments on a case-by-case basis, employers and service providers would have to remove barriers which constitute indirect discrimination, benefiting more disabled people.

Should the "social model" or "medical model" apply for disability?

7.2 We agree with the social model of disability; the tension between the social and medical models is particularly evident in the medical assessments process. In social security benefits, disabled people have to demonstrate that they have particular levels of care or mobility needs in order to qualify for Disability Living Allowance (for needs that start before age 65), or Attendance Allowance (for needs that start from 65 onwards). The claim form is a self assessment, but the DWP may supplement the information provided by the applicant by contacting their GP or other doctor, or by arranging for the applicant to be examined by a doctor retained for the purpose by the DWP. Conflicting views can arise between the applicant's own doctor and the one acting for DWP over the impact that the disability has on the applicant's every day needs. A person's own doctor will be focussed on dealing with the medical impact of their condition, while the doctor acting for the DWP should be focussed on what the person's care or mobility needs are. People who appeal against refusal of disability benefits have a success rate of about 50% at appeal tribunals, which seems likely to be attributable to the poor standard of the assessments carried out by doctors acting for the DWP.

7.3 Citizens Advice Bureaux have long been concerned about the flaws in the process and the quality of medical assessments and the decisions based upon them.[202] Often, incorrect decision-making causes substantial drops in income whilst clients have to go through an arduous and lengthy appeals process.

[202] *What the doctor ordered? CAB evidence on medical assessments for incapacity and disability benefits,* Citizens Advice 2006.

What is the role of the Equality and Human Rights Commission within the single Equality Act? What is the role of the Office for Disability Issues within the single Equality Act?

We would like to see the Government take the opportunity to strengthen the powers of the EHRC; for the new duties to be effective and meaningful the Commission should have the power to issue compliance notices to remedy breaches, and the ability to initiate representative actions where appropriate.

We recognise the benefit of retaining the Office for Disability Issues as part of the Department for Work and Pensions as a focal point within Government for co-ordinating disability policy and ensuring that the recommendations from the strategy report *Improving Life Chances of Disabled People* are implemented. As a result of the recommendations in this report, the Independent Living Review was set up and in March 2008 a new Independent Living Strategy was launched. However, there needs to be better policy co-ordination on equality and disability issues across Whitehall, and the problems with the Access to Work scheme perhaps illustrate that this is missing. The Government Equality Office has a key role to play here. The Government Equality Office should be allowed, and encouraged, to engage on all of the PSAs that relate to socio-economic inequality as well as those dealing directly with the six discrimination grounds, ensuring the interaction between the two is recognised in the steps taken to achieve targets and measure progress.

November 2008

32. Memorandum submitted by the Department for Work and Pensions

Summary

The Government is committed to creating a fair society with fair chances and fair rules for everyone. Equality not only has benefits for individuals but for society and the economy too.

Over recent years the employment rate for people from ethnic minorities, disabled people and people aged 50–69 have all increased and the gap between the rates for these groups and the overall employment rate has reduced. Even with these successes, the Government recognises that there is more to do and is moving forward in both the areas of welfare reform and tackling discrimination in employment.

The Disability Discrimination Act is already succeeding in driving systemic change. Other areas of domestic legislation provide protections against discrimination in employment and the provision of goods, facilities and services on grounds of race, gender including gender reassignment, age (employment only, at present), sexual orientation; and religion and belief.

The Government is keen to retain the successful features of the public sector disability, race and gender equality duties and to extend those benefits to the other protected strands. The proposed new duty will require public authorities to have due regard to the need to eliminate unlawful discrimination and harassment, promote equality of opportunity and promote good community relations in respect of all their functions and for all protected grounds.

All organisations, public and private, are subject to discrimination law. The Government is exploring options via public sector procurement to influence culture and practice in the private sector. The Equality Bill will ban secrecy clauses which prevent people discussing their own pay. The Government will work with business to improve transparency in the private sector, in particular through the introduction of a new "kite-mark", and gather and publish evidence on the effectiveness of equal pay audits in closing the gender pay gap. We expect business will increasingly regard reporting on their progress on equality as an important part of explaining to investors and others the prospects for the company.

The Government's ambition is to also bring about cultural change to tackle discrimination in the private sector. The Government wants employers and service providers to recognise their social responsibilities. This type of social change should help to drive improved opportunities without the need for individuals to have to rely on enforcement of legislation—though individuals will of course retain their existing rights to bring cases where they believe they have been discriminated against.

As well as strengthening the law in various ways, the Equality Bill will also simplify the law by bringing it together in one place.

1. Introduction

1.1 A fair society is one where people have the chance to live their lives freely and fulfil their potential. The Government is committed to creating a fair society with fair chances and fair rules for everyone. For a society to be fair we must tackle inequality and root out discrimination.

1.2 Equality not only has benefits for individuals but for society and the economy too. A more equal workforce is a stronger workforce. A more equal society is one more at ease with itself.

1.3 That is why the Government has committed to introduce a new Equality Bill which will do three things.

1.4 The new Equality Bill will strengthen the law where necessary to tackle discrimination where it still exists. For example, the Bill will include an expanded public sector equality duty that will also tackle discrimination against people because of their sexual orientation, age, religion or belief or their gender reassignment. It should not matter who you are, where you come from, what you look like, or what you believe: everyone should have the same, fair chances in life.

1.5 The Bill will support wider work to help people and businesses through tough times and emerge stronger. The Government will work with business, trade unions and delivery partners like the Equality and Human Rights Commission to provide practical guidance and day-to-day advice, to help make equality a reality.

1.6 The Bill will streamline the law, reducing nine major pieces of legislation into a single Act. This is particularly important in the current climate when resources are stretched. Employers and employees alike will benefit from a simpler, clearer framework for equality.

1.7 The Department for Work and Pensions has an interest in all areas of equality but the Office for Disability Issues, which sits within the Department, is the focal point within government for coordinating the development and the delivery of services for disabled people.

2. Equality in Employment

2.1 Overall, the UK labour market has improved considerably over the last decade. While the labour market has weakened over the last year, as a result of shocks to the world economy and in common with other countries, employment remains high by historic and international standards. In the quarter July–September (Q3) 2008 29.4 million people were in work, and the employment rate was 74.4%. However the Government has always believed that this relative success was not enough on its own. It is equally important to ensure that all groups have the opportunity to participate in the labour market, and in particular that the Government does all it can to support people through difficult times.

2.2 Over the last seven years[203] the employment rates for people from ethnic minorities, disabled people and people aged 50–69 have all increased. The gap between the overall employment rate and that of each of these disadvantaged groups has also fallen. Between Q3 2001 and Q3 2008 the employment rate for ethnic minorities has increased from 58.7% to 61.3% with the employment gap narrowing by 2.7 percentage points; for disabled people the employment rate increased from 42.7% to 48.3%, with the employment gap narrowing by 5.7 percentage points; and the employment rate for people aged 50–69 increased from 52.0% to 55.9%, with the employment gap narrowing by 4.1 percentage points.

2.3 The Department has used pilot programmes extensively to develop expertise and test out different ways of achieving desired outcomes. Lessons from these pilots have been used in developing the Department's approach to welfare reform. This approach was set out in the Department's Green Paper *No-one Written Off: Reforming Welfare to Reward Responsibility*[204] which included proposals for greater devolution of responsibility to individuals, providers and communities; for extending the support available through Pathways to Work to all individuals on incapacity benefits; a significant expansion of Access to Work; a new "Right to Control" for disabled people; and a "flexible New Deal" for those on Jobseeker's Allowance.

2.4 Taken together, these proposals represent a step-change in the welfare state, and in particular in support for the most disadvantaged people. The consultation on these proposals has now closed and the Government will respond in due course. What is clear however is that now more than ever it is imperative that the Government presses ahead with its welfare reforms—to extend opportunity to all and to ensure that, in contrast to previous economic slowdowns, the most disadvantaged are not left behind.

2.5 For disabled people, Pathways to Work is a ground-breaking programme that has been developed in partnership between the Department for Work and Pensions, the Department of Health and the National Health Service. Customers have access to a wide range of support including Condition Management Programmes, employment support and financial information. Since April 2008, Pathways has been available across the whole country and is mandatory for most new claimants. Research carried out by the Policy Studies Institute concluded that those who have gone through the Pathways programme are 25% more likely to be in a job after 18 months, than those who do not.[205]

2.6 The Department's public consultation on proposals to Improve the Specialist Disability Employment Services set out how the Department could improve these services to help more disabled people. As a consequence of less prescription and greater flexibility, better links between elements of provision and a greater focus on job entries, our services will be more capable than at present of being able to meet the work support needs of each individual. The Department will move away from "one size fits all", and tailor our services to what each customer needs in order to move into and stay in work.

[203] Comparable figures are not available for all of these groups prior to 2001.
[204] Cm7363, July 2008.
[205] *The Impact of Pathways to Work*, The Policy Studies Institute, DWP report no.435, 2007.

2.7 For people from ethnic minorities, DWP will be working with local strategic partnerships in areas that receive the new £1.5billion Working Neighbourhoods Fund to consider how they can extend support and deliver improved outcomes for their ethnic minority residents. This is of a different order of magnitude to the small-scale outreach pilots, which it replaces and the Department believes that this is a more efficient and effective way to spend public money.

2.8 DWP also works, through the Age Positive initiative, to tackle age discrimination in employment and strongly promote the business benefits of employing a mixed age workforce and adopting flexible approaches to work and retirement.

2.9 The Disability Discrimination Act (DDA) 1995 required amending to give real strength and powers to disabled people. The DDA now provides comprehensive rights for disabled people in recruitment and employment and the Government will ensure that this level of protection, particularly the key principle of reasonable adjustment for disabled people, will be maintained in the Equality Bill. The Equality Bill will not simply carry forward existing legislation, but will build on this foundation. The Government is taking opportunities to rationalise the disability provisions. This will help improve opportunities in employment for disabled people and ensure that equality legislation is more effective by making it more straightforward for employers to operate and disabled people to enforce.

2.10 The Government's policy intention is that disability discrimination legislation should strike a balance between the rights of the disabled person and the interests of those with duties under the legislation. A disabled person should be able to demonstrate relatively easily that discrimination for a reason related to his or her disability (disability-related discrimination) has occurred, and the duty holder, such as an employer or service provider, should be able to put forward a justification for the discriminatory act. The House of Lords' judgment in the *Lewisham v Malcolm* case has disturbed that balance by making it harder for a disabled person to be able to demonstrate a *prima facie* case of disability-related discrimination. The Government has been carefully considering how the disability-related discrimination provisions in the DDA1995 operate following the House of Lords' judgment, and whether the disability provisions in the Equality Bill should take a different approach to tackling this type of discrimination.

2.11 The Government has concluded that the concept of indirect discrimination should be adopted for disability in the Equality Bill and it is currently conducting a consultation exercise to seek views from stakeholders on how this should operate. The Government considers that adopting the concept of indirect discrimination in the Equality Bill will achieve an appropriate level of protection for disabled people. In addition it will improve consistency, within the Equality Bill, between the provisions for disability and those related to the other protected characteristics, such as age, race and sex.

2.12 Although the judgment in the *Lewisham v Malcolm* case has made it more difficult for a person to demonstrate a *prima facie* case of disability-related discrimination disabled people do still have means of redress ahead of the Government legislating in the Equality Bill. The judgment does not alter the duty which requires employers not to discriminate directly against a disabled job applicant or disabled employee. Nor does it alter the duty which requires those such as employers; providers of goods, facilities, services, premises and education; and public authorities carrying out their functions, not to discriminate by failing to make reasonable adjustments for disabled people.

2.13 In most instances, disability-related discrimination may be overcome by the duty of reasonable adjustment. For example, a restaurant may have a policy of excluding animals, which disadvantages a blind person who requires the support of a guide dog in order to use the restaurant. If it is reasonable to do so, the restaurant must adjust its "no animal" policy to enable assistance dogs to enter the premises, and therefore remove the barrier to the disabled person using the restaurant.

2.14 The Government is also considering the implications for domestic discrimination law of the European Court of Justice (ECJ) judgment in the case of *Coleman v Attridge Law* to assess what changes need to be made to the legislation as a result. However, the Government has made clear that it does not intend to extend protection against discrimination for carers as carers; or for parents as parents. We recognise the very valuable role which carers play and the additional responsibilities and challenges that people face when they act as carers—and are taking specific measures that support people in this position, particularly to help them balance work/life responsibilities. In particular, following the report by Imelda Walsh earlier this year, the Government has decided to extend the right to request flexible working to apply to all parents of children up to the age of 16. The Government has also adopted a new 10-year carers' strategy,[206] which focuses on providing greater services and support for carers, including an additional £150million on breaks for carers, up to £38million in helping carers combine paid employment and caring; and over £6million in support for young carers, within a total of £255million on short-term improvements, on top of the £224million granted to local authorities to support carers in 2008–09.

[206] *Carers at the heart of 21st century families and communities: a caring system on your side, a life of your own* (June 2008).

3. Equality in Goods, Facilities and Services (GFS)

3.1 There is evidence from research commissioned by the Department for Work and Pensions that the DDA is already succeeding in driving systemic change. Research conducted in 2006 shows that compared with 2003 service providers were more likely to have made, or be planning, reasonable adjustments for disabled people. Nearly 90% of service providers had made, or planned, adjustments and 72% of service providers that had made an adjustment had done so because it was the right thing to do for the disabled person.

3.2 At the time that the research was conducted, many of the provisions in the DDA 2005 had not yet come into force. The DDA 2005 extended the provisions in Part 3 of the 1995 Act to include access to the use of land-based transport services, larger private clubs and the functions of public authorities. By extending the coverage of the DDA to most aspects of society the Government aims to ensure that tackling disability discrimination becomes more of a mainstream consideration for organisations.

3.3 Building on the individual disability discrimination rights for disabled people, the DDA 2005 also introduced the Disability Equality Duty (DED). The DED ensures that public authorities must have due regard to the needs of disabled people and promote equality of opportunity for disabled people when developing their policies and delivery mechanisms. Certain public authorities also need to produce a Disability Equality Scheme to demonstrate how they are meeting the general DED. The Government considers the DED to be key to driving systemic change within public authorities and it will build on the DED in taking forward the new single equality duty.

3.4 The Government has established the Equality and Human Rights Commission (EHRC) which provides a source of advice and guidance for people who wish to enforce their rights under anti-discrimination legislation. For disabled people, this builds on the foundation provided by the former Disability Rights Commission. In addition, under provisions in the Disability Discrimination Act 2005, the Government extended the coverage of the Questions Procedure so that it may now be used in respect of the goods, facilities, services, premises, private clubs and public authority functions provisions of the Disability Discrimination Act. The procedure is intended to help a person who thinks that he or she has been discriminated against to find out more about the treatment that he or she believes is unlawful. It also gives the individual or organisation that is alleged to have discriminated the opportunity to respond to the allegations made.

3.5 As the Government indicated in its response to the consultation on proposals for the Equality Bill,[207] it is considering the European Court of Justice's judgment in *Coleman v Attridge Law* and what the implications are for the coverage of association in the Equality Bill.

3.6 Research[208] undertaken by the Department for Work and Pensions concluded that local authorities and housing associations tended to demonstrate a good understanding of disabled tenants' needs, but that private sector landlords were less aware of their needs. The report recommended that disabled tenants should be empowered to use the DDA effectively, and that more proactive approaches to providing information to disabled tenants and landlords needed to be found.

3.7 The Office for Disability Issues published a series of factsheets in September 2008 about disability and premises issues. The factsheets, one of which explains the premises provisions of the DDA, are aimed at enabling landlords, managers of premises and disabled tenants to use legislation governing disability-related alterations more effectively. The factsheets have been distributed to a range of housing and tenant organisations. They have also been publicised on the Office for Disability Issues' website and through its ODInsight newsletter.

3.8 The Government recognises that further improvements should be made to the premises provisions of disability discrimination legislation. That is why it intends to include provisions in the Equality Bill that will require landlords, where it is reasonable for them to do so, to make disability-related alterations to the common parts, such as common entrances or stairways, of let residential premises. This duty will only apply where the request for a disability–related alteration is made by or on behalf of the disabled person and the costs of the alteration, including reasonable maintenance costs and reinstatement costs, will be the responsibility of the disabled person.

3.9 In the Equality Bill, the Government intends to harmonise the different provisions that currently allow employers, service providers, etc to justify disability discrimination. Currently, landlords and managers of premises may only justify disability-related discrimination in specific circumstances. Once the Equality Bill is enacted, they will be able to justify discrimination where the discriminatory treatment is a proportionate means of achieving a legitimate aim. However, landlords and managers of rented premises will remain under a duty to make reasonable adjustments, for example by changing policies or procedures, or providing auxiliary aids or services, where these are requested by the disabled person. The Government considers that this will achieve an appropriate balance between the rights of disabled people and the interests of landlords, etc.

[207] *The Equality Bill—Government Response to the Consultation* Cm7454 (July 2008).
[208] *Landlords' responses to the Disability Discrimination Act* (2007).

New EU Directive

3.10 A draft EU Directive proposes to make it unlawful to discriminate against or harass someone on the basis of religion or belief, disability, age or sexual orientation in relation to a wide range of areas, in particular social security, healthcare, education and the provision of goods and services including housing and transport.

3.11 The UK strongly supports the aims of the draft Directive. The Government believes that a new Directive can contribute to a fairer and therefore stronger Europe and that a good level of minimum protection across all States is important. The Government believes the Directive should build on the experience that the previous Directives have provided and that it is important to get the scope right when it comes to issues such as education, healthcare and other areas of social policy.

3.12 The Government will want to ensure that the measures in the draft Directive complement the extensive and carefully balanced legal structures established or proposed in the UK—which have led to real progress. The Government will also want to be sure that the scope and various provisions of the draft Directive will work effectively and achieve the aim of enhancing protection against discrimination, without placing undue burdens on business.

3.13 In a number of respects, domestic legislation already anticipates provisions of the draft Directive, for example protection against discrimination on grounds of sexual orientation, religion and belief and disability, in the provision of goods, facilities and services. These protections will be incorporated in the Equality Bill. In addition the Government has made clear that it intends to prohibit age discrimination in the provision of goods, facilities and services, in the Equality Bill. The Directive is under negotiation and to the extent that the UK takes a different view on some aspects, these are not included in the Equality Bill. The Government will be consulting shortly on the Directive.

4. Public Sector Equality Duty

4.1 The Government is keen to retain the successful features of the disability, race and gender equality duties on public authorities and to extend those benefits to the other protected strands. The substance of the proposed single public sector equality duty will be broadly similar to the existing duties. The new duty will require public authorities to have due regard to the need to eliminate unlawful discrimination and harassment, promote equality of opportunity (whose meaning it is proposed to make clear on the face of the Bill as in particular addressing disadvantage, advancing positive attitudes, meeting different needs and promoting participation and inclusion). Public Authorities will also be required to promote good community relations in respect of all their functions and for all protected grounds (with the exception of age, regarding pupils in schools).

4.2 A single public sector duty will be easier, simpler and more practical for public authorities to implement and will enable public authorities to address their equality responsibilities more efficiently through a single mechanism. The current duties focus on the needs related to individual protected grounds rather than encouraging action to address the particular disadvantage experienced by groups, such as women from particular minority ethnic communities or gay and lesbian disabled people. More than 80% of the respondents to the Discrimination Law Review consultation[209] favoured integrating the three existing duties into one duty, and 90% favoured extending the duty.

4.3 The new equality duty will build significantly on the successes of the existing Disability Equality Duty (DED). Clear statutory guidance from the EHRC should help public authorities to implement the new duty in an effective and proportionate way.

4.4 The DED came into force on 4 December 2006, and since then the Office for Disability Issues (ODI) has undertaken a range of activities to ensure that the Duty is implemented effectively. Ipsos MORI was commissioned to carry out an audit of compliance in January 2007. The final report revealed that 72% of public authorities covered by the audit were found to have published a Disability Equality Scheme (DES), and at least 54% of all authorities covered in the audit had published a DES that contained evidence that the authority had involved disabled people in its production. By the summer very few authorities did not have a scheme in place, representing a high level of compliance.

4.5 While the ODI does not formally monitor compliance or progress made by all public bodies, in early 2008 the Strathclyde Centre for Disability Research, University of Glasgow was commissioned to carry out an in-depth examination of the implementation of the DED in England. The results indicated that a positive change in perceptions of disabled people and disability issues had taken place within most of the organisations in the study.

4.6 In addition to the requirement relating to the schemes, certain Secretaries of State are also required to publish a report, the first one being no later than 1 December 2008, on progress toward equality in their policy sector and proposals for co-ordination of future work by relevant public authorities within their policy sector. Some early anecdotal indications from departments suggest that the process of producing the

[209] *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, June 2007.*

reports has itself had an impact on mainstreaming disability into policy areas. Further anecdotal evidence from key stakeholders highlights the important fact that disabled people and organisations are using the DED as a lever for challenge and change at both the local and national level.

Equality in DWP

4.7 DWP has internal targets for the representation of women, ethnic minority staff and disabled staff at all grades at which there is under-representation (further information shown at Annex 1). DWP has met or exceeded its targets in many of these areas but there is clearly more work to do. The Department has in place a number of activities to help achieve equality in employment: such as the DWP Equality Schemes, Equality Impact Assessments, the Customer Involvement Strategy, the Reasonable Adjustments process, positive action programmes and mentoring.

4.8 DWP regularly take part in external benchmarking exercises on the different aspects of diversity. The Department achieved Gold standard in the Employers' Forum on Disability Standard 2007, scoring 89% against an overall average of 57% and public sector average of 60%. DWP assesses, monitors and provides an update on outcomes and progress against its equality action plans on a yearly basis, including reports such as promotions and recruitment by diversity strands (measures of success).[210]

4.9 DWP encourages all staff to disclose their ethnicity, disability and sexual orientation but disclosure itself is voluntary. Although DWP has achieved high disclosure rates for disability and ethnicity compared to other government departments, it believes that there are still more people who could disclose their status but who have yet to do so. For that reason it will continue to run campaigns for its staff to promote the importance of disclosing their status. DWP communications on disclosure set out the rationale behind diversity monitoring and emphasise particularly the confidentiality of the disclosure process. The most recent campaign to encourage disclosure ran in November 2008. DWP does not currently collect or monitor data regarding staff caring responsibilities.

4.10 DWP hold diversity events, Excellence in Diversity Awards, and has six National Staff Network Groups. These groups have informed, for example, the development of DWP's reasonable adjustment policy.

4.11 For its customers, DWP has established a Customer Insight team dedicated to better understanding customers' needs. DWP has held discussions with its customers at various events, including the annual Disability Forum to identify their specific diversity needs. The Department measures the success of its service to diverse customers by asking them for their views, for example through customer satisfaction surveys and mystery shopping.

4.12 As a result, DWP has developed a set of cross-departmental customer service processes to help customers with specific communication barriers better access DWP services. The Department has also developed centralised, easy to access guidance designed for customer facing staff, which provides links to current guidance and practical information relating to diverse customers. The guidance also includes information about equality and anti-discrimination laws, and links to examples of good practice in customer service from across DWP. DWP is also currently working to improve the ability of its IT systems to store and share information relating to disabled customers.

4.13 The Disability Equality Duty is an important tool in helping the Department to focus on disability equality issues in its policy-making. It provides a useful lever for the Department in its negotiations with other public authorities to help make progress towards disability equality. This is clear in much of the evidence in the Department's Secretary of State Report which outlines the progress made towards disability equality in policy sectors on which the Department leads, including employment, later life and disability equality.

4.14 However, the report also makes clear that more progress still needs to be made towards disability equality across these policy sectors. For example, the employment rate of people with learning difficulties remains low at 14 to 24% as does the employment rate of people with mental health conditions (11 to 17%).[211] The report sets out what the Department is doing in order to make further progress towards disability equality, including how it is working with other public authorities. For example, it is developing a National Strategy for Mental Health and Employment, to ensure a coordinated response across government to the challenges faced by people of working age with mental health conditions and improve their employment chances.

[210] *Department for Work and Pensions Race, Disability and Gender Equality Schemes 2008–2011* (www.dwp.gov.uk/aboutus/equalityschemes/progress.asp)
[211] Labour Force Survey 2008, Quarter 3;

Use of Procurement

4.15 The public sector spends around £175billion every year on purchasing goods and services from the private sector. 30% of British companies are contracted by the public sector. Public sector procurement can therefore be a potentially powerful lever to drive progress on equality.

4.16 Under the existing public sector equality duties, public bodies are already required, in carrying out their procurement activities, to have due regard to the need to eliminate unlawful discrimination and to promote race, disability and gender equality. Some public bodies, for example, ask potential contractors for relevant equality related information, concerning relevant contracts.

4.17 The new equality duty will give a greater focus to increasing transparency. The Government is looking at how to help public bodies comply with the duty more effectively through legislative and non-legislative mechanisms.

4.18 The Office of Government Commerce's (OGC) procurement policy and standards framework was launched earlier in 2008. It sets out policy, standards and best practice guidance on public procurement, including what can be achieved through public procurement and how it can be done. The Government encourages public authorities to use this framework and is looking at mechanisms for collating and sharing examples of good practice.

4.19 As part of this framework the Government recently set out how social issues can be addressed through public sector purchasing. The OGC publication *Buy and make a difference*,[212] provides practical advice, with good-practice examples to public procurers on when and how they can reflect social issues at the various stages of the procurement process: when identifying the need, at the specification stage; at the pre-qualification/selection stage; at the award stage; in the performance of the contract; and through relationship management.

4.20 The OGC will be publishing a similar guide specifically on addressing equality issues in procurement, including clarification of what the existing public sector equality duties mean for public procurement.

5. Private Sector Commitment and Support, Guidance, Advice and Information for Employers

5.1 The Government has a public policy objective to achieve a fair society in which people have the opportunity to succeed. Public bodies such as schools, local authorities, health authorities and government departments, have an important role to play in delivering this objective because of the services they provide, the people they employ and the money they spend in the private sector. The Government expects the private sector to play its part in making progress towards equality, including through its relationships and interactions with the private sector.

5.2 For example, Jobcentre Plus staff are trained to challenge any employer who appears to be behaving in a potentially discriminatory way when using their vacancy service. Additionally, if a customer reports to Jobcentre Plus that they have suffered discrimination, staff will advise them of their rights, provide details of how to access the Employment Tribunal Service and signpost to ACAS and EHRC if the customer requires further advice or guidance. Jobcentre Plus is currently introducing written guidance for customers, as part of its Job Kit. This explains to customers what to do if they feel they have been discriminated against when looking for work. Following the introduction of the guidance, Jobcentre Plus will explore including a question on awareness of discrimination reporting procedures in its two yearly customer satisfaction survey.

5.3 The Government does not think that an equality duty on the private sector is appropriate. However, the private sector has a valuable role to play in advancing good equality practice. The Government is exploring how to help public bodies comply with the equality duty more effectively, through legislative and non-legislative mechanisms.

5.4 The Government's ambition is to bring about cultural change to tackle discrimination in the private sector. Case study evidence from research[213] shows that the most important factor in employers and service providers making adjustments for disabled people was that "it was the right thing to do". That is the direction in which the Government want employers and service providers to move: to recognise their social responsibilities. It is expected that this type of social change will help to drive improved employment opportunities without the need for individuals to have to rely solely on enforcement of legislation. In addition, the Bill will widen the scope of recommendations made by employment tribunals so that they can indicate future best practice.

5.5 The task of achieving sustained attitude change amongst employers in relation to people from disadvantaged groups will not be delivered by a short awareness campaign. The Department has adopted a two-pronged approach through the *Employ ability* initiative, challenging employer attitudes (targeting small and medium sized employers on an area basis) and developing an employer-led strategy to develop and disseminate employer ownership and leadership of this agenda. The Department's strategy for achieving this is to work with a group of key (mainly larger) employers and disability-focused employer organisations, who have already demonstrated a commitment to do more to recruit and retain disabled people, and who have

[212] *Buy and make a difference: How to address social issues in public procurement* (June 2008).
[213] DWP Research Report 410: *Organisations' Responses to the Disability Discrimination Act.*

experience of the difficulties employers encounter in achieving this and good practice ideas for overcoming barriers. There will be a series of seven expert panel events between December 2008 and March 2009. Interim findings will be reviewed with partners in January 2009 and further action agreed building on the outcomes of the events in spring 2009.

5.6 Small and medium sized employers will be targeted as part of a new phase of the *Employ ability* campaign, which has an expected launch date of around this time next year. *Employ ability* currently addresses perceptions about the employability of disabled people, but it is to be expanded to cover lone parents, carers and ethnic minority groups.

5.7 In addition to exploring what more employers can do themselves, the Department has asked employers to look at what more they expect from Government and other intermediaries (including Jobcentre Plus and other job brokers and providers) who influence development, recruitment and retention, and from disabled people themselves. The aim is to replace *ad hoc*, reactive employer thinking with consistent, proactive and representative ideas, widely accepted by employers. This will inform the design and delivery of services provided by intermediaries and the Government.

5.8 The aim is to develop a core employer expertise and leadership—and from there to establish employer-led communication channels for disseminating information and good practice.

The Access to Work scheme

5.9 The Department is looking at how it can improve Access to Work and make the best use of the resources available to the programme, including the additional funding proposed in the Green Paper *No one written off*.[214] The Department will consider whether awareness of Access to Work needs to be raised amongst small and medium sized employers and some customer groups, such as those with mental health conditions. More generally, the Department is also looking at how we can expand the support provided by Access to Work without displacing the support that we continue to expect employers to provide.

5.10 Although Access to Work can currently help support people with mental health conditions, the Department recognises that some people have fluctuating conditions that are not fully supported. From the end of November 2008 the Department will be piloting more flexible support for people with mental health conditions in two areas of London.

5.11 The "Mind" London Employment Network, with the backing of national "Mind", will collaborate with Access to Work to provide this new innovative "in work" support package targeted specifically at people with early onset of mental health issues or an established condition. The plan is to provide a flexible and practical intervention while an employee is still in work, using support workers with an in-depth knowledge of mental health conditions. The aim of the specialist support worker will be to embed skills and tools into the workplace so that the need for ongoing support is minimised.

5.12 The Department is also considering how it could enhance choice and control for customers of our specialist disability employment services—including Access to Work—and is specifically considering how we might improve customers' experiences.

5.13 Policy development in this area will build upon the In-Control[215] and Individual Budgets pilots,[216] which both focused on adult social care. These studies found that when disabled people had more say over how money was spent they were more likely to feel enhanced choice and control over their lives and have higher aspirations. The Individual Budgets pilot found that younger physically disabled people and mental health service users were the most likely to benefit from the new care arrangement; there was tentative evidence that physical and psychological outcomes were improved and that the quality of care was increased. The outcomes for older people and those with learning difficulties were more mixed and older people were more likely to find the experience stressful and an additional burden. The individual budgets pilot attempted to integrate a number of funding streams—including Access to Work—into a single pot but with limited results, due to some significant administrative and legislative barriers to bringing funding streams together.

5.14 The Department's recent welfare reform green paper, *No one written off*, included a proposal for giving disabled people a legislative "right to request" funding through an individual budget. The Department will shortly be announcing how this proposal will be taken forward. In developing our policy, we are considering how we might enable more effective integration of Access to Work into the individual budget approach.

5.15 The Prime Minister's Strategy Unit Report *Improving the Life Chances of Disabled People* (2005) said that "there are strong arguments for requiring central Government Departments—and potentially the wider public sector, in due course—to make provision in their expenditure baselines for the costs of employing disabled employees".

5.16 When the Access to Work scheme was withdrawn in central government departments in October 2006, the Department said that disabled staff working in Ministerial Government Departments would continue to receive the same support they would have received from Access to Work. The only difference

[214] *No one written off: reforming welfare to reward responsibility* (Cm 7363), July 2008.
[215] *A report on in Control's Second Phase: Evaluation and learning 2005–07* (June 2008).
[216] *Evaluation of the Individual Budgets Pilot Programme: Final Report* (October 2008).

would be the source of the funding, which would be from Departments' running costs. Staff working for central Government Departments have continued to be entitled to an assessment from Access to Work, and they and their employers have also continued to be entitled to information and advice from Access to Work Advisers. DWP brokered an agreement through which Access to Work support would be provided to any staff who would have been eligible and whose employing Department refused to fund the adjustment. The Government is pleased that this safety net has not been invoked.

5.17 An independent qualitative evaluation of Access to Work has specifically looked at the impact on staff of the decision that Ministerial Government Departments should fund the Access to Work adjustments of their staff from October 2006. The findings from this evaluation are expected to be published in spring 2009.

5.18 Any decision on whether the changes made in Ministerial Government Departments since October 2006 will be extended to other parts of the public sector will be made in light of the findings of the independent qualitative evaluation of Access to Work, along with responses to the public consultation *Improving Specialist Disability Employment Services* in which the Department specifically included a question about views on other public sector employers paying for the workplace disability adjustments required by their staff.

6. The New Equality Bill

6.1 Discrimination law has developed over a number of years and is set out in nine major pieces of legislation, including the DDA, and various ancillary pieces of legislation. There is widespread agreement that those who need to understand this law would benefit from having it in a single Equality Act.

6.2 In the process of harmonising and simplifying the law the Government will make a number of improvements to discrimination law for disabled people in the Equality Bill. These were set out in the Government's response to the consultation.[217] The Equality Bill will:

- make it more straightforward for disabled people to show that they are disabled;
- simplify the definitions of discrimination in accessing goods, facilities and services etc;
- introduce direct discrimination to the supply of goods, facilities and services etc;
- introduce a common threshold for the duty to make reasonable adjustments;
- introduce a new duty on landlords to make disability-related alterations to the common parts of let residential premises; and
- remove the possibility of justifying a failure to make a reasonable adjustment outside of employment.

The Equality Bill will be easier to understand and use and will help improve the life chances of disabled people.

6.3 The Government's overall strategy on disability equality is strongly influenced by the social model of disability. For the purposes of anti-discrimination legislation, the Government considers that it is appropriate to maintain the current approach to models of disability, which draws on different models for different purposes. The basic principle of the legislation is that it is asymmetrical, in that generally it protects only disabled people.[218] Consequently, it is necessary to define who is a disabled person for the purposes of the Act and the Government considers that an essentially "medical" model provides the most appropriate means of doing so.

6.4 However, a key principle underpinning the protection provided by disability discrimination legislation is the duty to provide reasonable adjustments, which is clearly based on the social model of disability. The reasonable adjustment provisions take account of the barriers that disabled people face in a wide range of aspects of day-to-day life, including employment, goods, facilities and services, private clubs and the functions of public bodies. They require duty holders to take reasonable steps to overcome those barriers.

6.5 The role of the EHRC is set out in Part 1 and relevant Schedules of the Equality Act 2006. The Government will look to the EHRC to issue appropriate codes of practice and guidance on the new Act and to carry out its various enforcement, supportive and promotional activities. The EHRC is planning to launch a series of inquiries into inequality in a number of sectors.

6.6 Within the Discrimination Law Review's remit of creating a more streamlined legal framework for equality, the Office for Disability Issues is working to ensure that disability is properly reflected in that new framework, and that opportunities are taken to harmonise approaches where possible whilst also ensuring that there are distinct provisions for disability within the Equality Bill where appropriate. It is also working to ensure that the commitment that there should generally be no erosion of existing levels of protection for disabled people is delivered. The ODI's role regarding the Equality Bill after it has received Royal Assent will be decided in due course.

[217] *The Equality Bill—Government response to the consultation,* July 2008.
[218] Although, there may be some extension of coverage following consideration of the ECJ judgment in *Coleman v Attridge Law.*

Annex 1

REPRESENTATION RATES OF ETHNIC MINORITY STAFF: DWP

Grade	*Ethnic minority staff % September 2008*	*2008 DWP Target*
SCS	4.4	5.0
G/G6-F/G7	4.0	4.0
E/SEO	4.3	4.0
D/HEO	6.2	5.5
All DWP	10.2	n/a

REPRESENTATION RATES OF DISABLED STAFF: DWP

Grade	*Disabled staff % September 2008*	*2008 DWP Target*
SCS	4.0	6.0
G/G6 + F/G7 + E/SEO	4.2	4.0
D/HEO + C/EO	6.5	7.0
B/AO + A/AA	5.2	6.0
All DWP	5.7	n/a

REPRESENTATION OF WOMEN: DWP

Grade	*Women % September 2008*	*2008 DWP Target*
SCS grade PB2 and above	24.2	30.0
Total SCS	34.1	39.0
G/G6	42.8	45.0
F/G7	45.2	45.0
All DWP	68.5	n/a

December 2008

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33. Memorandum submitted by Unite

Introduction

This response is submitted by Unite, the union. Unite is Britain and Ireland's largest trade union with 2 million members across the private and public sectors. As the union's members work in a range of industries including manufacturing, financial services, print, media, construction, transport, local government, education, health and not for profit sectors, we have extensive experience of representing men and women workers who are faced with discrimination on all grounds and believe that the Single Equality Act is an opportunity to address and tackle these issues in employment and the public arena.

The following evidence is complementary to the attached key points from our responses to the Women and Work Commission and the Discrimination Law Review consultations.

1. Equality in Employment

1.a *How effective has DWP been in achieving equality in employment, how would it have to change to achieve greater equality in employment?*

1. (a.1) We recognise there has been positive work done by DWP regarding women, black, Asian and ethnic minority workers, disabled workers, carers and pensioners. However, we would still strongly stress the importance of action to implement the Women and Work commission's report recommendations relevant to DWP including monitoring information. We believe to be effective in achieving equality in employment, in addition to addressing more effectively specific equality areas there needs to be a more consistent inclusion of cross-cutting discrimination in DWP. For example, in requiring data on a cross section of equality areas there were difficulties in identifying supported employment participants by gender and/or ethnic origin in

DWP information. However a positive example of addressing inequality is from our experience of DEAC. This important advisory committee took action to ensure disabled ethnic minority people were included in the work and composition of the committee in a positive and proactive way.

1. (a.2) Specifically on disabled workers, since the introduction of the DDA we have witnessed some improvement in the recruitment of disabled people. This does not mean that currently disabled people are getting a fair deal especially in the area of retention and when seeking employment after being out of work, as it is clear from recent surveys that disabled people are still more likely to be unemployed and be in low wage jobs. This is due to the fact that employers continue to discriminate particularly against those with mental health problems.

To address this issue the government needs to make positive changes to help disabled people back to work and stay at work. For this reason, we believe that proposals such as the Employment and Support Allowance will not be a move towards better employment. This will only put more stress on disabled workers and can worsen their conditions as a result. We are extremely concerned about forcing workers to take unsuitable jobs or face poverty. These proposals will only affect the poorest people in society especially when there is a lack of adequate provision of appropriate support for the increasing number of disabled people who will be required to take up employment.

We believe that the government needs to seriously look at these proposals again so that its intention that "Work is the best route out of poverty" will become reality.

1. (a.3) We welcome the positive support for lone parents which assists them to support their families and to work. However, we are very concerned that the approach should recognise that lone parents, the vast majority of whom are women, provide family support including at times of extreme difficulty and hardship eg after the death of the other parent or family breakdown, or in relation to the circumstances of the birth of the child. The government's positive approach has succeeded in achieving a major increase in the employment of lone parents, without the threat of coercion. We do not believe equality is enhanced through the current proposals that will undermine this positive approach.

1. (a.4) Additionally, our experience of representing lone parents and learning from positive attitudes in the New Deal for disabled and young workers, leads us to recommend that including an incentive to employers for employing lone parents could further help with recruitment and retention at work.

1.b How can the Equality Bill open up opportunities in employment, particularly for disabled people, carers and pensioners?

1. (b.1) The Equality Bill—Opening up opportunities in employment

The Equality Bill has put equality on the agenda and it can ensure that employers promote equality and zero tolerance on discrimination on all grounds. The proposal to strengthen positive action and the inclusion of employment opportunities for black, Asian and ethnic minority and disabled workers in the transparency requirements can tackle under representation. Also the extension of Equality Duty to cover age, sexual orientation, religion or belief and gender reassignment, an end to age and disability discrimination in the provision of goods, facilities and services and the extension of protection from third party harassment to all grounds of equality will be a move to have employers and service providers to equality proof their policies and practices.

1. (b.2) The Equality Bill—The Role of Union Equality Representatives in opening up opportunities in employment

An important measure to tackle inequality in the workplace is the establishment of statutory rights for union equality representatives. They play a vital role in ensuring better working conditions for all workers. First and foremost, our experience shows that the role of union equality representative has been particularly important in supporting the implementation of discrimination law, both in terms of supporting individual workers to identify their needs appropriately, and in raising awareness with the employer and other workers on the issue in general. As union equality representatives do not currently have sufficient rights to carry out their role, we would call for this to be addressed, recognising its importance to support equality and prevent discrimination, as the following examples show:

— Union Equality Reps: Supporting retention of disabled workers in work

  In a China Clay organisation a work reorganisation was introduced. This action disproportionately affected disabled workers, as the new jobs were later identified as unsuitable for a number of disabled workers because of their impairment and they were selected for redundancy. The union equality representative, a disabled worker himself ensured that the abilities of the disabled workers were recognised and asked for the examination of reasonable adjustments. The involvement of the union equality representative ensured the disabled workers had a fair chance to stay in work and to avoid unfair and potentially unlawful selection for redundancy on ground of disability.

  Also in another case a disabled worker was threatened with redundancy where he was marked

down on potential after applying the points system. As part of our ongoing negotiations to retain the disabled worker, the union equality representative has advised the employer to get specialist advice on Access to work.

— Union Equality Reps supporting workers with family responsibilities and on flexible working

In one manufacturing workplace, for example, a white male union equality representative who has agreed time off from the employer has supported a number of men workers who have non-resident parental responsibilities following divorce. The divorce settlement has led to the time they spend with their children being restricted to specific hours and days which do not readily fit with their shift pattern, and the support provided by the union equality rep has been very important in assisting effective solution to be found with the employer.

In the civil aviation industry, for example, a woman union equality representative of Asian origin who does not receive agreed time off from the employer in this role, has raised awareness of flexible working amongst union members and representatives and done her best to support individuals in her own time, and through using holiday time. However, she feels the lack of support from the employer for this role has meant missed opportunities to resolve difficult issues, and generally to support workers balancing their home and family responsibilities

However, in those workplaces where the employer recognises the role, and we strongly recommend that the role of union equality representatives be included as part of the Equality Act.

1. (b.3) The Equality Bill—Opening up opportunities for disabled people

In our experience one of the main issues for disabled workers is retention at work. This is mainly due to employers' refusal, unwillingness or ignorance about making reasonable adjustments. We also find that employers dismiss disabled workers before ensuring that sickness absence policies are used to help them return to work after a long absence or consider alternative options such as redeployment first. The Equality Bill can change the employers' focus from discipline to rehabilitation.

We find workplace health inequalities a major problem which the bill can address. It should ensure that employers carry out an equality impact assessment, review their sickness policies and introduce paid disability leave including for those conditions with fluctuating circumstances. Also, all workplaces should carry out a Disability Audit, monitor the recruitment, retention, promotion and pay of disabled workers. This should include those who develop an impairment or long-term health condition or those with learning disabilities and mental health problems.

Finally, employers need to be made aware that flexible working can be part of the reasonable adjustments and should be positively considered. This will provide the chance for disabled workers and carers to support their families encouraging many men and women to stay in or return to work.

In our experience in workplaces where disabled workers themselves are consulted on work practices and arrangements there is more productivity and industrial relations. Therefore, there should be a great emphasis on consultation in the Bill after all it is the disabled person who knows best.

1. (b.4) The Equality Bill—Opening up opportunities for carers

Carers can and do face discrimination which is not adequately provided for at present eg the father of a child with epilepsy who occasionally required a start time delay of 15 minutes was granted emergency leave, but deducted 15 minutes' pay. We are, however, concerned at the lack of importance given to the need for anti-discrimination protection for those with caring responsibilities. From our experience of representing members, many workers with caring responsibilities who are predominantly women have to use indirect sex discrimination to seek remedy. This option is an inadequate means of recognising the specific discrimination and under-valuing of caring responsibilities undertaken by both women and men. Increasingly, as older as well as younger people are becoming carers, the Bill can help by providing protection against discrimination on grounds of age by association.

Many carers lose out in retirement due to broken employment service. The Bill can extend the rights to all carers ensuring equal opportunities for those with caring responsibilities. This should include flexible working rights for all, paid carers leave and health support for carers, increased Carers' Allowance, backdating State Second Pension, protecting pensions of carers with broken service.

1. (b.5) The Equality Bill—Opening up opportunities for pensioners

As a trade union we have consistently argued the importance of addressing discrimination as part of the solution to the poverty faced in retirement by many women, disabled workers, and black, Asian and ethnic minority workers. They are more likely to have worked in jobs without access to an occupational pension, and are less likely to qualify for a full state pension as they have had less opportunity to build up their National Insurance record. In particular, the importance of equal pay being effectively addressed in the Equality Bill is essential as part of the measures to tackle the poverty amongst women in retirement. We have welcomed some of the pensions and equality measures introduced by the DWP, including in relation to women and carers, same sex partners and others, but continue to remain concerned that :

— there is no immediate increase in the basic state pension

— older people are forced to work beyond retirement to top up their pensions or are put under pressure by employers to retire early

— means tested benefits stops older people seeking employment

1.c How should the Equality Bill respond to the decision in the Malcolm case in respect of disability rights in employment?

We believe that it is very important to address the decision in the *Malcolm* case, and are preparing a fuller response on this issue, which we would be pleased to send you shortly. We are concerned that the implication of the *Malcolm* case could lead to the loss of rights for disabled workers who are discriminated against only for the reason of their disability. We believe that indirect disability discrimination should be explicitly introduced in the Bill. The requirement to take a reasonable action for an individual is complementary to the requirement not to indirectly discriminate against disabled people in general. Recognition of indirect discrimination allows for structural barriers to be addressed much more effectively. To address discrimination it is therefore necessary that indirect discrimination should be in addition and not instead of disability related discrimination provisions. In our experience of taking disability discrimination cases we found that comparing the treatment of disabled workers with non-disabled workers is not as straight forward as the case of men and women or black and white people. Therefore, reinstating the protection against disability related discrimination to pre-*Malcolm* which does not require a comparator would be the positive way forward.

1.d How should the Government improve protection of carers in equality legislation, following the decision in the Coleman case?

Carers play an important role in our society but do not receive the recognition they deserve, it is time that we have equal opportunities for those with caring responsibilities. We believe that the decision in the *Coleman* case has provided a great opportunity for government to address and put right the issues faced by all carers. It is important to refer to the Disability Rights Task Force report, which recommended that protection against discrimination needs to include those people who may be discriminated against because they are "perceived" to be disabled, and those "associated" with a disabled person eg as a partner or carer, and who face discrimination as a result of that association.

To integrate the *Coleman* case ruling into the Equality Bill, we believe that discrimination as a result of association should be prohibited on all grounds. Currently, those people who care for friends or neighbours or some relatives do not enjoy the same rights. The legal definition can exclude vulnerable groups, including migrant workers who may have no relatives in the UK and the growing number of men estranged from their families after divorce. Gay, lesbian, bisexual and transgender people may also lose out, as they are more likely than other communities to rely on friends rather than blood relatives for mutual support and care. To ensure the Bill addresses discrimination faced by carers, the protection against associative discrimination needs to be extended to cover all carers.

2. Equality in Goods, Facilities and Services

2.1 We agree with the TUC and we would particularly like to stress the importance of accessible transport to equality for disabled people at work and in the wider community. In our experience disabled people face many barriers when using different forms of transport. Disabled passengers should be able to have a better experience of rail travel and better safer stations. Also, there needs to be improvements on accessibility for disabled and older people, which can also ensure greater equality and access for others, eg parents with pushchairs. These improvements can provide a better quality of life for disabled workers who need to use public transport including for getting to work, and can improve general access in the community and enhance community and family life. This can only be achieved by removing the exemption for transport providers in the Bill.

2.2 Many disabled workers are refused a private pension on ground of their disability. We also believe that no pension providers should be able to justify discrimination. Pension providers should operate within a level playing-field, but that the field should be levelled up—ie they should have to make reasonable adjustments. In addition, there should be a guarantee to equal access to occupational pension schemes where disabled people join at the start of their employment as suggested by the Disability Rights Taskforce.

3. The Public Sector Equality Duty

How could a Disability Equality Duty in the public sector be built upon within a Single Equality Duty? Is a Single Duty desirable? Will there be unintended consequences for disabled people or disability rights? Has the Disability Equality Duty been effective in promoting equality in the public sector, including local government? How could procurement be made a more effective lever for equality outcomes? What are the good practice examples in the public, private and voluntary sectors? How can guidance on procurement improve at EU and national level to make procurement a more effective lever for equality outcomes?

3.1 We recognise that the introduction of a Single Equality Duty in the Equality Bill provides the opportunity to extend this important positive measure beyond gender, race and disability to sexual orientation and age, as well as to strengthen the existing duties. We would be concerned, however, if the Single Equality Duty does not recognise the requirements of distinct areas of equality and the differences between them. For example, measures to encourage women with young children back into the labour market will be different from measures to support retention of disabled workers in work, and again measures to tackle disproportionate unemployment faced by young black men in some areas. It is important not to lose the focus necessary for addressing issues specific to each area of equality through over-general commitments rather than specific measures to address particular barriers.

3.2 The Duty should also include issues of multiple discrimination and the inter-relationship between areas of equality—ensuring for example, discrimination against black, Asian and ethnic minority women is covered.

3.3 The role of trade unions in supporting the implementation of the Single Equality Duty, which is currently included in the gender equality duty needs to be part of the new Duty for all areas of equality. Trade union shop stewards, safety reps, union learning reps and union equality representatives can all have experience of tackling discrimination and promoting equality and involvement of under-represented sections of the workforce, which is essential if the duty is to be effective, is to make a difference, and is to win support across all in the workplace.

3.4 We strongly support the call to strengthen the duty for implementation, including monitoring action holding the authority to account, and requiring a written equality scheme and the measurement of outcomes through Equality Impact Assessments for example, as the way forward. Most importantly, as our experience shows, without real enforcement, the single duty can amount to yet another "paper exercise". Therefore, in addition to ensuring trade unions are included (see above) the EHRC should be provided with sufficient resources to ensure effective enforcement.

3.5 We believe that procurement is key to ensuring that poor practice in the private sector cannot be used to undermine good practice introduced in the public sector in response to the Equality Duty, and that equality should be taken into account in all public functions. The importance of addressing the responsibilities in the private sector is clearly stated in the government's pamphlet *Buy and make a difference*. This includes the opportunity to ensure private and voluntary sector organisations adhere to and promote equality when they are carrying out public functions, as well as to award a contract specifically to eg a women's project or black business in a way that is not in conflict with the requirements of EU law.

4. Private Sector Commitment and Support, Guidance, Advice and Information for Employers

4.a *Is an Equality Duty on the Private Sector workable?*

4. (a.1) We have been consistently calling for the duty on the public sector to be extended to the private sector. The government should recognise the importance of using the Equality Bill as an opportunity to extend to the private sector the requirement to promote equality and prevent discrimination. We have a great deal of experience promoting equality in the private sector with employers of a range of sizes, including eg British Airways, Ford Motor Company, J Sainsbury, BAA, London Buses, English Church Housing Group, Ineos, TNT, Happy Computers, Associated British Ports, Cadbury, Stagecoach. Our experience is that a clear commitment to promoting equality and to establishing procedures for implementing this commitment is beneficial to all aspects of the workplace. The specific example of win-win-win agreements on equality and flexible working that meet workers' caring and other commitments outside work, as well as the employers' need for flexibility in order to meet varying customer demand demonstrates this. Additionally, the financial cost of discrimination to individual employers and to the whole economy, as well as the savings from promoting equality have been calculated in a range of areas eg Women & Work Commission, Boots plc.

4. (a.2) Additionally, our experience of representing members who are employed through private sector agencies leads us to make a very strong case for them to be specifically included in the Equality Bill. This is particularly important as a potential source of discrimination faced by disabled workers. We have examples of cases where disabled workers for an agency who raised issues or requested reasonable adjustments were never asked back. We also have the example of a workplace where the use of the workers' sickness record was in effect disability discrimination on grounds of mental health—having suffered a serious mental health problem following the death of her father, the worker had been undergoing therapy for a considerable period, but was now ready for work, which the agency procedures would not allow.

4. (a.3) All employers are required to take action on health and safety, and in our experience of representing workers facing discrimination, we have seen a strong link between health & safety and disability and our work in this area has been very successful eg. producing guides, factsheets, using and publicising the joint DRC/HSE Statement on overarching principles of health and safety management and disability, and in carrying out workplace disability audits as part of regular safety inspections. It is vital that health and safety is not used as an excuse to discriminate.

4. (a.4) We believe Disability Audits carried out regularly are key to identifying discrimination in recruitment, retention, promotion and other work practices, and our experience of carrying out over 100 disability audits across workplaces, mainly in the private sector, revealed problems that could then be addressed. Therefore, it is important to place a duty on private sector as well as public sector employers to carry out a disability audit.

4.b How can the Access to Work scheme better enable people to obtain, stay and progress in work? How can Access to Work better support people with mental illness and fluctuating illnesses?

4. (b.1) In our experience, Access to Work is one of the most effective schemes. We strongly support it, and would support its much wider promotion and awareness raising of the positive role it can play. This measure could make an enormous difference.

4. (b.2) We have expressed our serious concern at the removal of Access to Work from government departments, at the same time as the public sector duty on disability was introduced. At the very time it was needed most, we were concerned that the needs of disabled workers were potentially being pitted against other budgeted items, in a general climate of pressure on public spending. We would strongly oppose any extension of this approach, and very close examination of the impact of decisions to date, which we would call to be reversed.

4. (b.3) In terms of the specific questions on disabled people and work, we support government schemes such as Pathways to Work and Access to Work. We also believe that a continuing growth in the budget for Access to Work is essential to helping disabled people get and stay in work, including support for transport to work. This needs to be seen as an investment, and complementary to the anti-discrimination and positive duty included in the Equality Bill. In our experience, many companies are unaware or plead ignorance about Access to Work, leading to dismissals of disabled workers that we believe could be avoided—not just because they are potentially unlawful, but because they mean a loss of the talents and experience of the disabled worker, because of the impact of unemployment on disabled people and their families, and the requirement to move from earning a living to claiming benefits. The effectiveness of Employment Retention Assessments to help disabled people stay in work also needs to be looked at, both as part of the Independent Living Strategy, and in the light of the requirement to carry out Reasonable Adjustments.

4. (b.4) Specifically, in terms of support for workers with mental health problems, in our experience the difficulty most workers face is actually declaring their mental health disability and that in many cases it is work related. These conditions have either started or worsened due to bullying, harassment and discrimination or other poor working practices. We have also found that black, Asian and ethnic minority workers face double discrimination due to cultural misunderstandings, stereotyping and discrimination. This can lead to unemployment, poverty stress and mental health issues.

Some of our members who are on sick leave due to work related stress are punished by performance procedures instead of employers finding ways of eliminating the causes. To move forward, we for example have asked managers at Ninewells Hospital in Scotland to carry out risk assessments and monitor the effectiveness of the actions resulting from them. Also, by working with the Scottish government they provided £1 m funding to the STUC to get disabled workers back to work. This Buddy System project is being piloted in five organisations including BT and the NHS trust and is a supportive and important initiative, which we would recommend is looked at as an example of positive support that could be provided more widely through Access to Work in the future.

4. (b.5) In terms of making Access to Work fully accessible to disabled people with mental health problems, we believe it is vital that the additional barriers to accessing this support are better recognised and addressed, not least the fact that for a number of mentally disabled people, their condition can prevent them recognising that they have a disability. For example, a union equality representative who was supporting a member in this situation, found that the current procedure, where the employer or the disabled person themselves have to apply to Jobcentre Plus for Access to Work, prevented the union equality representative from gaining playing a more helpful role in gaining the necessary support.

We therefore want to see recognition for workers with mental health problems, whether it is a medical condition they are born with or is developed due to working conditions, and positive ways to support their retention and recruitment at work.

5. Single Equality Act

How does Disability fit in a single Equality Act? Should the "social model", or "medical model" apply for disability? What is the role of the Equality and Human Rights Commission within the single Equality Act?

5.1 In the establishment of the Single Equality Act, we remain very concerned to ensure that the specific focus on disability is included, recognised and effectively addressed. This is the approach needed for all the specific areas of equality covered currently by separate pieces of legislation. There is a serious danger that

the Single Equality Act provides too much of a general overview, rather than identifying the specific forms of discrimination or positive action. Our experience of the early days of the Equality & Human Rights Commission demonstrates the importance of keeping to the forefront the distinctions between different areas of equality and the need to treat them accordingly, rather than addressing "equality" as a general issue. For example, in terms of disability, access, reasonable adjustment and disability-related discrimination are important distinctions, and it is important that the Act addresses the needs of each area to ensure equality for all.

5.2 We agree with advancing the "social model" of disability and not the "medical model". Disabled people's right to independent living is underpinned by the social model which means identifying the barriers to participation, addressing them and changing the environment in order to provide disability access. It is clearly outlined in the Guidance for Public Authorities on Disability Equality Duty that the Duty reflects the social model of disability. This takes the approach that what stops or hinders a disabled person doing something are barriers that society has put in place or chosen to ignore. It is society that disables a person not their impairment. It is therefore necessary that the social model be adopted in the Single Equality Act to empower disabled people and include everyone in the activities of society.

5.3 We support the role of the Equality and Human Rights Commission as set out in the law in terms of advising, promoting, monitoring and enforcing anti-discrimination laws and the promotion of equality in key specific areas. In our experience equality legislation can be effective in setting minimum standards, on which employers working with trade unions can then build through identifying inequalities, addressing discrimination and taking action. The EHRC can greatly assist this process.

5.4 It is also absolutely vital that every area of equalities is adequately resourced in the Equality and Human Rights Commission. Nothing could be more detrimental to the equalities agenda than competition for resources and for a campaigning profile between different areas. Other roles: commissioning new research in all areas, raising awareness of discrimination on all grounds, representing cases, carrying out Inquiries, and as a source of information and guidance are also important. At this stage of its development, we would be concerned to stress the need for the EHRC to ensure the core issues which were very effectively addressed in the EOC, CRE and DRC remain sufficiently high profile alongside the additional areas of equality being covered. The clear focus on the reality of discrimination and the action needed to address it of the former commissions is not currently a clear focus in the EHRC, and we would call for a far greater concentration on the experience of discrimination faced today by the diversity of women, black, Asian & ethnic minorities, disabled people, LGBT, young and older people and those of different religions and beliefs or none, as well as multiple discrimination. We are specifically concerned at the lack of trade union representation on the EHRC Disability Committee.

5.5 We welcome the Office for Disability Issues work on setting the overall disability strategy, raising awareness and improving information provision as well as moving forward the agenda on disability rights. They have an important ongoing role working with disabled people, government departments and disability organisations to provide better services and rights for disabled people. They can continue their role of involving disabled people, providing information and evidence to government, promoting and communicating effective government policy and legislation as specialist in the field of disability within the Single Equality Act.

December 2008

Annex

UNITE—THE UNION: SIX STEPS TO PROMOTE EQUALITY FOR ALL, TO PREVENT & DEAL WITH DISCRIMINATION

The Single Equality Act provides a major opportunity to make our equality law fairer and more effective. This is an opportunity we must seize, or generations into the future will continue to pay the price of discrimination that occurs today. In summary, we therefore call for:

1. AN EQUALITY DUTY FOR ALL: all employers and service providers to promote gender, race, disability, LGBT, religion/belief, and age equality, including recognition of caring responsibilities, a requirement to carry out an equal pay audit, and to ensure equality in public procurement and sub-contracting. The importance of promotion of equality, rather than just addressing discrimination after it has occurred, is fundamental—acting once the damage has taken place is too late. It is our experience that without a clear statutory duty to promote equality, and a right to bargaining, action is piecemeal and mainly driven by negative experiences of discrimination and harassment cases. The Single Equality Act provides a major opportunity to put this right.

2. ESTABLISHMENT OF UNION EQUALITY REPRESENTATIVES: with statutory rights to paid time off, information and training. The limited impact of the equalities laws on workplace practices since the 1970s, when compared with health and safety legislation from the same time, has been in major part due to the role of union health and safety reps and committees. The Single Equality Act provides a major opportunity to put this right.

3. RECOGNITION OF COLLECTIVE DISCRIMINATION AND UNEQUAL PAY: existing anti-discrimination law does not recognise the collective and structural nature of much discrimination and unequal pay and the need for equality impact assessments. This makes it much harder and more complex to address, puts significant pressure on individuals, and means many injustices are not addressed. The Single Equality Act provides a major opportunity to put this right.

4. ENSURING EQUAL OPPORTUNITIES FOR THOSE WITH CARING RESPONSIBILITIES: indirect sex discrimination is an inadequate means of recognising the specific discrimination and under-valuing of caring responsibilities undertaken by both women and men, increasingly at older as well as younger ages. The Single Equality Act provides a major opportunity to put this right.

5. RECOGNITION OF MULTIPLE DISCRIMINATION: existing anti-discrimination law requires separate legal cases on grounds of eg gender and race, without recognising the inter-relationship between them. This lessens the ability to tackle clear discrimination and inequality effectively and fairly. The Single Equality Act provides a major opportunity to put this right.

6. THE LEGAL FRAMEWORK TO INCLUDE THE CLEAR VISION OF EQUALITY eg from the terms of reference of the Commission for Equality & Human Rights: the principles and objectives underpinning our equality legislation need to be set out to ensure it is implemented as intended. A Purpose Clause is central to this. The Single Equality Act provides a major opportunity to put this right.

UNITE strongly supports the response of the TUC, and the above points and more detailed comments are complementary, drawn from our extensive direct experience of representing members at the workplace and in the wider community.

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34. Memorandum submitted by the Confederation of British Industry

1. The CBI is pleased to submit evidence to the Work and Pensions Committee inquiry on the Equality Bill and the steps that the Department for Work and Pensions should take to achieve greater equality. Employers are already convinced of the business benefits of a diverse workforce to fill skills gaps, to attract and retain the best talent and to explore new markets. Businesses are now looking to the Government for assistance and guidance on their responsibilities and limitations: with tight definitions and clear wording, the Government has the opportunity to create a workable and effective piece of legislation. The Department for Work and Pensions must use its experience of the Disability Discrimination Act to inform and shape the new Equality Bill.

2. The terms of reference of this inquiry are wide ranging and this CBI response concentrates on the following key points:

- There is a potential for "scope creep" without tighter definitions of discrimination in the EU non-discrimination directive on equality in goods, facilities and services
- Business will require targeted guidance from the Government to understand their responsibilities under the widening of duties in goods, facilities and services
- Equality through procurement can be effective if the focus is on outcomes not processes
- The CBI supports the Government's efforts to open further the labour market for disabled people
- UK employers are already convinced of the business case for diversity.

There is a potential for "scope creep" without tighter definitions of discrimination in the EU non-discrimination directive on equality in goods, facilities and services.

3. The CBI believes that the draft EU directive on implementing the principle of equal treatment is fundamentally an unsuitable legislative approach to the area of non-discrimination. The horizontal method cannot account sufficiently for the different types of discrimination that require differentiated solutions. We have concerns that the complex drafting, filled with exceptions and conditions, would make the legislation indecipherable to business. Furthermore, we are alarmed at the potential for "scope creep" in the Commission's definitions of discrimination. The European Court of Justice's method of interpretation of existing discrimination definitions at EU level can lead to the widening of the concept of discrimination as set out in the directives. As such, it is essential that definitions are clear.

4. The risk of "scope creep" in connection with the definitions of discrimination is well demonstrated by the *Coleman v Attridge* judgement. The aims and objectives of legislation of this nature are to assist those who are disadvantaged and to improve their access, engagement and fair treatment within society. This case clearly illustrated that no one should feel that they have to accept degrading treatment due to their relationship with a disabled person—in this regard, the judgment fits the directive's aims. However, the implications of this case go further. The reality is that the *Coleman* judgement, by extending the realm of associative discrimination, creates questions about how close the association has to be with the disabled party in order to gain discrimination rights under this legislation. Presumably, greater specification would be necessary, particularly in the areas of:

- the level of care given;
- the relationship with the disabled person being cared for;

— who would determine the status of the relationship.

The Department for Work and Pensions needs to set out clearly how the UK would define these elements.

5. CBI members have expressed concerns about the implications that an extension of discrimination by association would have on UK flexible working regulations. When granting requests, employers might have to give priority to parents of disabled children over parents of non-disabled children, and to carers of disabled people over carers of non-disabled people. There would be a greater risk of accusations of discrimination if individuals consider that they are refused or treated less favourably in relation to a request made for a disabled person. The same situation would potentially arise in relation to carers of elderly people through age discrimination by association. However, provided that an employer can demonstrate that accepting a particular request would prove detrimental to the business, claims of discrimination by association would still fail because the operational requirements were such that no request would have been agreed. On this point, the law would remain unchanged; however, employers will require detailed and unequivocal guidance from the Government on their responsibilities.

Business will require targeted guidance from the Government to understand their responsibilities under the widening of duties in goods, facilities and services

6. Article 4 in the draft EU directive introduces the concept of a service provider having to put in place measures which enable disabled people effective non-discriminatory access to goods and services "by anticipation". This differs from the current UK legislation is this area. Under the goods and services provisions in the Disability Discrimination Act, the duty to make reasonable adjustment arises where the existence of a practice, policy or procedure, or a physical feature makes it impossible or unreasonably difficult for disabled people to make use of the service provided by the service provider. Whilst the current UK provisions are designed to be anticipatory in nature—the duty that service providers owe is to disabled people at large, unlike in the employment sphere where the employer's duty is to a particular disabled person—the EU concept seems to go further. Although the explanatory memorandum to the draft directive states that the concept of "reasonable accommodation" should already be familiar to business—having been established in Directive 2000/78/EC—it fails to note that the concept of "by anticipation" is a new one which will undoubtedly lead to a body of EU case law to determine its meaning. Although the Department for Work and Pensions does not have the lead on this piece of EU legislation, it should make the case for clear definitions to ensure that the individual who gains the right to reasonable accommodation is the person with the protected characteristic. Businesses and service providers will find this legislation incredibly problematic if they are not given adequate assistance by the Government and equality bodies, such as the Equality and Human Rights Commission.

7. CBI members have also expressed concern about the financial and bureaucratic implications for companies of the reversal of the burden of proof in the context of access to goods and services. The CBI recognises the potential difficulty for claimants in proving discrimination in an employment context, where the respondent will often have access to the necessary evidence, and accepts the rationale in the reversal of proof in these discrimination cases. It is not so problematic in the context of employer-employee relationships, where records are more likely to be kept and for longer periods. The sheer volume of transactions occurring between businesses and customers, however, are bound to lead to evidential issues for service providers if they are forced to defend a discrimination claim. As such, both the challenges involved in keeping elements of proof in a customer relationship and the limited administrative capacities of SMEs for this function must be acknowledged.

Equality through procurement can be effective if the focus is on outcomes not processes

8. The CBI believes that the Government's proposal to introduce a single equality duty to replace the existing separate duties on gender, race and disability could help public bodies respond to the requirements more effectively. Streamlining the process could cut bureaucracy and render the different requirements more manageable. However, lessons should be learned from the existing duties before the new single duty is introduced. CBI members believe that the current duties place too great a focus on processes—such as recruitment targets and audits—at the expense of value for money outcomes. Such a situation merely creates compliance rather than commitment. As the Equalities Review recognised, there is little evidence that the public sector duty on race, for example, has been effective in improving outcomes:

> "although it has had value in forcing public authorities to confront some of their shortcomings, it is too bureaucratic and process-laden to provide a really effective vehicle for change".[219]

9. Against this background, there is little evidence that the extension of the duty to the private sector would be necessary or effective. The additional bureaucracy would have a disproportionate impact on SMEs who are unlikely to have the financial and administrative capacities to prove compliance. The CBI believes that the Government should continue to stand firm on this issue and concentrate on creating a workable public sector equality duty.

10. The CBI agrees that procurement can be an effective lever to promote social objectives. It is essential, however, that the Government commits to developing procurement practice that makes clear the requirements placed on contractors. If procurement is to support social goals, the right procurement skills need to be in place. Too many public authorities are still not clear about the relative importance of equality

[219] *Fairness and Freedom: the Final Report of the Equalities Review*, 2007, p. 37.

criteria in the tendering process and still adopt a 'lowest cost' mentality when awarding contracts. Contracts need to be well designed—too many still demand specific processes which have little impact on the overall outcome. Such processes reduce equality duties to a tick-box exercise in compliance. The requirements need to strike a balance between 'making the public pound work harder' and impinging on the private sector business process: to do this, the CBI believes that the requirements need to be related to contract delivery not procedures. The Equality Bill proposals have not yet found this balance, intruding instead into the internal HR structures of the tendering company.

The CBI supports the Government's efforts to open further the labour market for disabled people.

11. The CBI welcomes initiatives designed to help those with disabilities into the workforce. There has been marginal progress made in the last decade: the 2008 Equalities White Paper, *Framework for a fairer future*, reports that the employment rate of people with disabilities has risen from 38% in 1998 to the current figure of 48%. Despite this improvement, however, a disabled person is still two and a half times more likely to be out of work than a non-disabled person. The 2007 Equalities Review further notes that disabled people are not only more likely to be out of work but they are also more likely to exit work and, once out of work, less likely to move back into employment than individuals without a disability.

12. The CBI supported the introduction of the Employment and Support Allowance (ESA) in October 2008 to replace Incapacity Benefit (IB). We believe it can play a significant role in placing those IB claimants that can and want to work in sustainable employment. A shift in ESA assessment to focus on what claimants can do, rather than what they cannot, is appropriate to reflect the change in people's working environments. However, the Government must ensure that medical professionals conducting the Work Capacity Assessment (WCA) have the appropriate occupational health understanding and take into consideration the adjustments employers would need to hire individuals with a fluctuating health condition. It must not be assumed that all individuals with such conditions will be capable of sustained work.

13. People with permanent disabilities can often face physical barriers in returning to employment due to an unsuitable working environment, and employers can face considerable financial costs making appropriate adjustments. As such, the CBI welcomes the proposals to double the Access to Work budget. However, concerns remain that there are no proposals for funding adjustments for individuals on work placements, such as those placed through Local Employment Partnerships. This deficiency creates difficulties for disabled people to demonstrate their potential value to employers.

UK employers are already convinced of the business case for diversity

14. The 2008 CBI/Pertemps Employment Trends Survey shows that 82% of our members have a diversity policy or equality practices in place. One of the most consistent findings over the ten years of this survey is the importance that employers attach to diversity issues and their recognition of both the moral and business imperatives. The CBI/TUC report *Talent Not Tokenism* shows that promoting diversity in the workplace need not be expensive or time-consuming but does require a commitment from the top to trigger a change in culture and attitude. However, employers still face barriers: for the fifth consecutive year, the survey shows that the lack of applicants from disadvantaged groups is still the greatest obstacle to creating a more diverse workforce. Furthermore, too much regulation (27%) and lack of practical support from equality bodies and the Government (11%) were also highlighted as hurdles to overcome. These findings illustrate the key role that the Department for Work and Pensions can play in creating a clear and workable legislative framework—with responsibilities and opportunities are clearly defined—in which employers can easily comply with regulations and take positive action as necessary.

Case Study: Intercontinental Hotels Group (IHG)

Talent Not Tokenism (CBI/TUC)

When the law changed in 2004 to require services to be more accessible to disabled people, IHG trained all its employees in customer service and disability awareness, as well as looking at physical changes to its hotel premises. Following its customer-focused work, IHG's UK human resources team decided to target disabled job seekers as potential new recruits, believing they could be a source of new talent for the company. Instead of just advertising available jobs and hoping disabled people might apply and be suitable, disabled people looking for work were given the opportunity to have relevant training and support before, during and after the application process.

Working in partnership with Jobcentre Plus and the Royal National Institute of Blind People, IHG held a pilot recruitment open day in January 2006. It was attended by over 70 people with a range of disabilities. Almost half went on to be interviewed for jobs at the hotel, and four were successful—two house-keeping assistants, a receptionist and a hall porter. Twelve more people attended a two-week pre-employment course before being interviewed. This course was designed to provide potential applicants with a variety of useful transferable skills, including interview techniques, customer service training and certificates in health and safety and basic food hygiene. At the end of the course, these 12 were also interviewed for specific positions and four secured employment. Those who didn't immediately secure positions were offered a six-week work placement at the hotel which resulted in a further linen porter's position being filled. The model has been repeated in partnership with Jobcentre Plus and Shaw Trust in the London area, and there are plans to extend it to other areas too.

IHG makes the point that reasonable adjustments don't have to be complicated or expensive. Often, it is working practices that need to change slightly. For example, one person recruited as a hall porter has Asperger syndrome—a form of autism—affecting the way a person communicates and relates to others. The following adjustments were made for him:

— Task sheets were adapted to include an expected timescale for each task

— An extra clock was put in place in the lift area to help with time management

— A clipboard was implemented at reception to record guest requests to help deal with an initial reluctance to use the porter's radio

— A radio holder was provided to make it easier to use the radio.

It is important to understand the disabled person's needs and potential—but removable—barriers to their carrying out the duties of the job. This is one reason why establishing close working relationships with specialist organisations such as RNIB and Shaw Trust has been fundamental to the overall success of the initiative. IHG acknowledges that the expertise of specialist organisations has enabled IHG not only to recruit disabled people, but to retain them by helping find answers to what adjustments may be required to do a job.

Additional workshops at the hotels involved—ahead of each open day—have been used to help departmental managers understand more about employing disabled people and to make sure they knew what support was available. Now, managers are more likely to take the initiative when recruiting, training and dealing with different disabilities, and accessing additional information from disability groups or the internet.

IHG is sure the business has benefited from these positive attitudes and from the recruits themselves. As well as receiving recognition by winning RADAR's People of the Year employment Award in 2007, the programme has:

— Helped IHG to tap into a wider pool of talent

— Developed line managers

— Promoted team-work

— Reduced absence and employee turnover.

Ultimately, it has demonstrated IHG's commitment for recognising employees as individuals and for what they can bring to the business, which every employee can appreciate—not just those with disabilities.

Christopher Rawstron, Vice-President Operations UK and Ireland, says: "Being a global hospitality business, IHG has one of the UK's most diverse workforces and this is something we are proud of. Recruiting disabled people allows us to access a wide and rich pool of talent, and we are attracting fantastic staff to our great teams. Our disabled employees are typically committed and loyal to their jobs, so we are very pleased to have them on board."

Case Study: Royal Bank of Scotland Group

Talent Not Tokenism (CBI/TUC)

RBS takes diversity seriously and is very open about its policies, which are available on its website alongside information about the composition of its workforce and the results of its staff satisfaction survey. The Group's "Managing diversity" policy clearly sets out the Group's commitment to valuing and promoting diversity in all areas of recruitment, employment, training and promotion, and the responsibilities of the Group as employer and of all employees. It also challenges myths about different groups. Compliance with the policy is built into the Group's performance management framework and RBS expects similarly high standards from its suppliers.

One of the areas where RBS aims to go beyond the requirements of the law is the removal of barriers for disabled people, whether employees or customers. While the classic image of a disabled person is a wheelchair user who has been disabled since birth or childhood, that is far from the reality.
Practical steps the company has taken include:

— Interviewing every disabled job applicant who meets the minimum standards of the vacancy

— Giving a written commitment to ensure staff who become disabled while they work at the company are given every chance to remain in post

— Working in partnership with employees to develop reasonable and practicable workplace adjustments to allow them to perform their jobs effectively—for example by tailoring induction programmes to individual needs

— Ensuring intranets meet accessibility standards just as much as the Group's externally focused websites

— Setting up forums of disabled staff and using them to suggest and monitor changes.

There have been physical adjustments too. In 2006, RBS looked in detail at how offices and the network of branches worked for disabled people—employees and customers. Having consulted on what was needed, the company introduced measures including audio induction loops, automated opening and closing doors, disabled car parking bays, more use of handrails and improved lighting in every branch it could. Every new branch is built to incorporate these adjustments.

The company has also found that training is important. As well as broad training on diversity awareness and dignity at work, there are two mandatory online training sessions a year for every employee on what the Disability Discrimination Act means, focused on how staff interact with disabled customers, but which obviously has an impact on behaviour towards colleagues too. There is extra training and advice for line managers.

This approach has won recognition and several awards for the Group and its constituent businesses, for example, from the Employers' Forum on Disability. However, although the awards are welcome, ultimately the Group Head of Diversity, John Last, says that there are clear "bottom-line" benefits to RBS's work on disability: "Diversity means attracting everybody regardless of disability and removing all barriers to employment. For RBS, this is about making an investment to get the best people".

December 2008

35. Memorandum submitted by the UK Drug Policy Commission

1 Introduction/Summary

1.1 The UK Drug Policy Commission (UKDPC) is an independent non-campaigning body providing objective analysis of evidence related to UK drug policy. We aim to improve political, media and public understanding of drug policy issues and consider the options for achieving an effective, evidence-led response to the problems caused by illegal drugs. A list of our Commissioners is attached. We welcome the opportunity to submit this memorandum in the light of recent research conducted for the Commission relating to the employment of people with drug problems.

1.2 This memorandum invites the Work and Pensions Committee to consider:

- Whether the definition of disability as understood through the disability discrimination legislation should be clarified so as to explicitly include substance misuse addiction.
- The issue of fairness and equality for those who experience unequal treatment and discrimination on the grounds of their substance misuse addiction or dependence and how this is acknowledged in the proposed Equalities legislation and statutory guidance.

2 Background

2.1 The UKDPC has recently completed a review looking at how to get recovering problem drug users ("addicts") into jobs.[220] As part of this we commissioned research examining (i) social security and relevant aspects of employment law and policy and (ii) barriers to employment for this group.[221]

2.2 At the heart of our concerns is the conclusion that, unlike mental health and physical disabilities, society at large and legislation does not yet consider substance addiction sufficient grounds to warrant its inclusion in the various "protective" and enabling legislation to address unequal treatment and discrimination (Yet legislation does exist that singles-out drug users for additional requirements and conditions. The Welfare Bill currently going through Parliament looks set to add to this). The scale and nature of substance addiction suggests a review of this exclusion is overdue.

2.3 A concern is that if this group is not explicitly recognised by the legislation, it may reinforce and even heighten the inequalities they already face. Drug misusers (especially those dependent on heroin and/or crack cocaine) are a group which are more likely to suffer from a range of health and social inequalities including social deprivation, poor physical and mental health, poor housing and education and employment opportunities.

2.4 Furthermore, the legislation risks having a differential negative impact on particular sections of the community who we know are more likely to develop serious drug problems. Young men who live in areas of social deprivation are particularly at risk, as are certain ethnic communities.

[220] UKDPC (2008), *Working Towards Recovery: Getting Problem Drug Users into Jobs*, London: UKDPC.
[221] Harris N (2008), *Social Security and Problem Drug Users: Law and policy*, London: UKDPC. Spencer J *et al* (2008), *Getting Problem Drug Users (Back) Into Employment*, London: UKDPC.

3 Single Equality Act: How does disability fit in a Single Equality Act? Should the "social model", or "medical model" apply for disability?

3.1 We are aware there has been much debate about the definition of disability. We are not sufficiently competent nor do we have sufficient evidence to comment on the merits or drawbacks of placing substance addiction into either the "social" or "medical" model. In reality, consideration of substance addiction has been excluded from either perspective and hence is not considered in any discussion about unequal treatment and discrimination. In part this is due to the complicating factor of criminality, particularly associated with some illegal drug addiction.

3.2 As the United Nations and World Health Organization have commented:[222]

> "The notion that drug dependence could be considered a "self-acquired disease", based on individual free choice leading to the first experimentation with illicit drugs, has contributed to stigma and discrimination associated with drug dependence. However, scientific evidence indicates that the development of the disease is a result of a complex multi-factorial interaction between repeated exposure to drugs, and biological and environmental factors."

Furthermore:

- a range of "impairments" are associated with drug addiction, which is medically classified as a mental and behavioural disorder;[223]
- it has been estimated that between 40-60% of an individual's vulnerability to addiction is attributable to genetics.[224] Other risk factors will include various social and environmental ones such as deprivation, etc;
- the Academy of Medical Sciences has examined evidence about brain science and addiction and has concurred with the view that addiction is now considered to be a "chronic relapsing brain disorder" with associated neurobiological changes or differences in the brain.[225]

3.3 Many people incorrectly assume that the disability discrimination legislation does in fact cover drug addiction. Even the recent Impact Assessment for the Welfare Reform Bill states, "Problem drug use is an internationally recognised mental illness, so all problem drug users are covered under the Disability Discrimination Act. Therefore this policy will be targeting a proportion of the disabled client group".[226]

3.4 Nevertheless, the disability discrimination regulations explicitly state that "addiction to alcohol, nicotine or any other substance is to be treated as not amounting to an impairment for the purposes of the Act".[227] Of course some impairments which may come as a consequence of addiction (eg other mental or physical ill-health) are covered by the legislation. However, substance addiction *per se* is excluded. (Although, an anomaly of the regulations is that addiction originally caused by prescribed drugs is covered, and is therefore legally recognised as a disability).

3.5 We invite the Committee to consider the above anomalies and to consider if and how impairment due to substance addiction should be included within the legislation (Equalities Bill and the DDA), including more explicit recognition of this disorder within the definition of disability.

4. Quality in Employment: How Effective has DWP been in achieving equality in employment? How would it have to change to achieve greater equality in employment?

4.1 In a major study of people in England seeking help for their drug problem, nearly 80% were found to be unemployed.[228] With an estimated 400,000 problem drug users (PDUs) across the UK, many with extremely complex needs, the scale of the challenge facing those in drug treatment and employment services is considerable.

4.2 There is much anecdotal evidence that those suffering from substance addiction face considerable prejudice and negative attitudes towards their condition, by employers and others. In the research conducted for us to gauge the attitudes of employers, two-thirds of employers said they would not employ a former heroin or crack cocaine user even if they were otherwise suitable for the job.[229] Although this was a modest sample of 135 employers, it was amongst those voluntarily responding. There is every reason to suspect other employers would have similar if not more discriminatory attitudes.

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[222] United Nations Office on Drugs and Crime and World Health Organization, *Discussion Paper—Principles of Drug Dependence Treatment*, 2008.
[223] World Health Organisation, *The ICD-10 Classification of Mental and Behavioural Disorders*, 2007. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)
[224] National Institute of Drug Abuse (US Department of Health & Human Services), *Comorbidity: Addiction & other mental illnesses*, Research Report 2008.
[225] Academy of Medical Sciences, *Brain Science, addiction and drugs*, 2008.
[226] DWP, *Impact Assessment of the Welfare Reform Bill*, 2009, (para 360). http://www.dwp.gov.uk/resourcecentre/welfarereform-bill09-ia-intro.pdf (accessed 13/02/09)
[227] The Disability Discrimination (Meaning of Disability) Regulations, Statutory Instrument 1996 No 1455.
[228] Jones A *et al* (2007), The Drug Treatment Outcomes Research Study (DTORS): Baseline report, Home Office, Research Report 3, London: Home Office.
[229] Spencer J *et al* (2008), Getting Problem Drug Users (Back) Into Employment, London: UKDPC.

4.3 There is also misunderstanding and lack of knowledge among employers (and others) about people who are using prescribed medication to help them recovering from substance addiction, resulting in a resistance to employ them. In one Scottish study, those on methadone (used to treat the addiction of heroin and other opiates) came at the top of a list of "hard to employ" categories in terms of employers saying they would not employ people from that group.[230]

4.4 The Government and DWP are taking steps through the Welfare Reform Bill to help those with drug problems into treatment and into work. We have an open mind as to the likely results of such measures and await research as to their impact. However, without parallel steps to address negative and unfair employer attitudes and behaviours, our research suggests improved employment outcomes are likely to be limited.

4.5 We conclude that the statutory guidance which is likely to accompany the Equality legislation should specifically address the unequal treatment of those suffering/recovering from substance addiction alongside requirements to address inequality experienced through other disabilities.

5. The Public Sector Equality Duty: How does the Department fare in promoting equality and tackling discrimination? How could procurement be made a more effective lever for equality outcomes?

5.1 Our research carried out into employer attitudes towards employing those with substance addiction problems revealed a handful of respondents claiming that some public contracts specifically and unfairly excluded the employment of those with drug problems and/or certain criminal histories. We do not know how widespread this is or the details. There were also concerns that the new Independent Safeguarding Authority regime might have a disproportionate impact on the drug treatment sector due to the many recovering/former drug users who are currently employed there.

5.2 We would urge the DWP along with the Cabinet Office and/or the Office of Government Commerce to undertake a review of the extent to which public procurement/contract requirements unfairly exclude those people with substance addiction histories and/or criminal records and the extent to which procurement policies can support those recovering from drug problems.

February 2009

Annex

UK DRUG POLICY COMMISSIONERS

The UKDPC brings together senior figures from policing, public policy and the media along with leading experts from the drug treatment and medical research fields.

Dame Ruth Runciman (Chair): Chair of the Central & NW London NHS Foundation Trust & previously Chair of the Independent Inquiry into the Misuse of Drugs Act and member of the Advisory Council on the Misuse of Drugs.

Professor Baroness Haleh Afshar OBE: Professor of Politics & Women's Studies, University of York.

Professor Colin Blakemore FRS: Professor of Neuroscience at the Universities of Oxford and Warwick and Chair of the Food Standard Agency's General Advisory Committee on Science.

David Blakey CBE QPM: formerly HM Inspector of Constabulary, President of ACPO and Chief Constable of West Mercia Police.

Annette Dale-Perera: Director of Quality at the National Treatment Agency for Substance Misuse.

Baroness Finlay of Llandaff: Professor of Palliative Care, University of Wales Cardiff & Former President of the Royal Society of Medicine.

Daniel Finkelstein OBE: Comment Editor at *The Times*.

Jeremy Hardie CBE: Former Chair and trustee of Esmee Fairbairn Foundation.

Professor Lord Kamlesh Patel OBE: Head of the Centre for Ethnicity & Health at University of Central Lancashire & Chairman of the Mental Health Act Commission.

Adam Sampson: Chief Executive of Shelter.

Professor John Strang: Director of the National Addiction Centre, Institute of Psychiatry, Kings College London.

Professor Alan Maynard OBE: Professor of Health Economics and Director of the York Health Policy Group, University of York and Adjunct Professor, University of Technology, Sydney, Australia.

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[230] Scott G and Sillars K (2003) Employers' Attitudes to Hard-to-employ Groups, Glasgow: Scottish Poverty Information Unit.

36. Joint memorandum submitted by National AIDS Trust, Terrence Higgins Trust and Rethink

Recommendation

National Aids Trust (NAT), Terrence Higgins Trust (THT) and Rethink recommend that the forthcoming Equality Bill prohibit the use of pre-employment health-related questions which are not directly relevant to the candidate's ability to do the job they have applied for.

Introduction

NAT, THT and Rethink would like the Government to use the Equality Bill to prohibit the use of pre-employment health questionnaires before the offer of a job has been made.

Sadly people living with HIV or with mental illness still face discrimination; employers often do not understand that today someone living with such conditions can have a fulfilling and busy career. The lack of understanding about such stigmatised conditions and the advancement of treatment means that many employers will discriminate against people with HIV, mental illness or other disabilities, once disclosed, even if they are the best candidate for the job.

In the UK while there is no law that imposes an obligation on an employee (or a prospective employee) to provide specific information on health, there is also no law to stop an employer from asking health related questions. When people apply for a job, there may be questions on the application form about medication or having a medical condition. They may also be asked whether they have a disability. In both the United States and a significant number of EU member states such questions are unlawful—we are recommending a similar prohibition in the UK.

A recent Rethink survey of more than 3,000 mental health service users found that half of the respondents felt that they had to hide their mental health problems and 41% were put off even applying for jobs because of the fear of discrimination from employers.[231] People with HIV also repeatedly cite the job application process and fear of health or disability-related questions as a deterrent to seeking or changing jobs.[232] Disabled people in DWP research identified recruitment as the most common source of discrimination.[233]

It is estimated that fewer than 50% of people diagnosed with HIV are in paid employment—with the result that about one in three report not having enough income to cover their basic needs. People with mental illness have the highest "want to work" rate of any group of people with disabilities.[234] Yet the actual employment rate for this group is one of the lowest: 13.3% compared to 59% for those with difficulty hearing.[235]

The current reforms of the benefits system are designed to encourage people with disabilities back into appropriate work where possible. Also, Public Service Agreement 16 commits the Government to improving employment rates for people with severe mental illness. Whilst we strongly share this ambition to increase employment amongst disabled people, and thus reduce poverty and social exclusion, it will not succeed if we focus only on disabled persons and ignore barriers amongst employers.

Continuing Discriminatory Attitudes amongst Employers

The need for this protection is illustrated by the Chartered Institute of Personnel and Development (CIPD) findings from 2003 that discovered that more than 60% of employers said they disregarded applications from people with drug or alcohol problems, a criminal record, a history of mental health problems or incapacity. More than half of respondents said nothing would persuade them to recruit from these "core jobless" groups.[236] Furthermore, research carried out by Rethink highlights the fact that fewer than four in 10 employers would consider employing someone with a history of mental health problems.

If employers were only permitted to ask people to fill out a health questionnaire after the offer of a job had been made, this would guard against this discrimination and make discrimination when it occurs much easier to prove. We believe it would have a substantial impact in encouraging people with disabilities, especially those which are stigmatised, back into employment.

This recommendation was also made by the Disability Taskforce and then again by the Disability Rights Commission in 2003.[237]

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[231] Rethink, *Stigma Shout 2008*.
[232] See for example *Outsider Status* NAT/Sigma Research 2005.
[233] *Disabled for life, attitudes towards and experiences of disability in Britain* DWP 2002.
[234] Social Exclusion Unit (2004) *Mental Health and Social Exclusion*.
[235] UK's Office for National Statistics (Sept—Dec 2006) Labour Force Survey—figures quoted for people of working age only.
[236] CIPD (October 2005) *Labour Market Outlook: Survey Report Summer/Autumn 2005*.
[237] *Disability Equality: Making it happen* Disability Rights Commission April 2003.

Case Studies

This example from THT's report *21st Century HIV* illustrates the discrimination experienced in the job application process:

> "Some time ago I did experience some discrimination in the first stages of the application process when applying for a job. In three different applications I got through the interview stages and I got to the point of doing the medical tests you need when you are practically in and have the job, but for some reason things didn't go any further. Since then I've gotten to the stage where I could go to interviews and I haven't, because of my fears, I suppose, of going through the same thing."

The example below is from Rethink's recent report, *Breaking Down the Wall*,

> "I have an honours degree in Education but never got to teach in spite of many interviews. At this point I had only been in the mental health system for less than two years. The Jobcentre made me re-train and I did a Business Admin course, but I couldn't even get a job in filing after 86 applications. I felt useless, rejected and the motivation and enthusiasm I had struggled so hard to retain, was fast disappearing.
>
> It had a huge impact on my mental health. I lost all belief in myself and seemed to lurch from one mental health crisis to another. I felt as if I had diagnostic labels stamped on my head and when people approached me and saw them—they turned away."

Health-related Questions and Deception

If someone lies in a job application in relation to their health status and this is later discovered, they could lose the job (this is called a breach of mutual trust). Research reveals that one in 10 employers has withdrawn a job offer because the applicant had lied or misrepresented their health situation on the health-screening questionnaire. 7% of employers have dismissed an employee while in employment for the same reason. Withdrawn job offers or dismissal on these grounds is twice as common in large organisations.[238] This is particularly relevant to people living with HIV or with mental illness as people's experience of stigma and discrimination mean that some are unwilling to disclose their status on health-screen questionnaires in advance of a job offer being made.

How would a Prohibition on Pre-employment Health-related Questions Work in Practice?

An individual's health and disability may well be relevant to his or her suitability for a particular job. There is a legal obligation not to discriminate on grounds of disability but even where an employer is willing to provide reasonable adjustments it may not be possible for someone to fulfil a particular role. There is therefore a place for appropriate and relevant health-related questions (and medical examinations) as part of some recruitment processes.

We are not arguing that such questions should never be asked—but most health- or disability-related questions should only be asked after a conditional/provisional job offer has been made. There could then be cases where a job offer is withdrawn because of health-related concerns or because reasonable adjustment for a disability is not possible. The process would be transparent, and where there is disagreement as to the decision, further consideration or mediation are possible, and complaint if appropriate to an Employment Tribunal in instances of discrimination.

In limited circumstances, to be clearly defined, it could be appropriate to ask health-related questions in advance of a job offer, where a particular state of health is absolutely necessary for the specific role: where, for example, there is an absolute prohibition on persons with certain health conditions taking on particular healthcare roles.

Other National Jurisdictions

Prohibition of pre-employment health-related questions is found in a significant number of comparable developed countries. For example in many European countries (France, Spain, Belgium, Italy, the Netherlands, and Portugal) there are laws prohibiting employers from asking job applicants irrelevant medical questions. The below set out models in several European countries:

Spain

In Spain, the Law on Occupational Risk Prevention (Law 31/1995) does not specifically require job applicants to declare a disability, unless it impacts adversely on the performance of the job. This is interpreted as indicating that health-related questions are illegal in Spain.

[238] *Labour Market Outlook: quarterly survey report*—Autumn 2007 (2007) Chartered Institute of Personnel and Development.

France

Under the terms of the Law of 12 July 1990, employers do not have the right to ask health-related questions in job interviews. If such a question is asked, candidates have the right to give incorrect information, without this being used against them if their condition are disclosed or discovered at a later stage. In addition, job applicants may make appeal to the Labour Inspectorate.

Italy

In Italy, employers are not allowed to ask health-related questions during a job interview, unless a condition would impact adversely on the candidate's performance of the job.

Belgium

In Belgium, article 11 of the Collective agreement (no.38) provides that the private life of the worker should be protected. This has been interpreted as indicating that an employee does not have to disclose a disability, or their HIV status. The Law regarding medical examinations in the framework of an employment relationship confirms this interpretation, as it provides that HIV tests and genetic tests are explicitly forbidden, although a Royal Decree may authorise exceptions in certain cases.

Portugal

The New Portuguese Labour Code that came into force on 1st December 2003 forbids medical examinations in the workplace, except those necessary for protection of third parties or the worker themselves. This can be interpreted as indicating that HIV testing for jobs is illegal in Portugal.

The Netherlands

Since 1998, it is unlawful for employers in the Netherlands to ask health-related questions in job interviews. In addition, the Dutch Medical Examinations Act provides that a medical examination of a future employee may only take place in regard to functions for which special medical requirements are required. In such circumstance, the medical examination must be limited to the purpose for which it is deemed necessary. This can be interpreted as indicating that HIV testing for jobs is considered unlawful in the Netherlands.

It is not only in Europe that the UK is behind in this area. In the United States employers cannot ask people if they have a disability until after a job offer has been made. The Americans with Disabilities Act 1990 states that employers:

> "shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability"

Pre-employment questionnaires are only allowed if they relate to "the ability of an applicant to perform job-related functions." This ensures that it is easier to recognise cases where employers have discriminated against a potential applicant: 16,000 charges are filed under the Americans with Disabilities Act every year.[239]

Conclusion

NAT, THT and Rethink all share a commitment to supporting as appropriate those with stigmatised disabilities such as HIV or mental health problems back into work. Too many people in the UK are consigned to unemployment, benefit dependence and poverty through no fault of their own but simply as a result of society's prejudice and stigma.

Irrelevant and inappropriate health-related questions prior to job offer are a major deterrent to job application for those with stigmatised conditions. Prohibiting such questions will encourage people with disabilities back into work, deter discriminatory behaviour from employers, and where discrimination does take place, make it much easier to identify and address. Prohibiting such questions will not force employers to appoint someone unable, even with reasonable adjustments, to fulfil the role.

About NAT, THT and Rethink

NAT is the UK's leading charity dedicated to transforming society's response to HIV. We provide fresh thinking, expert advice and practical resources. We campaign for change.

THT is the UK's largest sexual health and HIV charity, with over 30 service centres across England, Scotland and Wales, providing both direct services and policy and campaigning based on our experiences.

[239] DWP Research Report 2002.

Rethink, the leading national mental health membership charity, was founded over 30 years ago to give a voice to people affected by severe mental illness. Today, with over 7,800 members, we remain determined that this voice will continue to be heard. We help around 50,000 people every year through our services, support groups and by providing information on mental health problems.

February 2009

37. Supplementary memorandum submitted by the Department for Work and Pensions

WHAT LEGAL ADVICE HAS THE DEPARTMENT RECEIVED ON THE IMPLICATIONS OF THE MALCOLM AND COLEMAN CASES?

Malcolm

Legal advisers within the Department provided advice on the implications of the *Malcolm* judgment on the operation of the disability-related discrimination provisions in the Disability Discrimination Act 1995. They advised on the impact of the judgment for disabled people: that it is now more difficult for a disabled person to demonstrate a case of less favourable treatment which arises from the person's disability. They also provided advice on the options for disabled people to pursue a claim of discrimination under other provisions of the Act: the direct discrimination and reasonable adjustment provisions.

They have also advised on the options for legislating to ensure that protection from disability-related discrimination meets the policy objective that existed prior to *Malcolm*. That objective is to provide an appropriate balance between enabling a disabled person to demonstrate relatively easily, that they have experienced less favourable treatment for a reason related to their disability and the opportunity for the duty holder to justify that treatment.

In preparing options for legislation, the Department sought legal advice from external Counsel, who is experienced in discrimination law, on the operation of indirect discrimination and the potential implications if it were applied to disability. The advice informed the proposal, which the Government consulted on recently, to adopt the concept of indirect discrimination for disability in the Equality Bill.

Coleman

Departmental legal advisers and Treasury Solicitors provided advice on the circumstances of the case of *Coleman v Attridge Law* and on the Government's evidence to the European Court of Justice (ECJ). Treasury Solicitors with the assistance of the Department instructed external Counsel to provide advice to the Government on its evidence.

Departmental legal advisers provided advice on the Advocate General's Opinion and on the implications of the ECJ's judgment for domestic disability discrimination legislation. In particular, they advised that the judgment means that the UK disability discrimination legislation does not now meet the requirements of the EU Framework Employment Directive in respect of providing protection, in employment and vocational training, from direct discrimination or harassment that arises from a person's association with a disabled person. They also provided advice on the fact that the Court's judgment would have direct effect in respect of associative direct disability discrimination against, or associative disability-related harassment of, an employee of a public entity. Further advice was provided on the "Marleasing" principle, under which domestic tribunals and courts could read their own interpretation of the ECJ judgment into domestic law; the issue of claims for Francovich damages; and the possible actions of the Employment Tribunal in Ms Coleman's case.

WHAT CRITERIA IS USED TO DECIDE WHAT TO PAY FOR IN ACCESS TO WORK CLAIMS; AND WHAT IS THE FINANCIAL CAP, IF ANY?

Access to Work (AtW) is available to fund the additional costs that someone may have at work as a consequence of their disability.

The first step with any claim to Access to Work is to identify exactly what support an individual needs to be able to do particular job. In some cases this can be done by the AtW adviser in discussion with the customer and where appropriate their employer, for example deciding if someone needs travel to work help.

Where support cannot be easily identified in this way the AtW adviser will arrange for an assessment of the support needs by an appropriate external expert. The assessment report produced includes details of the actual type of equipment or other support that would be most beneficial.

In all cases AtW will fund the most cost effective solution that will provide the minimum level of support. This does not mean that AtW will only fund the cheapest support but equally it would not be a cost effective use of the limited AtW budget to fund the most expensive support if something less costly would be adequate and allow the individual to effectively do their job. There is no financial cap on any support—AtW will fund what is required within these guidelines.

Once funding has been agreed with the customer the actual support is purchased by either the customer or their employer. If a customer (or employer) would like to buy more expensive support they are free to do that but would have to pay the additional costs themselves. In some areas AtW or the employer themselves may have a call-off contract for certain types of support. In those cases AtW would usually fund up to the normal contract price. The individual is not bound to use the contractor but would have to fund any additional costs themselves if they chose a more expensive supplier.

In the case of BSL interpreters Jobcentre Plus has provided AtW advisers with guidance about appropriate levels of interpreter skill and numbers of interpreters required depending on the situation. So for example someone working in a sensitive job where accuracy of interpretation is crucial (for example someone dealing with members of the public in potentially difficult situations) would usually require an interpreter with the highest level of qualifcation. Similarly AtW will fund 2 interpreters when that is appropriate due to the length or complexity of meetings etc. AtW never advocate the use of untrained interpreters. The level of interpretation is something that the AtW adviser will decide in discussion with the customer and employer.

In the following circumstances the employer or the customer is expected to contribute towards the costs:

— if the individual has been with the same employer for more than 6 weeks and the funding is for equipment or adaptations to premises we expect the employer to pay all costs below £300 and 20% of the costs between £300 and £10,000. AtW pays 100% of the costs over £10,000 and all of the costs for a support worker or travel to work;

— if the employer would gain a more general business benefit from the support, for example a piece of equipment that could be used by all employees, we would negotiate a contribution from the employer; and

— if the customer would be able to use the support outside work, for example an electric wheelchair that they could use at home, we would negotiate a contribution from the customer.

AtW is not intended to remove the employer's responsibilities under the Disability Discrimination Act or Health and Safety legislation, nor is it intended to fund support at home as this is the responsibility of the Local Authorities.

AtW cannot be used to fund medical aids as these are the responsibility of the NHS. There are a couple of exceptions: in—ear hearing aids (the NHS only fund out of ear hearing aids which are not suitable for all types of work) and some more specialist electric wheelchairs which again are not normally available through the NHS.

February 2009

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38. Supplementary memorandum submitted by the National AIDS Trust

NAT would like to provide the Work and Pensions Committee with updated information on our response to the *Malcolm* judgment, referred to in our original submission to the Committee at para 6.

Subsequent to our initial submission there was more detailed consideration within the disability sector on how best to restore effective protections from discrimination for disabled people. Whilst the introduction of provisions on indirect discrimination, as proposed in our original submission, is still strongly supported, we also believe the Government should revise the definitions of disability related discrimination so as to restore the originally intended scope of protection. Below are the key recommendations we later made to the consultation on the *Malcolm* judgment conducted by the Office for Disability Issues—*Improving protection from disability discrimination*:

Recommendation: The Government should adopt the concept of indirect discrimination for disability but this should be in addition to, not instead of, reforming disability related discrimination in the light of the *Malcolm* judgment.

Recommendation: The Government should use the opportunity the Equality Bill presents to introduce the necessary provision for reforming disability related discrimination, as set out by RADAR, which states:

> "A person discriminates against a disabled person where he carries out an act which puts that person at a substantial disadvantage for a reason connected with their particular disability, and which cannot be justified as being a proportionate means of achieving a legitimate aim."

Recommendation: If the Government adopts its proposals on indirect discrimination, specific provisions should be inserted into the Bill to:

— clarify that indirect discrimination applies in relation to single acts or omissions;

— clarify that in relation to disability the relevant comparators are people in the same or similar circumstances but who do not have a disability or face issues connected with a disability; and

— provide that knowledge of the claimant's disability is not relevant for the purposes of establishing whether or not indirect discrimination has taken place.

February 2009

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39. Supplementary memorandum submitted by the Public Interest Research Unit

1. This memorandum was submitted subsequent to the Public Interest Research Unit (PIRU) giving oral evidence to the Committee, and is designed to supplement PIRU's answers to questions 70, 90, 95–99, and 122. It addresses enforcement of the unlawful discrimination provisions; the Disability Equality Duty; PIRU's proposals for different specific duties on different organisations; and the consequences of *Malcolm*.

2. Employment Tribunal Recommendations (Q 71)

2.1 We consider that tribunals should have the power to make recommendations in all employment cases; and that:

(a) There should be a provision, in materially the same terms as section 17A(5) DDA, and applicable across the employment field, giving the tribunal the power to increase the amount of compensation when the employer fails, without reasonable justification, to comply with a recommendation.

(b) In addition to a power directed at obviating or reducing adverse effects (related to the complaint) on the complainant, there should (bearing in mind, for example, that the complainant will quite often no longer be employed by the respondent) be a power to make recommendations aimed at preventing further discriminatory acts against any employee, ex-employee, and/or applicant for employment.

(c) The power to make recommendations should be linked in practice (and perhaps in law) with Equality and Human Rights Commission (EHRC) enforcement powers. For example, a failure to comply with a tribunal recommendation could provide a basis for the EHRC to require an action plan on the part of the employer in question.

(d) There should be a power to order reinstatement for discriminatory dismissal.

3. Transferring the best of the Disability Equality Duty (Q 90)

Attention to all strands

3.1 There appears some danger that "due regard" could be understood, at least in practice, as something which can be achieved across strands (in a summative fashion), rather than having to be had in the case of each strand. Of particular concern, 'less popular' strands (in an organisation or in general) might be tokenistically dealt with in the multi-strand Equality Impact Assessments.

Need to eliminate discrimination

3.2 We would argue that the requirement (in the Disability Equality Duty and as proposed for the Single Equality Duty) to have due regard to "the need to eliminate discrimination that is unlawful . . ." is unnecessarily restrictive; and that it would be preferable to require "due regard to the need to eliminate adverse discrimination, including that which is unlawful under the Act." Otherwise, the duty would appear to not encompass, for example, avoidable and detrimental discrimination which would be unlawful but for a weak (but sufficient in law) justification.

A need to set objectives in the Disability Equality Scheme

3.3 The 2005 disability specific duty regulations do not require an organisation to set objectives in its Disability Equality Scheme. Regulation 2(3)(c) does provide that the Disability Equality Scheme shall include a statement of "the steps which that authority proposes to take . . .". Such steps, however, should be directed at achieving objectives (at a lower level of generalisation than the aspirations set-out at section 49A(1)); the steps would not, in themselves, constitute objectives.

3.4 One of the steps might, for instance, be "to interview all staff on sick leave". Without objectives to which this is directed, however, it could promote equality or discrimination. Some managers, for example, might use the interview to gather evidence that an employee will not be able to return to an unchanged work situation within a reasonable time, and should, therefore, be dismissed. Others might, in contrast, use it as an opportunity to discuss reasonable adjustments that could enable an employee to return to a changed work situation.

4. Enforcing the Equality Duty

Compliance problems

4.1 Even if compliance with the General Duty is taken to require no more than Equality Impact Assessments of proposed policies, the available research indicates that most public authorities are likely to have been non-compliant in relation to the majority of their policies.

It is notable, for example, that the Commission for Racial Equality (CRE)—which should, perhaps, have been the exemplar of best practice—conducted, according to our *Race Back from Equality* report, no Race Equality Impact Assessments on any of its HR policies and procedures between 2001 and 2007.

Past enforcement

4.2 It does not appear possible for the Equality and Human Rights Commission to effectively monitor and enforce compliance, with a single equality duty, on the part of around 44,000 public authorities. It appears relevant, for example, that (according to our aforementioned report) the CRE, between 1 January 2001 and 1 June 2006, did not challenge, by means of a claim for judicial review, any failures to meet the general race equality duty (but did, to good effect, intervene in *R (Elias) v Secretary of State for Defence*).

4.3 There are also serious doubts as to whether judicial review is a sufficient means to enforce the general duty, including, in particular, because a quite limited number of individuals are likely to risk what, according to the Public Law Project, could be £20,000 in costs. However, where organisations have taken (or supported) cases, judicial review, encompassing the question of compliance with the general equality duties, does appear to be having an important impact on policies and practice.

Proposals for future enforcement

4.4 While we think the EHRC could play a far more active role in enforcing the equality duties, as could various other regulatory bodies, the scale of the task suggests that the single equality duty also needs to be enforced through enforcement of the unlawful discrimination provisions. For example, where an employment tribunal determines that a failure to comply with the duty contributed to an unlawful act:

(a) the tribunal should be able to recommend that the respondent take specified actions to comply with the general duty in the relevant area.

(b) there should, perhaps, be the possibility of awarding exemplary damages where there appears to have been an ongoing breach of the duty which is likely to have contributed to acts of unlawful discrimination additional to that complained of (and where, therefore, the normal level of compensation would be inadequate to punish the wrong doer).

(c) there should, perhaps, be a provision whereby, in determining whether justification has been made out, due regard shall be had, in particular, to whether non-compliance with the general duty appears to have contributed to the unlawful act.

4.5 In addition, Social Security tribunals should, we would argue, be empowered to make recommendations to DWP where failure to meet the general duty appears likely to have contributed to unlawful action against benefit claimants.

5. Different specific duties on a range of different organisations (Qs 95–99)

5.1 We are arguing for different specific duties on a range of organisations. We have focussed on DWP because of concerns that DWP may be unlawfully discriminating against large numbers of benefit claimants; and because DWP does not appear to have recognised (or publicly admitted to recognising) this strong possibility.

5.2 We would suggest, as a possible approach, that all public bodies (subject to the specific duties) be subject to the same foundation specific duties (presumably including, for example, production of an Equality Scheme); but that there be a final regulation (the variation regulation) which would reflect what needs to be done to meet the single general equality duty in the different circumstances of different organisations. Indeed, we would argue that the requirement to assess whether clients (or, for example, patients, prisoners, or students) require reasonable adjustments might be something that should be included in the "variation regulation" of a large number of public bodies.

6. Discrimination against Benefit Claimants

Public-private discrimination

6.1 A good illustration of the nature of the problem is what might be called "public-private discrimination". For example, an employee could resign because unlawful harassment is damaging his mental health, and JCP could suspend his Jobseeker's Allowance for having left his job voluntarily without just cause. Later he may be required to undertake training, be thrown-off for being late (when being late was the result of severe depression), and have his benefits suspended for having lost his place through misconduct. In the space of 12 months, he could have been (we would argue) unlawfully discriminated against by an employer once, JCP twice, and a training provider once.

6.2 It seems unlikely that he would recover well from the initial depressive episode in these circumstances or be able to get quickly back into employment. We would argue that DWP needs to remember that claimants cannot be punished into getting better; and that the sick and disabled are not criminals to be cracked down on (however politically popular this may appear).

7. Retain disability related discrimination and introduce indirect discrimination (Q 122)

(a) It is, we would argue, important to retain the Disability Related Discrimination provision (as well as introducing an indirect discrimination provision into the disability strand). Introducing the later, without retaining the former, could lead to an overall regression in the level of protection for disabled people.

(b) It is not sufficient to assume (despite ODI's assurances) that the pools of comparison will operate in a more (or sufficiently) flexible way when applied to disability. Post-*Malcolm*, the correct comparator needs to be spelled out ie the relevant provisions need to be, what might be called, Bingham proofed.

(c) The objective justification defence, for indirect discrimination, should give proper effect to the Directive ie there should be a requirement to show that a provision, criterion or practice is "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". The government's current proposals appear to omit (on the face of the proposed law) the requirement to show that the provision, criterion or practice is "necessary" (or even reasonably necessary).

February 2009

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40. Supplementary memorandum submitted by the Confederation of British Industry

How does disability fit within a single Equality Act?

We are sympathetic to the Government's intentions in the Equality Bill to simplify and streamline legislation across the different equality strands. The technical knowledge required of HR managers and SMEs to understand and comply with the multitude of regulations related to different equality strands is vast and costly. Disability discrimination has until now differed from the other strands due to the lack of an indirect discrimination definition—the more targeted disability-related discrimination being preferable. We have acknowledged that there is an obvious attraction to aligning the forms of disability discrimination with the other strands in the Equality Bill; however, this standardisation may have the converse effect of creating further complexity for employers.

What lessons should the Government learn from the Malcolm case?

Many of our members have highlighted the issue of comparators as one to be clarified as a result of the *Malcolm* case. The ODI acknowledges in its consultation document on indirect discrimination that disability differs from some other protected characteristics in that disabled people are not a homogeneous group. Proving that a neutral provision, criterion or practice puts disabled people at a disadvantage—as required under the definition of indirect discrimination—would depend heavily on the comparator chosen by a tribunal. We believe that determining these appropriate comparators will be fraught with difficulty in a post-*Malcolm* environment.

Recent high profile cases highlight the difficulty in proving group disadvantage and anticipating the comparator that would be used by the tribunal. *Eweida v British Airways*, for example, failed to show indirect discrimination due to the use of a wider group comparator. The tribunal did not use as a comparator a group who shared Miss Eweida's particular belief about the wearing of a crucifix; instead the tribunal used followers of the wider Christian faith and judged that Christianity, in general, does not require the crucifix to be worn at all times. The ODI suggested that had Mr Malcolm been able to allege indirect discrimination in his tribunal application, his case would have had more merit. The *Eweida v British Airways* case, however,

shows that the choice of comparator remains crucial to the success of the case and there is little evidence that the judgment in Mr Malcolm's case could have been drastically altered. The tribunal panel would still have to choose how specific an impairment group to take as comparator. In consultation, our members observed that other people with a similar disability to Mr Malcolm—perhaps with varying degrees of severity—would have been able to understand the sub-letting regulations. This dilemma is reflected in the *Eweida* case: is the group comparator Christians in general or a particular sub-denomination? It will take some time for a sufficient body of case law to interpret these questions if indirect discrimination in disability cases was introduced, whilst employers and disabled people would remain uncertain about their rights and responsibilities.

Is indirect discrimination the appropriate concept to include, or would it be better to have a modified version of the disability-related discrimination concept?

The move from disability-related discrimination to indirect discrimination has not been initiated proactively by the Government. The Equalities White Paper, released in June 2008, advocated the retention of disability-related discrimination and the unique character of the DDA legislation. Instead, the *Malcolm* judgment has forced a change to an interpretation that had been widely accepted since the *Clark v Novacold* judgment. The speed at which the ODI conducted its consultation has left many questions unanswered about how indirect discrimination would operate in practice. Our members have highlighted concerns and raised questions about group comparators, objective justification and reasonable adjustment by anticipation—all areas that will require understanding and compliance from employers in order to operate effectively. In this sense, the move to indirect discrimination might result in a more complicated and technical set of regulations for employers to unravel and comprehend—something which is not adequately reflected in the regulatory impact assessment.

However, any discussion on the merits of adopting the concept of indirect discrimination seems, from the language of the consultation, almost redundant in light of the EU draft directive on non-discrimination. If the directive is transposed in its current form by the UK, there will be no option but to incorporate indirect disability discrimination. In this regard, the pertinent question is whether there is any room or need for disability-related discrimination in the legislative spectrum. Would there be any merit in keeping it, in some form, on the statute books? Our members have expressed concern about this possibility and we would reiterate that clarity of understanding and ease of implementation should remain priorities for the ODI. The pre-*Malcolm* interpretation of the DDA was widely understood and familiar to employers and employees alike, not to mention more effective in its protection of disabled people: in this light, the reversal of the *Malcolm* judgment might be the preferred option.

Do you think that implementing the Coleman case (extending coverage to association and possibly perception of disability) could help to move the current definition more to the social model approach to disability?

The aims of rulings of this nature are to assist those who are disadvantaged and to improve their access, engagement and fair treatment within society: this case clearly illustrated that no one should feel that they have to accept degrading treatment due to their relationship with a disabled person. However, we need to stress that the implications of this case go further. We are concerned with the risk of "scope creep" in harmonising the other equality strands to include discrimination by association and perception, and how employers would cope with the implications. The reality is that the *Coleman* judgment, in extending the realm of associative discrimination, creates questions about how close the association has to be with the disabled party in order to gain discrimination rights under this legislation. Presumably, greater specification would be necessary, particularly in the areas of:

- the level of care given;
- the relationship with the disabled person being cared for; and
- who determines the status of the relationship.

The Department for Work and Pensions needs to set out clearly how the Equality Bill would define these elements.

Our members have expressed concerns about the implications that an extension of discrimination by association would have on UK flexible working regulations. When granting requests, employers might have to give priority to parents of disabled children over parents of non-disabled children, and to carers of disabled people over carers of non-disabled people. There could be a greater risk of accusations of discrimination if individuals consider that they are refused or treated less favourably in relation to a request made for a disabled person. The same situation would potentially arise in relation to carers of elderly people through age discrimination by association. However, provided that an employer can demonstrate that accepting a particular request would prove detrimental to the business, claims of discrimination by association would still fail because the operational requirements were such that no request would have been agreed. On this point, the law would remain unchanged; however, employers will require detailed and unequivocal guidance from the Government on their responsibilities.

Coleman certainly has implications for the provision of discrimination by association, but the extent to which then judgment could or should change the definition of disability is highly questionable. Equality for disabled people frequently requires reasonable adjustments on an individual case-by-case approach to achieve a fair outcome. The legal definition of disability—together with the concept of reasonable adjustment—was designed to ensure that the wide range of disabilities and long-term health needs could be accommodated. However, it was recognised that to qualify for protection, disability had to be long term and have an adverse effect on an individual's ability to carry out normal day-to-day activities.

In our submission to the Discrimination Law Review, we emphasised that any review must not lead to legislation being harmonised at the highest level and improved support and advice for employers is the key to delivering better outcomes. Extending the definition of disability may "simplify" the legislation but not in a way employers would find helpful.

Extending the definition of disability may discredit the legislation

The proposal to extend the definition of disability to protection against discrimination on the grounds of any "impairment", regardless of level or type of impairment, would represent a radical reformulation of the law. Under the existing DDA a person has a disability if s/he has a physical or mental impairment with a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. The focus is on the medical condition and the requirement to make reasonable adjustments.

The social model would shift focus from the medical condition of the individual (is s/he disabled under the DDA and does s/he require adjustments) to the act of alleged discrimination. This would mean that anyone, with potentially any level or type of impairment (lower back pain, sore foot, stress etc), could make a discrimination claim. Our members are concerned that this approach would trivialise disability rights and discredit the legislation by opening it to abuse.

Businesses need to have confidence in the clarity and practicality of the definition

Employers agree that the current definition of disability creates uncertainty and in some cases the only way to determine whether a person is disabled is to go to tribunal. Nevertheless, they do not believe that extending the definition of disability would resolve this uncertainty. While there would be no need to determine whether someone was disabled, far more people would be able to ask for reasonable adjustments and there would be less clarity about the extent to which these would have to be accommodated. This is likely to lead to a higher number of tribunal cases, with added complexity that will lead to a more adversarial atmosphere and higher costs in drafting in more experts at the hearing stage.

The social definition could weaken protection for the most disadvantaged

In reality, not all requests for reasonable adjustments can be met. Resources will always be finite and people who are in need of more or expensive adjustments may not receive them if employers receive an increased number of requests for adjustments from employees with minor or even severe but short-term ailments. One practical example relates to company cars: some employees claim they have impairment, such as lower back pain, and ask for "reasonable adjustments"—typically adjustments to their existing car or to buy them out of their car contracts. Under the current legislation, if the occupational doctor confirms they are not disabled, employers are entitled to make no or more minor adjustments than if they were covered by the DDA. This enables a more targeted approach that benefits those with serious or long-term impairments.

We are also concerned about the possibility of unintended consequences. At present, guaranteed interview schemes and other positive employment practices are designed to help the most disadvantaged. There is a real risk that extending the definition of disability would weaken protection for the most disadvantaged, in order to aid those with more trivial or less disabling conditions.

Our members have emphasised that there needs to be a clear distinction between what the law requires and "best practice". Many employers are able to make adjustments for staff with impairments that do not come under the definition of disability; however, this should not be a requirement of the law. The purpose of the law should be to set out minimum standards, not best practice.

What are your views on the default retirement age? Should it be scrapped?

We support the decision to retain a default retirement age with a right to request postponing retirement. The legislation provides both employers and employees with a clear picture of their responsibilities and rights and offers a framework for retirement discussions.

A Default Retirement Age encourages dialogue between employers and employees

Individuals do not necessarily want to work longer or on a full-time basis after 65—what they really want is greater choice and engagement with their employer about the options open to them at retirement. The default retirement age (DRA) provides this dialogue with a point around which to focus meaningful discussion: without it, employers might be less keen to open up a discussion about retirement options for risk of incurring an age discrimination charge. The current legislation protects the individual's dignity and their opportunity to discuss retirement options in non-confrontational circumstances.

It is right that employees should not have a unilateral entitlement to remain in employment after 65. The new right for employees to request postponement of retirement provides a balance: indeed, many companies employ staff beyond retirement age where they are needed. However, this is not about forcing people to work till they drop and neither party should have to maintain an employment relationship longer than they want to.

Businesses value the DRA as a tool to plan for the future

Employers firmly believe that the right to retire staff at or above 65 (or an objectively justified lower age) is a vital management tool—for health and safety or employment planning reasons. A clear retirement age is important to companies in planning their business and ensures that firms can retire employees with dignity rather than forcing them to dismiss staff on grounds of competence. Without a normal or default retirement age, firms would have to justify and re-justify each individual retirement. Having certainty as to the end of the employment allows businesses to operate efficiently in a variety of ways:

- Many firms with long training periods use the number of employees nearing retirement age to calculate how many apprentices or trainees to take on.
- Smaller firms may use retirement ages to predict when senior positions will become available—either to ensure knowledge transfer or to retain junior members of staff who need to be offered promotion.
- Firms facing a number of redundancies might be able to use numbers nearing retirement to more accurately predict losses through natural wastage—and in this way not make more redundancies than are necessary.

However, flexible retirement is growing in popularity

Whilst the default retirement age has allowed businesses to plan their HR functions with greater certainty, there is evidence that firms are also becoming more receptive to the concept of flexible retirement. The right to request postponing retirement has proven successful in balancing the individual needs of staff and the needs of the business, and complements the rise in other types of flexible working, with employers embracing practices such as part-time work, flexible hours and remote working.

The 2008 CBI/Pertemps Employment Trends Survey illustrates how employers have adapted to the new regulations after 18 months and shows that:

- Almost a third (31%) of employees reaching retirement age postponed retirement in the last 12 months. More than four fifths (81%) of requests were granted, representing substantial increases on last year's results—22% and 72% respectively.
- Encouragingly, employers of all sizes are offering extended working: nine out of ten requests are now accepted by employers with up to 500 employees, up from 55% in 2007. This suggests that smaller firms—without the HR capacity of larger employers—have adapted to the new regulations after testing the water in the first year.
- The total percentage of employees working post-retirement age has increased from 16% to 33%.

These figures suggest the encouraging start made by employers and employees has continued, as firms gain a greater understanding of how the new system operates in practice. Employers value and want to retain the skills and experience of older workers: the "right to request" system balances this flexibility with the need for a default retirement age, so that employers can say no when the extension is not possible. We believe that this is the right solution and is working in practice.

The DRA will be reviewed in 2011 and we trust that BERR's consultation and regulatory impact assessment will reflect both the legislation's success and the economic environment as it stands at that time.

February 2009

41. Supplementary memorandum submitted by Employers' Forum on Disability

EFD is the authoritative voice on disability as it affects business, representing over 400 major employers in the UK. EFD works closely with disabled people, government and other stakeholders, sharing best practice to make it easier to employ disabled people and serve disabled customers.

EFD's mission is to mobilise the power of its members to promote the economic and social inclusion of disabled people. For 17 years EFD has been successful in driving forward employer engagement and sets the standard by which business and public sector measure their performance on all aspects of disability.

How does disability fit within a single Equality Act? What lessons should the Government learn from the Malcolm case? Is indirect discrimination the appropriate concept to include, or would it be better to have a modified version of the disability related discrimination concept?

Treating everyone the same does not mean that everyone is treated fairly. Disability needs different wording to the other strands. We understand the Government's wish to harmonise and simplify the law. However to take this to mean that there should be the same wording for all the strands is too simplistic.

Harmonisation and simplification should be about the spirit of the law not the letter. The aim should be for equality of protection for all disadvantaged groups. This may mean having to have different language for different groups.

The reasonable adjustment provisions which are unique to disability are an example of how different strand provisions and language is needed for different discrimination strands. Reasonable adjustments could be viewed as more favourable treatment but in fact simply level the playing field for disabled people and remove obstacles to their economic and social inclusion in society. As we understand it, there is no suggestion that the Equality Bill will remove the reasonable adjustments provisions.

Disability discrimination is the only strand which is asymmetric ie only disabled people have protection under it. This is unlike the other strands where people of all races, all religions or none, every age, sexuality and gender are protected. It is therefore possible for employers to positively discriminate in favour of disabled people if they wish.

In the *Malcolm* case the House of Lords failed to recognise some of the unique aspects of the DDA. The decision effectively removed disabled people's rights to bring claims for less favourable treatment for a reason relating to their disability and has left them only with direct discrimination and reasonable adjustments claims. The DDA did not contain indirect discrimination provisions because that would not have been as effective in addressing the discrimination disabled people encounter as the combination of less favourable treatment for a reason relating to disability (as interpreted by the Court of Appeal in *Clark v Novacold*) and the duty to make reasonable adjustments.

Indirect discrimination has to be included in the Equality Bill if the EU Directive is passed. We welcome that it will address systemic barriers faced by groups of disabled people, for example people with sensory or mobility impairments

However, indirect discrimination will not plug the gaps left by the *Malcolm* case. We think therefore that the Equality Bill should re-introduce less favourable treatment for a reason related to disability but without the need for a comparator as well as introducing indirect discrimination into disability legislation.

Do you think that implementing the Coleman case (extending coverage to association and possibly perception of disability) could help move the current definition more to the social model approach to disability?

We welcome that the *Coleman* case means that people associated with disabled people will now have protection from direct discrimination and harassment.

We understand that the Equality Bill will also extend this protection to people who are perceived to be disabled but are not in fact disabled.

This too is welcome and fits with the social model of disability ie that the focus should be on whether or not people have been treated badly/unfairly and not on whether they are entitled to fair treatment because they meet a specific definition of disability.

What are your views on the default retirement age? Should it be scrapped?

There is a correlation between age and disability. The focus should be on making reasonable adjustments to enable people of any age to work to the best of their ability if they wish to do so.

You state that the division of responsibilities within government departments is confusing and undermines the effectiveness of any single equality legislation. Can you expand on that? How should this be addressed?

We believe there is confusion in government about how disability sits in relation to the equality agenda. We are particularly concerned that the separation between GEO and ODI will mean that disability issues will not be adequately understood or dealt with within equality legislation. This fear is particularly acute given that GEO have a small staff team and thus limited capacity to build up expertise across all diversity strand areas.

A good example of this is the ODI consultation on the *Malcolm* case. This consultation was led by ODI. However, in discussion with ODI it was apparent that the consultation responses were simply informing ODI's work with Government Equalities Office on the Equality Bill. This division makes it difficult for employers to represent their views to relevant officials and Ministers. It also means that there are conflicting messages going to employers. There appear to be mixed messages emerging from DWP, Government Equalities Office and BERR about the equality agenda. Disability is variously positioned as an issue about equality, talent and business performance, welfare reform or a source of additional regulatory or financial burdens on business. This is unhelpful when trying to promote change within employers.

It would send a powerful message to the nation were the government to appoint a Minister for Equality and Human Rights with a seat at the cabinet table. Currently, questions about disability are referred from the Government Equalities Office to the Office for Disability Issues, yet these questions are often about the Equality Bill, which is the responsibility of the Government Equalities Office. The flow of information is extremely unhelpful and gives the impression that understanding of disability as it impacts on business is not well understood within government.

February 2009

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42. Letter dated 26 February 2009, from Kitty Ussher MP, Parliamentary Under-Secretary of State, Department for Work and Pensions

At our recent appearance before the Committee on 9th February, Maria Eagle and I promised to provide the Committee with further information on PSA Delivery Agreement 8, Access to Work and the Procurement Pilots. This information can be found in the attached Annex A.

Annex A

Measurement of progress on PSA Delivery Agreement 8: Maximise employment opportunity for all (Q164 to Q167)

The approach to measuring progress on PSA8 for the CSR07 period is set out in PSA Delivery Agreement 8: Maximise employment opportunity for all,[240] published in December 2008.

Annex A to the Delivery Agreement provides full details about how progress will be measured for each element of the PSA target. Indicator 2 deals with narrowing the gap between the overall employment rate and that of specified disadvantaged groups. For each group, the policy is judged successful if there is "upward movement on the indicator in excess of sampling variability". For disabled people this requires an upward movement in the employment rate of at least 1.41 percentage points.

Access to Work—Royal Mail Group Operating Agreement (Q198)

Access to Work is currently piloting a collaborative way of working with the Royal Mail Group where DWP has entered into an operating agreement aiming to enhance the customer experience of the Royal Mail Group disabled employees, whilst increasing the employer's commitment and financial contribution.

A close working relationship, clear communication routes and dedicated national teams have been put in place which have resulted in a streamlined process and simplified working practices.

This innovative model has attracted the attention of other national organisations and through our close association with the Employers' Forum on Disability we are currently exploring similar agreements with Sainsbury's, Ernst and Young, KPMG and Pricewaterhouse Coopers.

[240] http://www.hm-treasury.gov.uk/d/pbr_csr07_psa8.pdf

Access to Work Budget (Q200 to Q201)

The Access to Work budget is managed within DWP's departmental expenditure limits (DEL). The department manages any variation in demand for Access to Work within these overall limits, taking into account other spending priorities. The Access to Work budget has increased from £14.6million in 1997–08 to £69million in 2008–09. In future years, the budget will double to £138million by 2013–14.

Can you tell us what the results were of the Ethnic Minority Employment Task Force race equality procurement pilot in terms of securing equality outcomes? (Q224)

The procurement pilots have been set up by the Ethnic Minority Employment Task Force and are ongoing. The Ethnic Minority Employment Task Force is supporting a period of promoting race equality when procuring from private sector suppliers, in a small number of Government departments. The aim of these procurement pilots is, among other things, to enhance race equality in procurement. This will be achieved by increasing the diversity of suppliers and, at the same time, encouraging suppliers to make real changes in their practices.

The pilots are taking place in the Department for Work and Pensions (DWP), the Department for Children, Schools and Families (DCSF) and the Identity and Passport Service (IPS). The contract areas are:

— the procurement of training through the New Deal programme in DWP;

— the provision of Children's Centres in DCSF; and

— the provision of learning and development for the HR department in IPS.

The qualitative evaluation of the procurement processes implemented in the pilots is currently taking place and will be published at the end of August 2009.

DWP is committed to looking at how procurement can be used as a lever to address inequalities. One of the Ethnic Minority Employment Task Force's project groups focuses on how public sector procurement can be better used to address inequality of outcomes in the labour market.

43. Supplementary memorandum submitted by the Federation of Small Businesses

Default Retirement Age

78% of FSB members do not have a fixed retirement age.

However we do believe that retirement ages have a place in employment law. There are certain sectors where a Default Retirement Age is a way of retiring members of staff if there are safety concerns, especially construction. This can often be an easier way of approaching the issue for both parties than a disciplinary route when talking to a respected and valued member of staff. For small companies there can also be concerns about career progression and motivating other members of staff. On the whole small businesses have a very positive attitude towards older workers who are seen as having a better work ethic. But we believe that the Default Retirement Age allows businesses to set their own policies and have to have a positive conversation with employees about retirement options. Many FSB members are finding that more employees are wanting to work after 65 and this is usually regarded as positive for both the business and the employee.

Division of responsibilities within Government Departments

The FSB would like to see all information about equalities coming to business through Business link. This fits with the government's aim to have a single portal for business information. Also Business link are more used to communicating with the business community than other government departments and we believe that they would be more able to communicate a complicated piece of legislation in an effective way.

March 2009

44. Supplementary memorandum submitted by Carers UK

This memorandum summarises the evidence which indicates what good levels of employment for carers would look like. Whilst each carer's circumstances are different, we would say there is overwhelming evidence that there are many carers who are not in paid work who would like to be, and also many who are currently in paid work who are at risk of falling out of work.

To summarise, the statistics below show that:

— many carers who are currently in work are at risk of falling out of work because of a lack of services and a lack of support at work; and

— many carers who are not currently in work would like to work, but are not able to because of poor services, a lack of flexible working and the benefits trap.

All figures below are from Carers, Employment and Services Report Series, Carers UK/University of Leeds, 2007; Report 2—*Managing Caring and Employment*.[241]

Carers in work

— only about a quarter of working carers felt they had adequate support from formal services to enable them to combine work and care;

— over a third of working carers had considered giving up work to care;

— 52% of carers working in the private sector said their employer was carer-friendly, compared with 68% in the public sector and 78% in the voluntary sector; and

— of carers working part-time, 50% of those in private sector, 44% in public sector and 54% in voluntary sector said they only worked part time because services were not adequate for them to work full time.

Of those carers who were unemployed, or who described themselves as looking after home and family but said they would like to return to work if suitable arrangements could be made to make this possible:

— more than two thirds of carers outside employment said their caring responsibilities had caused them to leave paid work;

— more than three quarter of carers outside employment said it was difficult to find a job that fits with their caring responsibilities; and

— more than half said they would rather be in paid work but the services available to them do not make a job possible for them.

From NAO report *Department for Work and Pensions: Supporting Carers to Care*, published 26 February:

— Almost a quarter of carers who responded to the NAO's survey would like to do more paid work, but do not want to lose their entitlement to Carer's Allowance.

— Around one in 10 of the people eligible for Carer's Allowance (883,000 in May 2008) currently combine paid work with the required hours of caring.

March 2009

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[241] http://www.carersuk.org/Policyandpractice/Research/CarersEmploymentandServices

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