Discrimination Law Review

EMPLOYMENT LAWYERS ASSOCIATION

Response to the Consultation Paper

A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain

4 September 2007

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INTRODUCTION

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative and Policy Committee of the ELA under the chairmanship of Sarah Gregory of Baker & McKenzie LLP and Alison Wetherfield of McDermott Will & Emery UK LLP to consider and comment on the *Discrimination Law Review - A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* consultation paper. Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

The Government has invited views on a wide range of proposed legislative changes. Our comments are divided according to the chapter arrangement in the consultation paper. We have limited our comments to matters within the expertise of our membership.

1 CHAPTER 1 : "Promoting Compliance And Good Practice, Simplifying Definitions, Tests And Exceptions"

Definitions and tests: Direct Discrimination (Paragraph 1.3(a))

1.1 The Green Paper proposes to keep the existing requirement for a comparator in direct discrimination claims in order to "keep the essentially comparative nature of British discrimination law, which… is by its nature about equal treatment rather than fair treatment" (paragraph 1.3(a) and 1.9 to 1.16).

1.2 In summary, ELA believes the formal requirement for a comparator could be removed without losing the essentially comparative nature of the law. ELA would therefore support further examination by the Government of the idea of removal of the comparator requirement, which, ELA believes, could simplify the law and help to avoid sterile arguments.

1.3 ELA does not take issue with the notion that discrimination law should be about equal rather than fair treatment, and that the nature of the exercise should essentially be comparative. However, ELA disagrees with the statement (at paragraph 1.15 of the Green Paper) that, if the requirement for a comparator were removed, "people could bring claims of discrimination on the basis that they have simply been treated badly". This is to misunderstand the nature of discrimination law and the role of the comparator.

1.4 The case law has identified two roles for comparators in determining whether direct discrimination has occurred (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*).

1.4.1 Part of the statutory formula. The statutes require the Tribunal to determine whether the claimant has been treated less favourably than an actual comparator has been treated, or a hypothetical comparator would be treated, in circumstances that are the same or not materially different.

1.4.2 The "evidential" role. The Tribunal may take into account evidence as to how the respondent treats, or would treat, other individuals (who may be real or hypothetical) in identical, similar or different circumstances to the claimant. The purpose of that evidence is to assist the Tribunal in determining whether the less favourable treatment was for a prohibited reason (i.e. on grounds of sex, race, etc). The strength of the evidence will be weakened by greater differences in circumstances between the claimant and the comparator.

1.5 The test for direct discrimination has traditionally been broken down into two stages:

1.5.1 Whether the claimant has been treated less favourably than a comparator (the "less favourable treatment/comparator" issue).

1.5.2 Whether the treatment was on a prohibited ground (the "reason why" issue).

1.6 The House of Lords in Shamoon (and in the earlier case of *Glasgow City Council v Zafar [1998] IRLR 36*) recognised that, while this two-stage approach can sometime be helpful, it often leads to confusion and to sterile lines of inquiry. Tribunals can spend a great deal of time trying to decide whether a particular individual cited by the claimant is or is not an appropriate comparator, whether an appropriate actual comparator exists, and, if not, how the hypothetical comparator should be constructed. There is very little flexibility in identifying the correct comparator (contrary to the suggestion at paragraph 1.16 of the Green Paper), and appeals on this point are common.

1.7 The House of Lords recognised the essence of discrimination - the "primary issue"- is in identifying the reason for the treatment. In determining that reason, Tribunals will in the vast majority of cases need to consider how the respondent has treated or would treat other people with varying degrees of similarity to the claimant (the evidential comparator role referred to above).

1.8 Having established the reason for the treatment, it will invariably be the case that the answer to the "less favourable treatment/comparator" issue will become obvious. For example, if it is established that the claimant was dismissed because of her race, then the comparator will be someone identical to the claimant but for her race, and it will be obvious that she has been treated less favourably than such a person is or would have been treated.

1.9 In view of the above, ELA takes the view that if direct discrimination were reformulated to remove the statutory requirement for the Tribunal to identify a comparator (real or hypothetical) then the essential nature of discrimination law - the "primary question" - would still remain, and Tribunals would still be obliged to carry out a comparative exercise to reach the answer to the "reason why" but without the often artificial emphasis on identifying a particular actual or hypothetical individual for this purpose.

1.10 ELA notes that the idea of a comparator in various branches of discrimination law is being phased out without the essential nature of the law being changed:

1.10.1 There is no statutory requirement for a comparator in claims of harassment.

1.10.2 There is no need to identify a comparator in pregnancy and maternity cases, other than to compare the claimant's treatment with how she herself would otherwise have been treated (and even this comparative exercise has been found contrary to EU law by the High Court in *EOC v Secretary of State for Trade and Industry [2007] EWHC 483 (Admin)*).

1.10.3 The Government is now proposing (rightly, in ELA's view) to remove the statutory requirement for a comparator in victimisation cases in order to "make it more effective" (paragraph 1.62 of the Green Paper).

Definitions and tests: Disability Discrimination (Paragraph 1.3(b))

1.11 At paragraph 1.3(b) of the Consultation Paper the Government proposes to introduce a single definition of disability discrimination. We are then asked at paragraph 1.18 whether we have any comments on the Government’s proposal to replace the separate definitions of discrimination in Part 3 of the DDA with a single definition.

1.12 These matters are outside the remit of ELA (although we are generally in favour of harmonisation and simplification) but this seems an appropriate place to discuss more generally the definition of disability because this is an issue that causes immense practical problems for both claimants and employers.

1.13 The current definition of disability focuses heavily on the extent of the impairment. In particular, the effects of the impairment must be substantial and long-term. The result of this is that:

1.13.1 it is difficult for employers managing employees with health related problems to know for certain whether or not they have a disability within the definition of the DDA 1995 and therefore whether or not they have a legal duty to make reasonable adjustments;

1.13.2 Employment Tribunal cases involving disability frequently require PHRs with detailed medical evidence. This adds an enormous costs burden to both parties and often creates long delays in a Tribunal system that was originally designed to produce a swift resolution of workplace related disputes;

1.13.3 it excludes those who suffer a detriment because of or for a reason related to a short-term but severe impairment or a long-term impairment that does not have a substantial effect; and

1.13.4 it does not incentivise an employer to manage an employee with health related problems, short of the current definition of disability, in a professional and compassionate way.

1.14 ELA would have liked to have seen the Government include in the consultation consideration of removing from the definition of disability the requirement that the impairment be substantial and long-term so that opinions from all perspectives could have been considered. The problems created by the present definition cause difficulties for both claimants and employers.

1.15 Otherwise, ELA would generally like to see the definition of discrimination simplified. One proposal, covered elsewhere, is the removal of the list of "day to day activities" which we support.

Definitions and tests: Gender Reassignment and the existing approach to perception and association protection (Paragraph 1.3(c))

1.16 At paragraph 1.3(c) of the Consultation Paper the Government asks whether the protection against discrimination on the basis of association should be extended to those who associate with individuals undergoing gender reassignment but not on the grounds of perceived gender reassignment.

1.17 We consider that there is no logical reason why protection should not be extended to include those treated less favourably because they associate with a transsexual person. However, if the Government considers that there are reason(s), policy or otherwise, why protection should not be extended to this group then we would suggest that these reason(s) are set out in any future consultation paper that the Government produces on this issue.

1.18 Extending the protection to perceived gender reassignment would go beyond the current purpose of discrimination law, potentially providing some level of protection to transvestites. We make no comments on this issue as the question of whether to extend protection to transvestites is a political issue which is beyond the remit of ELA.

1.19 The Government also asks whether the existing approach to perception and association protections should otherwise remain the same. We note that there is already protection against discrimination on the grounds of association and perception for race, religion or belief and sexual orientation but not for sex or disability. Age discrimination is only prohibited on the grounds of perceived age but not association.

1.20 We consider that discrimination on the grounds of perception of gender is either covered by transgender discrimination or by sex discrimination. Similarly discrimination because of associating with someone of a particular sex is very likely to be covered by sexual orientation discrimination.

1.21 We observe that extending the prohibition of age discrimination to include association by age would make the scope of this protection extremely wide. We would suggest that such an extension is likely to be impractical. We are all potentially covered by age discrimination in a

way that is unique in the field of discrimination law. It is a fact of life that as a person's age changes, the age group(s) of the people they tend to associate will also change. We therefore see real difficulties in trying to introduce such protection.

1.22 In *Attridge Law & another v Coleman* (UKEAT/0417/06 unreported) the EAT referred to the European Court of Justice (ECJ) the question of whether 'associative' disability discrimination is unlawful. We would therefore suggest that the Government awaits the ECJ decision in *Attridge* before introducing legislation on this issue.

1.23 We would agree with the statement in the consultation paper (para. 1.22) that extending protection against discrimination to people who are perceived to be disabled would potentially extend coverage to many more people. That is, however, also true for the discrimination legislation which already does prohibit discrimination on the grounds of perception. Whether this is desirable is a political question which is beyond the remit of ELA to comment on. However, if the Government did not include such protection, in our opinion, this would not amount to an act inconsistent with its obligations under the European Directive.

1.24 Finally, although not dealt with in the consultation paper itself, there are two issues we consider it appropriate to raise here[1]:

1.24.1 Whether the Government intends to harmonise the law to enable those who are instructed to discriminate against a disabled person to have a remedy in law. In *Weathersfield Ltd t/a Van and Truck Rentals v Sargeant [1999] IRLR 94*) the EAT confirmed that an employee who is instructed to discriminate against another on grounds of their race may pursue a race discrimination complaint against their employer as it is discrimination 'on the grounds of race'.

However, if an employee is instructed to discriminate against a disabled person on the grounds of that disabled person's disability, that employee cannot currently present a complaint to an Employment Tribunal. This is because that employee may not be a 'disabled person' within the meaning of s.1 of Disability Discrimination Act 1995 (DDA) and therefore would not be covered.

Even if they were they still would not be able to satisfy the requirements of s. 3A(1) or (5) of the DDA i.e. as a disabled person they must have either been discriminated against for *a reason related to his/her disability* or directly discriminated against on the ground of *his/her disability*. Consequently, as the reason for the treatment does not relate to *their* disability (if they do not have one) they do not have a remedy.

1.24.2 Currently, if someone does not get a job because they are not disabled they have no redress**.** In the same way that someone might lawfully not get a job because they are male if being a woman is a genuine occupational requirement/qualification, some organisations might consider being disabled to be a genuine occupational requirement. For sex and race discrimination, for example, this would only be lawful for particular jobs and not for every job within an organisation. Currently, an organisation could lawfully fill every job within its organisation with those who are disabled as the DDA does not apply to the non-disabled. See our comments on paragraph 1.4(a) below.

[1] The ELA does not comment on the desirability of the Government introducing legislation around these issues but wishes to draw the Government's attention to other areas where the Disability Discrimination Act 1995 is inconsistent with other discrimination legislation.

Definitions and tests: Extending indirect discrimination protection to transsexual people and people with a disability (Paragraph 1.3(d))

1.25 At paragraph 1.3(d) of the Consultation Paper the Government asks whether indirect discrimination protection should be extended to transgender discrimination.

1.26 ELA's view is that such an extension is desirable and logical.

1.27 The Government has also asked whether the explicit concept of indirect discrimination should be introduced in disability discrimination. It does not plan to do so.

1.28 ELA does not believe that it is necessary to have complete parity in approaches to different forms of indirect discrimination given the different approach to persons with a particular disability sanctioned by the Framework Directive (Article 2(b)(ii), Council Directive 2000/78/EC). While a question ultimately of policy, we note that a disabled person placed at a substantial disadvantage by a "neutral" policy, practice or aspect of premises would appear to be better served by a positive duty upon the employer to make reasonable adjustments than by an indirect discrimination claim subject to objective justification. Those who are disabled within the meaning of the DDA are already protected on an individual basis and employers have a positive duty to ensure that they are not placed at a disadvantage by any of the employer's practices.

1.29 We add that if the concept of indirect discrimination was explicitly introduced in disability discrimination <u>and</u> the concept of disability related discrimination, currently contained in s. 3A(1) of the DDA, were repealed, then this would be likely to result in less protection being afforded to disabled persons.

Definitions and tests: Harmonising the indirect discrimination test (Paragraph 1.3(e))

1.30 At paragraph 1.3(e) of the Consultation Paper the Government asks whether the definition of indirect discrimination should be harmonised for all indirect discrimination provisions.

1.31 ELA agrees with this proposal. Consistency is one of the aims of the exercise and we cannot identify any problems that would be created by harmonising.

Definitions and tests: Harmonising the objective justification tests (Paragraph 1.3(f))

1.32 At paragraph 1.3(f) of the Consultation Paper the Government asks whether the same objective justification test should be used for all indirect discrimination provisions.

1.33 Again if the objective is to simplify the law we cannot identify any reason why this would not work in practice.

1.34 We also agree that it would be appropriate to use the test of 'proportionate means of achieving a legitimate aim'. This test reflects the Human Rights/EU legislation and jurisprudence. We should however register some disquiet at the way in which this test may develop in the light of the recent judgment of the Employment Appeal Tribunal in *GMB v Allen* (UKEAT/0425/06/DA) which appears to create a moral vacuum when considering the issue of proportionality.

Definitions and tests: Single Objective Justification test in disability discrimination (Paragraph 1.3(g))

1.35 At paragraph 1.3(g) of the Consultation Paper the Government proposes to replace the different justification tests in disability discrimination law with a single objective justification test.

1.36 ELA agrees that there should be a single justification test. The threshold at which it is set is a matter of policy. Please see our comment in 1.34 above, however, as to the application of the objective justification test used by the other strands.

Definitions and tests: Establish a single threshold for triggering the duty to make reasonable adjustments (Paragraph 1.3(h))

1.37 At paragraph 1.3(h) of the Consultation Paper the Government proposes to establish a single threshold for the point at which the duty to make reasonable adjustments for disabled people is triggered.

1.38 In ELA's view it would assist the achievement of harmonised and simplified law to have a single threshold (although the proposal appears to be bringing the goods and services threshold into line with the current employment threshold and so that proposal is strictly outside ELA's remit).

Definitions and tests: Victimisation (Paragraph 1.3(i))

1.39 The Green Paper proposes to "have the same approach to victimisation in discrimination law as in employment law" (paragraphs 1.3(i) and 1.60 to 1.62).

1.40 In summary, ELA supports the Government's approach but some members would welcome consideration being given by the Government to introducing a specific "honest and reasonable" defence.

1.41 The proposal is to remove the express additional requirement for a comparator in discrimination victimisation legislation, aligning it to the test in employment victimisation legislation.

1.42 The courts have broadly interpreted the additional requirement in discrimination victimisation legislation as a requirement that the Claimant show less favourable treatment compared to other actual or hypothetical employees who do not do the various protected acts.

1.43 It is ELA's view that this express comparator test is implicit in the "by reason that" test. Accordingly, the need for a specific legislative requirement for a comparator in discrimination victimisation legislation is superfluous.

1.44 Indeed in Harvey on Employment Law at DII [593], it is noted within the employment victimisation commentary that when considering the analogous "on the ground that" test, "the correct approach… is to ask first whether the employer has in fact treated the complainant differently (from an actual or hypothetical comparator); second whether the reason for the different treatment was the employee's protected act or status… ; and third whether that different treatment did in fact result in a detriment to the employee, intended or unintended, foreseen or unforeseen…". So, despite the absence of an express legislative requirement for a comparator, it is considered that the test is implicit in the "on the ground that" test.

1.45 It would be sensible to align the employment victimisation legislation and discrimination victimisation legislation because their primary object is the same, namely "to ensure that persons are not penalised or prejudiced because they have taken steps to exercise statutory

rights or are intending to do so" (per Lord Nicholls of Birkenhead in *Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 (HL), paragraph 16*).

1.46 In *St Helens Borough Council v Derbyshire and others [2007] UKHL 16 (HL)*, Baroness Hale of Richmond at paragraph 40 addressed the comparator test in the context of a discrimination victimisation claim as follows:

> "The second question focuses upon how the employer treats other people. There is no equivalent comparison question in the Directives and so we must beware of introducing too many niceties into this aspect of our domestic legislation. But it may be that, without a difference in treatment, it would be difficult to assert that the employer's behaviour was a reaction to the discrimination claim. In any event, it is now common ground that the "other persons" for the purpose of comparison required by s 4(1) of the 1975 Act are those employees who are not doing the various acts protected under section 4(1)(a) to (d), in this case those who had not brought and continued equal pay claims. They had not been subjected to the particular detriment complained of and so these women have indeed been treated less favourably than others."

1.47 Baroness Hale links the comparator test to the "by reason that" test and cautions against reading too much into the comparator question due to the lack of an equivalent question in the Directive. This reasoning supports ELA's view that the comparator test is unnecessary as an express legislative requirement.

1.48 Some members of the ELA Legislative and Policy sub-committee would welcome consideration being given by the Government to introducing a specific "honest and reasonable" defence into the victimisation legislation to the effect that there will be no detriment if the actions complained of are simply honest and reasonable steps to preserve their position in litigation. This test was first propounded by Lord Hoffman in *Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 (HL)* at paragraph 31, although his Lordship's view was that such steps would not be held to be "by reason" of the employee's protected act. However Lord Neuberger of Abbotsbury in *St Helens Borough Council* at paragraph 65 was of the view that, although this was the correct result, its juridical analysis and subsequent interpretation was not entirely satisfactory. His concern stemmed not only from the fact that the "honest and reasonable employer" defence is not found in the legislation itself but also that it places a somewhat uncomfortable and unclear meaning on the words "by reason that". In his judgment the honest and reasonable defence should go to the question of whether the employee had suffered a detriment, while the "reason why" issue should be determined according to the ordinary meaning of the words.

1.49 It is therefore suggested that Lord Neuberger's reasoning should be enshrined in the legislation as part of the definition of detriment so as to avoid unnecessary confusion or academic analysis over the meaning of "by reason that" and the associated cost of litigation in determining whether the defence is properly considered under the "by reason that" test or the "detriment" test.

Additional ELA Commentary on Definitions and tests

Burden of Proof

1.50 The Green Paper does not specifically make any proposals or seek any views on the burden of proof in discrimination cases. However, this is currently one of the most fertile sources of appeals to the EAT and higher courts and it is ELA's view that much time and money could be saved, and greater justice be done, if this situation were addressed.

1.51 One of the key issues in most of the cases is whether the Tribunal has found sufficient "primary facts" to allow it to draw an inference that there has been discrimination. It is only in such cases that the burden of proof shifts to the respondent.

1.52 Currently, statute provides that the burden of proof will usually shift if the respondent has failed to reply to a questionnaire or has replied evasively or equivocally. Case law has also identified that the burden will often shift if the respondent has failed to follow a statutory code of practice. However, it is very difficult to establish other facts that are likely to shift the burden.

1.53 ELA does not have any specific proposal to change the law. However, it considers that there is a need for simple, practical and coherent guidance dealing with what facts are (and are not) likely to shift the burden. Such guidance could come from the CEHR, the President of the Employment Tribunals, ACAS, or the Government in the form of statutory guidance.

Territoriality and jurisdiction

1.54 The Green Paper does not specifically make any proposals or seek any views on the tests of territorial scope in discrimination law cases. However, in view of the aim of simplification of discrimination law, ELA considers that the Government could consider making uniform the tests of territorial scope.

1.55 Although recent changes have been made in this regard - the "wholly or partly in Great Britain" test - there is no equivalent parallel test in the ERA. This has the effect that an overseas employee claiming both unfair dismissal and discrimination has to run different arguments according to two different statutory tests.

1.56 Furthermore, even where the test is uniform within the discrimination legislation, there remain differences regarding the exceptions of those working on ships, hovercraft and aircraft. For example, recent changes to the legislation in respect of sex, sexual orientation, religion or belief, disability and age (see Section 10(2)(b) of the SDA, Reg 9(3)(b) of the Sexual orientation and Religion or Belief Regulations, Reg 10(3)(b) of the Age Regulations and Section 68(2C) of the DDA) are not reflected in the RRA. Other provisions which are not uniform within discrimination legislation are Section 10(4) SDA and Section 9 RRA.

Simplifying exceptions: Introducing a GOR test for all grounds of discrimination (except disability) (Paragraph 1.4(a))

1.57 At paragraph 1.4(a) of the Consultation Paper the Government asks whether a genuine occupational requirement (GOR) test for all grounds of discrimination should be introduced.

1.58 ELA is in favour of this proposal.

1.59 Should, however, disability be excluded from the genuine occupational requirement test on the grounds that it is not necessary?

1.60 There are some jobs (we can currently only think of acting) where it is arguable that the employee can not be disabled. It is likely, however, that this would amount to disability-related discrimination and not direct discrimination and therefore be capable of justification. Obviously, any change in the definition of “justification” for disability discrimination cases (see paragraph 1.3(g)) would affect the ability of the employer to treat a disabled employee or applicant less favourably.

Simplifying exceptions: Need for a list of GOQ exceptions (Paragraph 1.4(b))

1.61 We note (see also above in the discussion of paragraph 1.3(c)) that currently an employer is able to make a positive choice to employ someone who is disabled and not someone who is not disabled on the grounds of disability i.e. may positively discriminate. The DDA currently does not apply to or protect the person who is not disabled. Were this to change, then more thought would need to be given to having a GOR test under the DDA to assist disability-related organisations to prefer disabled candidates.

1.62 At paragraph 1.4(b) of the Consultation Paper the Government asks whether there is a need to retain the list of genuine occupational qualification (GOQ) exceptions as set out in the Sex Discrimination Act 1975 and the Race Relations Act 1976.

1.63 We consider that these could be repealed.

1.64 However, we would suggest that the Government/ACAS issues guidance on this issue, with the same legal status as the current Disability Rights Commission's Code of Practice 2006. For example, acting is not necessarily a GOQ for everyone. For example, we can think of no reason why a gay man could not play a straight man and vice versa.

Simplifying exceptions: Approach to specific exceptions (Paragraph 1.4(d))

1.65 At paragraph 1.4(d) of the Consultation Paper the Government asks whether there should be a unified approach to the exceptions where they apply to more than one protected ground.

1.66 In ELA's view, a unified approach is consistent with the aim of harmonisation and we cannot identify any reasons why this approach should not be taken.

1.67 Whether the exemptions listed in Annex A Tables 1 and 2 should be retained are political issues and therefore beyond the remit of ELA.

2 CHAPTER 3 : "Equal Pay"

The distinction between contractual and non-contractual pay (Paragraph 3.9(a))

2.1 At paragraphs 3.9(a) and 3.12 to 3.20 of the consultation paper: ‘A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain’, the Government proposes:

2.1.1 to bring equal pay provisions within a Single Equality Bill, and;

2.1.2 to retain current differences between claims relating to contractual and non-contractual issues.

Overview

2.2 In ELA’s view, the distinction between contractual and non-contractual pay should not be retained for the following reasons:

2.2.1 the distinction is a historical anomaly arising out of the sex discrimination laws being the first of their kind;

2.2.2 the distinction creates potentially complex, unfair and unequal boundaries between the two types of claim;

2.2.3 the abolition of the distinction would be consistent with a 21st century approach to discrimination law that is guided by the principle of equality;

2.2.4 a unitary approach to contractual and non-contractual pay based on the anti-discrimination principle would be entirely consistent with European law;

2.2.5 there is no convincing policy argument in favour of retaining the distinction.

Historical anomaly

2.3 The Equal Pay Act 1970 ("EqPA") was the first of the modern domestic discrimination statutes. It received royal assent on 29 May 1970. It was ultimately amended and enacted as Schedule 1 to the Sex Discrimination Act 1975 ("SDA"). Both the equal pay and equal treatment regimes came into force on the same day on 29 December 1975.

2.4 Both the EqPA and SDA were pioneering pieces of legislation; they were drafted when the concept of discrimination was in its infancy. Today, the concept of discrimination has developed considerably through an expansive body of European, domestic case law and the multiple discrimination laws that are now in force.

2.5 It seems clear that at the time they were drafted, Parliament intended for slightly different concepts of discrimination to apply to contractual and non-contractual matters. Parliament did not intend for there to be a unitary approach to pay. Otherwise, it would have simply included pay as a category of prohibited discrimination in the employment field in Part II of the SDA 1975.

2.6 This approach is no longer justified and is inconsistent with a 21st century approach to discrimination law that is guided by the principle of equality.

2.7 The purpose of both the EqPA and the SDA is to eliminate unlawful sex discrimination. Yet, the current distinction between contractual and non-contractual pay creates potentially complex, unfair and unequal boundaries.

2.8 If the purpose of the EqPA and SDA is the same, why is a hypothetical comparator only available to a Claimant under the SDA? Surely, the hypothetical comparator should be available for both forms of discrimination because discrimination in relation to contractual pay is no different from discrimination in relation to non-contractual pay. (Furthermore, as noted below (paragraph 2.13.4) there is some authority for no actual comparator being required.) The same point can be made in relation to the different defences, remedies and time limits for bringing claims available under the two Acts. These differences are unnecessary. The Single Equality Bill should apply the existing regime under the SDA in relation to defences, remedies and time limits to both contractual and non-contractual pay claims.

2.9 An example of the complexities of the current regime can be found with discretionary bonuses. These complaints may fall within the broad definition of 'pay' under Article 141 EC Treaty (e.g. *Lewen v. Denda* C-333/97 [2000] ICR 648 ECJ- Christmas bonus paid to staff was 'pay' for the purposes of Article 141). However, under domestic law it can be difficult to label such complaints as contractual or non-contractual. In such circumstances, advisers often plead the EqPA and SDA in the alternative. A different set of advantages and disadvantages ensue depending on which label (contractual/non-contractual) that the Tribunal may apply to the complaint. If the complaint relates to the terms and condition of the contract, the EqPA will apply. The Claimant has the advantage of a more generous limitation period (i.e. within 6 years of breach during employment and up to 6 months after its termination as opposed to within 3 months of the act complained of under the SDA) but may only be able to rely on an actual comparator. Conversely, if the discretionary bonus complaint does not relate to the terms and conditions of the contract, the SDA will apply. The Claimant has a more restrictive limitation period, but if the claim is brought in time the Claimant will be able to rely on an actual or hypothetical comparator and not need to prove like work, work rated as equivalent or work of equal value. Finally, if the claim under the SDA is successful, the Claimant will reap the benefits of a more generous regime of damages.

2.10 It would be in keeping with the remit of this Consultation to abolish the distinction between contractual and non-contractual pay claims. The outcome would create a more simplified, fairer and principled law.

European law

2.11 Article 141 EC Treaty does not have a contractual/non-contractual distinction. 'Pay' for the purposes of Article 141 is all-embracing and includes contractual entitlements, indirect benefits and non-contractual bonuses (e.g. *Defrenne v. Belgium* C-80/70 [1971] ECR 445 at 451).

2.12 In addition, EC Directive 2006/54/EC (which member states must implement by 15 August 2008) does not draw any distinction between contractual and non-contractual discrimination on the grounds of sex. Articles 2 and 4 of the Directive use the same language in the definition of discrimination that is used in the SDA and applies it to the principles of equal pay.

2.13 The abolition of the domestic distinction between contractual and non-contractual pay would thus be entirely consistent with European Law.

Policy

2.14 The fear that a unitary approach to pay and benefits would obscure links with current equal pay case law is not significant enough to justify retention of the distinction. The Single Equality Act will not have retrospective effect. Thus, for some period there would be two separate approaches under the new and old regime. However, that time frame is likely to be

short lived. It is unlikely to cause much confusion to litigants or their advisors. Both will have time to adjust to the new approach and best practice guidance can be published.

2.15 A move away from the contractual law approach is unlikely to have the effect of removing the certainty of the claimant's continuing entitlement of equal pay. There is already a considerable body of European case law that has defined the boundaries of 'pay' under Article 141. The new domestic definition will be guided and informed by that jurisprudence.

2.16 The principle of equality must guide the new approach. There is no policy reason why employers should not be held liable for the claimant's past financial losses but also broadly aggravated or exemplary damages, damages for injury to feeling and any other injury suffered by the claimant as a result of the discrimination.

2.17 It should not be a relevant policy consideration that employers with no deliberate discriminatory intent could be liable for structural differences in pay evolved over a long period. It is well established principle that the test for less favourable treatment is objective and not predicated on establishing a motive on the part of the discriminator (e.g. *James v. Eastleigh Borough Council [1990] ICR 554* (HL)). Intention and motive can be relevant to the level of aggravated or exemplary damages. However, it does not follow that an employer found to have acted without deliberate discriminatory intent will have to pay significant levels of aggravated or exemplary damages if found liable.

2.18 European law treats pay slightly differently to other forms of discrimination because it applies the principles of equal work and work of equal value to such claims. The Single Equality Bill will have to apply the same approach to pay claims to ensure consistency with Art 141 EC Treaty, EC Directive 2006/54/EC and European jurisprudence.

2.19 ELA advocates the following simple approach for proving discrimination in pay cases:

2.19.1 The employee must show that they were employed in like work, work related as equivalent or work of equal value to that of an employee not of the same sex/race/sexual orientation (etc.) employed by the same employer.

2.19.2 The employee can rely on an actual or a hypothetical comparator. (See also our comments as to paragraph 1.3(a) regarding whether this should be part of a statutory formula or simply part of an evidentiary approach.)

2.19.3 The employer must show that any difference in pay was not tainted by discrimination based on sex/race/sexual orientation (etc.) and, if it was indirectly discriminatory, that it was justified.

2.20 In ELA's view, this test is consistent with European law. It also adopts and develops the approach taken by the House of Lords (*Strathclyde v. Wallace* [1998] ICR 205 and *Glasgow CC v. Marshall* [2000] ICR 196). The same approach for pay claims should be taken for discrimination on the other grounds e.g. race, sexual orientation, religion as there is no reason why those grounds should be subject to a different test.

2.21 The same defences, damages and limitation regime available under the SDA should apply to all pay claims.

Clarifying and simplifying the law and other possible developments (Paragraph 3.9(b) and (c))

2.22 At paragraphs 3.9(b) & (c) and 3.21 – 3.24 of the consultation paper, the Government proposes: 1) including in legislation settled principles of equal pay law emerging from judgments; and 2) considering options for simplifying equal pay legislation or making it easier for it to work in practice.

Clarifying and simplifying the law

2.23 In ELA's view, the first proposal to include settled principles of equal pay law in legislation is an ambitious one. The meaning of the various provisions of what is a relatively short statute are currently being tested to the extreme as parties are engaged in extremely high value litigation in various sectors. These are currently predominantly of two types at the moment. First, public sector employers such as local authorities and NHS organisations are facing multiple claims from relatively low or average earners. Secondly, financial services employers are facing high value claims from individuals seeking parity in their reward packages. (The latter are more commonly combined with a sex discrimination claim in the alternative to ensure the claim does not fall foul of the current distinction between the regimes for contractual and non-contractual elements.)

2.24 Appeals on equal pay cases are currently emerging on an almost weekly basis. Gleaning settled principles given the current intense focus on equal pay issues would perhaps result in very few principles being identified, thus reducing the value of the exercise. An approach of allowing the current glut of case law to be worked through to the point where settled principles may emerge and provide clarity would provide more flexibility.

2.25 Codification, even if done on an exhaustive basis (e.g. the business reasons for refusing a flexible working request), does not necessarily lead to reduced litigation. Particularly where codification is done on the basis of a non-exhaustive list (with a catch all category, such as the "some other substantial reason" test in unfair dismissal), there is room for argument and litigation results. This flexibility, however, is a positive in that it allows a party to argue a point successfully which may not have been contemplated by the legislators at the time the legislation was drafted. So codification can act as a bar to a valid claim or defence (as the case may be) where a less prescriptive approach would not have done. A balance has to be struck between the need for certainty and denying access to justice.

2.26 If the distinction between contractual and non-contractual terms is abolished (see above), the need to clarify issues such as appropriate comparators and appropriate terms for comparison would not arise. These could be left to Tribunals to interpret according to general principles as with other forms of prohibited discrimination (see our comments on paragraph 1.3(a) and further comments below).

2.27 However, if the decision is made to retain the difference between contractual and non-contractual approaches, it would be preferable to provide assistance in understanding the law to issue some form of Guidance (perhaps akin to the Guidance on the Meaning of Disability) or an updated Code of Practice which Tribunals could take into account in determining contractual issues. This could be updated by the Commission for Equality and Human Rights which would be a quicker and more practical solution to keeping apace with settled principles as they emerge than amending primary or secondary legislation.

Other possible developments

2.28 Suggestions for simplifying equal pay legislation or making it easier to work in practice are:

2.28.1 The example given in the consultation paper is of a moratorium on equal pay issues. This would mean that where an employer carries out an equal pay review and identifies gender inequalities in pay systems, they would have a period free from legal challenge within which to rectify discriminatory pay policies.

2.28.2 This particular suggestion does not sit happily with the ELA's concern that in the 21st century, gender discrimination should be treated consistently with other forms of discrimination to avoid creating a hierarchy of rights between different forms of

discrimination (see above). Such a moratorium would be likely to result in a bar to access to justice unless it were operated in such a way as to allow an individual to seek redress following the moratorium as if it had not taken place. For example, in terms of limitation, the individual would be disadvantaged if he/she were not able to recover compensation for the period of the moratorium. However, the employee might have difficulty showing that he/she would have lodged a claim at that point. This is an example of the significant practical difficulties in introducing such a moratorium.

2.29 Other ideas which the ELA believes are worth further consideration are as follows:

2.29.1 *Restricting the number of comparators that can be relied on* – It is common in multiple claimant cases for the claimants to play little active part in the prosecution of their claims and for them to target a wide range of comparators. Although it is open to Tribunals to exercise their case management powers to restrict the number of comparators considered at a Hearing, the EAT has recently held in *Redcar & Cleveland Borough Council v Bainbridge UKEAT/0424/06/LA and UKEAT/0031/07/LA* that it is open to a claimant to pursue claims against different comparators for parallel periods. The Tribunal rules require Tribunals to operate in accordance with the over-riding objective of dealing with cases justly. This requires a balancing act between a number of factors including proportionality to the complexity or importance of the issues. A limit on the number of comparators cited, of say, 10 would be consistent with this over-riding objective. (This suggestion is without prejudice to the ELA's contentions above and below about the statutory requirements regarding identification of comparators.)

2.29.2 *Aligning time limits for bringing claims with other forms of discrimination* - As the law on equal pay currently stands, the limitation period for bringing an equal pay claim in standard cases is 6 months from the last day on which the woman was "employed in the employment". Before the amendments to the Equal Pay Act brought in following *Preston v Wolverhampton NHS Trust [1998] IRLR 197,* that phrase meant the contract in which the equality clause was implied (which is not necessarily the same as the date on which her employment relationship ends). The phrase "in the employment" could be clarified as meaning in a particular role. It is then clear that once the individual stops performing a role, the time limit for pursuing a claim in respect of that role is running, even if they remain with the employer in a different role. This can be a particular difficulty in the case of claimants with multiple part-time roles. It would be more straightforward and provide certainty that the same limitation period be adopted as for other forms of discrimination. In other words, the act complained of is the trigger for a 3 month (not 6 month) time limit. Normal principles from other forms of discrimination could then apply for determining what the act is, whether it is a continuing one and whether it is just and equitable on the facts to extend the primary time limit.

2.29.3 *The burden of proof in victimisation cases*- In *Oyarce v Cheshire County Council UKEAT/0557/06/DA* the EAT recent held that the shifting burden of proof under section 54A of the Race Relations Act 1976 (RRA) only applies to allegations of harassment or discrimination on grounds of race or ethnic or national origin, and that victimisation claims are excluded. This is in contrast to other discrimination legislation in which the burden shifts to the employer to disprove victimisation once the employee has established a prima facie case. Accordingly, as the law stands at present, for those employees making claims of victimisation under the RRA the rule is that if an employee establishes a prima facie case but the employer has not provided an adequate explanation, the employment tribunal **may** draw an inference that the employee has been victimised but is not obliged to do so. ELA suggests that

the Government uses the Discrimination Law Review to rectify this anomaly i.e. change the law so that the burden of proof for victimisation under the RRA is the same as for other forms of discrimination e.g. sex, age and religion.

Requiring an actual comparator : Do you agree that allowing the use of hypothetical comparators would be unlikely to give any benefit in practice? (Paragraph 3.9(d))

2.30 Please see the detailed discussion in relation to abolishing the contractual and non-contractual approaches set out above and our general views on the requirement within statutory formulae of a comparator, whether actual or hypothetical.

2.31 In summary, ELA's view is that the distinction in the law between contractual and non-contractual claims concerning disparate treatment on the grounds of sex is arbitrary. If abolished, the law relating to equal pay could fall into line with the definition of discrimination under the SDA. If statutory formulae continue to require identification of comparators, ELA's view is that the use of a hypothetical comparator cannot be said to be unlikely to give any benefit in practice.

An Arbitrary Distinction

2.32 As the law presently stands, if an employee from an ethnic minority brings a claim for disparate contractual pay and conditions on the grounds of race, such a claim would fall under the Race Relations Act 1976. As a result, the employee will be entitled to rely on a hypothetical comparator in order to advance the claim. If another employee makes the same complaint, save for the fact that she argues that the disparate treatment is on the grounds of sex, she will not be entitled to rely on a hypothetical comparator.

2.33 This anomaly is more due to historical factors (outlined above) rather than founded on legal principle. In the circumstances, ELA's view is that express exclusion of hypothetical comparators in an equal pay claim would be inconsistent with other parts of discrimination legislation.

2.34 Paragraph 3.28 of the Consultation Documents refers to the European Court of Justice decision (*McCarthy's Limited v Smith [1980] IRLR 210*) which states that an actual comparator is required in equal pay cases. It is, of course, plain to see that the *McCarthy's* case is a case which is nearly three decades old. To put this in context, *EC Directive 2006/54/EC* (which member states must implement by 15 August 2008) does not draw any distinction between contractual and non-contractual discrimination on the grounds of sex. *Articles 2 and 4* of the Directive use the same language in the definition of discrimination that is used in the SDA and applies it to the principles of equal pay, and so this reinforces the view that there is no legally sound basis to continue with the arbitrary distinction on comparators.

2.35 Furthermore there is already some authority for no actual comparator being required in equal pay claims under Article 141. In *Allonby v Accrington & Rossendale College [2004] IRLR 224,* the ECJ held in the context of Mrs Allonby's claim to join the Teachers' Superannuation Scheme that claims in respect of discriminatory state systems do not necessarily require an actual comparator provided there is proof by use of statistics that the scheme has a discriminatory effect.

Practicalities and Policy

2.36 The ELA notes that there are some practical difficulties with regards to relying on hypothetical comparators in equal pay claims. It is right that in practice both claimants and respondents may find it difficult to provide Tribunals with evidence of the pay and benefits that a hypothetical comparator would have received. However, Tribunals are familiar with

dealing with hypothetical comparators in non-contractual claims and are familiar with the concepts and safeguards that need to be applied when a hypothetical comparator is used in other species of discrimination claim. These issues arise in, for example, the City bonus discrimination claims, where the claim is in respect of a non-contractual bonus.

2.37 In *Chief Constable of West Yorkshire Police –v- Vento [2001] IRLR 124 EAT*, the Tribunal found that there was no actual comparator that the Claimant (a female police officer) could rely upon in her non-contractual sex discrimination claim. As a result the Tribunal relied on a hypothetical comparator looking at how four other police officers had been treated in various circumstances which the Tribunal considered to be relevant. Having considered that evidence the Tribunal found that the Claimant was less favourably treated than a hypothetical male officer would have been in the same circumstances. This approach was affirmed by the Employment Appeal Tribunal, and was not subsequently appealed when the case was appealed on other grounds. Therefore, the EAT has held that it was legitimate to look at how non-identical but not wholly dissimilar cases had been treated in order to guide the Tribunal as to its assessment of how a hypothetical comparator would have been treated.

2.38 While ELA recognises that it is a question of policy, whether ultimately to abolish what we have identified as an arbitrary distinction, we do not believe that it is correct to say that allowing the use of a hypothetical comparator would be of no practical benefit. It could benefit claimants. (It is a policy question whether to amend in a way that would benefit claimants, but not respondents). For a host of reasons (for example, that the workplace is gender-segregated), a claimant may not be able to point to an actual comparator, but will be able to point to other groups of workers where there is disparity between the sexes, in order to argue successfully that a hypothetical comparator would have received more pay. The use of a hypothetical comparator may balance the fact that it is now more difficult to rely on actual comparators in other species of discrimination. The House of Lords' decision in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337*, makes clear that the scope for using comparators in a discrimination complaint is much more limited than had been previously, and that the Tribunal must be careful in comparing "like for actual like", taking all relevant factors into account. For these reasons, it is more common for the Tribunal to look at a hypothetical comparator and therefore the role of hypothetical comparators has been reinforced in discrimination claims generally since *Shamoon*.

2.39 For these reasons ELA does not agree that allowing the use of hypothetical comparators would be unlikely to give any benefit in practice.

3 CHAPTER 4 – "Balancing Measures"

Confine the concept of "reasonable adjustments"(Paragraph 4.7(a))

3.1 At paragraph 4.7(a) f the Consultation Paper the Government proposes to confine the concept of “reasonable adjustment” to disability discrimination law as at present, and not to broaden it to other protected groups.

3.2 In ELA’s view an extension of this concept risks constituting unlawful positive discrimination were it extended to any of the other strands (other than perhaps age discrimination where direct discrimination can in some circumstances be justified). Whilst there is some scope for balancing measures within the current European framework it is limited and any attempt to construct a “reasonable adjustment” obligation outside of disability would inevitably be extremely limited and therefore potentially confusing.

4 CHAPTER 5 – "Public Sector Equality Duties"

Introduction to ELA Response

4.1 The public sector equality duties apply, broadly, to all functions of the public authorities to which they apply, not merely the employment function. ELA's particular interest is the extent to which the duties relate to employment including recruitment and post employment issues. ELA's comments below therefore relate to employment rather than the promotion of equality in other public functions – although many of the issues are identical.

The Case For A Single Public Sector Equality Duty (Paragraph 5.24)

4.2 At paragraph 5.24 of the Consultation Paper the Government asks whether we agree that the race, disability and gender equality duties should be replaced with a single duty on public authorities to promote race, disability and gender equality.

4.3 ELA would welcome a single equality duty. At present, the three existing general duties for the race, disability and sex strands are in three separate Acts of Parliament, and are supported by three separate Codes of Practice produced by the three separate former Commissions, which in turn are supported by three separate sets of guidance.

4.4 Those charged with implementing the legislation frequently complain that they are drowning in Codes of Practice and guidance on the three duties. ELA agrees that a single equality duty, policed by a single equality Commission (the CEHR) with a single Code of Practice and a single set of guidance could be simpler and more practical for public authorities to implement. As well as reducing time and cost this should improve implementation and ultimately therefore the success of the duty.

4.5 Of course, much would depend upon the drafting of the single equality duty. As one of the stated aims is to focus on the needs of groups facing multiple discrimination, one of the limbs of a new single equality duty would need to be drafted in similar terms to section 3(e) of the Equality Act 2006, which talks about supporting the development of a society where there is mutual respect between groups. This would mean that the new single equality duty would have to be more than merely a consolidation of the existing equality duties.

Purpose Of A Single Equality Duty (Paragraph 5.30)

4.6 At paragraph 5.30 of the Consultation Paper the Government asks whether:

4.6.1 we agree that it would be helpful to provide a clear statement of the purpose of a single public duty which public authorities should use as a foundation for taking action to promote equality and good relations;

4.6.2 we agree with the four areas set out in the proposed statement of purpose. If not we are asked to give reasons and any alternative suggestions; and

4.6.3 we think that the proposed statement of purpose adequately captures the need for work to build good relations and promote positive attitudes within and between groups and underpins efforts to build integration and cohesion.

4.7 In ELA's view, the role of the general duty is to set out the "mission statement" for equality. The duty should be self explanatory. There should be no need for a statement of purpose. A statement of purpose is more likely to cause confusion rather than clarify the purpose of the general duty.

4.8 It is easy to see how public authorities struggle with the distinction between permissible positive action and unlawful positive discrimination when even a proposed clarifying statement of purpose talks in terms of "taking steps to counter the effects of disadvantage so as to place people on an equal footing with others" (i.e. treating people differently in order to achieve equality). This is recognisable in terms of the provision of reasonable adjustments for the disabled, rather less so in relation to race and sex. Vague statements about "meeting different needs," which are not clearly cross referenced to positive action principles, run the risk of promoting rather than eradicating unlawful discrimination.

A Strategic Equality Duty (Paragraph 5.33)

4.9 At paragraph 5.33 of the Consultation Paper the Government asks whether we agree that a single public sector equality duty should require public authorities to identify priority race, disability and gender equality objectives and take proportionate action towards their achievement. If not we are asked to give reasons and any alternative suggestions.

4.10 If this proposal means that the duty would not apply across an authority's functions but only those areas identified as of priority, in ELA's view, this is both unnecessary and a step backwards. The underpinning principle of the three existing general equality duties is that equality needs to be "mainstreamed" into public authority functions, policies and practices. To quote from the Schneider-Ross survey *Towards Racial Equality – an evaluation of the public duty to promote race equality and good race relations in England and Wales (2002)* – "it is about institutional change – getting the concept of inclusion into the bloodstream of an organisation so that it reaches every part of the body - and therefore everything it does."

4.11 The identifying of priority objectives might make for a few "easy wins" but at the expense of overall longer term institutional change. The tendency will be to focus only on the priorities whereas the original intention of the legislation was to make public authorities consider equality as part of their core business.

4.12 The current legislation requires "due regard" to be given to equality when public authorities are carrying out their functions. "Due regard" provides, in ELA's view, sufficient acknowledgement that public authorities need to prioritise and indeed the specific duties in respect of disability and gender require listed public authorities to record their objectives i.e. create action plans.

4.13 Legislation often takes time to bring about change. There is evidence that the public equality duties are becoming more prominent and are beginning to have their intended effect: for example, in the courts in cases such as *R (Elias) v Secretary of State for Defence* [2005] IRLR 788, CA and *R (BAPIO) v Secretary of State for the Home Department and others* [2007] EWHC 199, Admin Ct. and in actions taken by public authorities (in carrying out impact assessments when developing policy) and trade unions (which are now requesting impact assessments more regularly when representing claimants in Employment Tribunals).

4.14 As Zhou Enlai, the first premier of the People's Republic of China is supposed to have said when asked about the impact of the French Revolution: "It's too early to tell"! Institutional change takes time. Whilst ELA would like to see change brought about quickly, ELA believes that it is too early to be talking about writing off the existing approach especially within a year of the introduction of the disability and gender duties.

Setting Priority Equality Objectives (Paragraph 5.40)

4.15 At paragraph 5.40 of the Consultation Paper the Government asks whether we agree that public authorities should be required to review their priority equality objectives at least every three years. If not we are asked to give our reasons and any alternative suggestions.

4.16 As stated above, in ELA's view there is no need to change the current approach of authorities having "due regard" to one where authorities set priority objectives. If priority objectives are however adopted a review period of at least every three years would seem appropriate.

Strategic Equality Outcomes (Paragraph 5.41)

4.17 At paragraph 5.41 of the Consultation Paper the Government asks whether we think it would be helpful for strategic equality outcomes to be set by the appropriate national Government and if so what would be an appropriate way of doing this.

4.18 As currently drafted the specific duties in relation to disability include a duty on reporting authorities (mostly the Secretaries of State) to report every three years on disability equality in their respective sectors – see regulation 5 Disability Discrimination (Public Authorities)(Statutory Duties) Regulations 2005. In ELA's view this requirement might usefully be extended to the other strands. These reports might then provide useful base material for setting any appropriate strategic equality outcomes.

4.19 More generally however, a balance needs to be struck, as with individual authorities setting their own priorities, between the advantages of mainstreaming equality considerations into all public functions and focussing only on inevitably narrower priorities.

Ensuring Effective Performance (Paragraph 5.46)

4.20 At paragraph 5.46 of the Consultation Paper the Government asks:

4.20.1 for views on the proposed new approach to supporting effective performance of a single public sector equality duty by requiring proportionate action towards the achievement of priority equality objectives and on the four key principles the Government has identified;

4.20.2 whether we prefer this approach or an extension of the type of specific duties adopted so far in the race, disability and gender equality duties (we are asked to provide reasons); and

4.20.3 if we prefer an extension of the type of specific duties adopted so far in the race, disability and gender equality duties, we are asked which elements of the specific duties do we think should be retained for a single public sector equality duty and why.

4.21 ELA is concerned that if existing specific duties are replaced by non-enforceable principles, this will be a step backwards. In some cases it may also run contrary to one of the Government's stated aims at paragraph 1.1 of the Consultation Paper – "we want to make sure we do not erode existing levels of protection against discrimination" – for example, that disabled persons must be involved in the development of a Disability Equality Scheme.

4.22 Public authorities want to comply with the legislation and want to know what compliance looks like. Equally, employees and unions want to see evidence that authorities are complying with the legislation. The advantage of the current specific duties is that they provide a degree of reassurance to both sides. This could be lost if the existing specific duties are replaced by four key principles.

4.23 ELA of course, accepts that the production of, for example, an equality scheme whilst complying with the specific duties is not an end in itself. There has in the past perhaps been too much focus on process and not enough on outcomes. But the production of an equality scheme is a tangible step on the road to compliance. The specific duties also help to create a standard approach which allows one authority to compare more easily what it is doing against

what other similar authorities are doing. There is some scope for this to create a degree of competition with good practice being replicated and improved upon.

4.24 So far as equality schemes are concerned, there are a number of problems with the existing legislation which could be improved. For example:

4.24.1 the requirements are framed differently for the race, disability and gender strands;

4.24.2 for all the guidance and Codes of Practice, no Commission has yet produced a simple framework into which an authority could write up its scheme in the same way, for example, that the Commissions have developed pro-forma Questionnaires;

4.24.3 brevity has so far not been encouraged meaning that authorities have produced pages and pages of overblown waffle which is extremely difficult to follow and creates resource issues for the Commissions when checking compliance.

4.25 ELA would however, prefer to see the requirement to produce an equality scheme harmonised and simplified rather than scrapped.

4.26 So far as the race equality monitoring requirement is concerned, this provides valuable and transparent data about the way an authority's policies and practices are affecting race equality. It will be harder to monitor an authority's performance if monitoring ceases to be mandatory.

4.27 So far as the specific duty on Secretaries of State in relation to disability is concerned, please see our comments on paragraph 5.41 of the Consultation Paper (Strategic Equality Outcomes) above.

Which Public Authorities Should The Duty Apply To? (Paragraph 5.56)

4.28 At paragraph 5.56 of the Consultation Paper the Government asks whether we think that the proposed single public sector equality duty should apply to all public authorities and if not, we are asked to say how we think it should be targeted (we are asked to provide reasons).

4.29 In ELA's view it is important that the application of the legislation should be as clear as possible. Currently there is more clarity in relation to the race legislation than there is in relation to disability and gender because the race legislation is list based. An authority is covered only if it is on the list. That said, there appears to ELA to be no good reason for excluding some "pure" public authorities from the coverage of the legislation.

4.30 A more difficult question arises in relation to "hybrid" or "functional" public authorities i.e. bodies that have some private functions and some public functions for example a private or voluntary sector body contracting with a public authority to provide public functions. The example typically given is of a private security company transporting prisoners to and from court but this might also cover, for example, train operating companies or private bus companies contracting with local authorities.

4.31 Given the general approach adopted in the disability and sex discrimination legislation of mirroring the Human Rights Act 1998 definition of "public authority", it seems to ELA that the original intention of the Government was to cover "hybrid" or "functional" public authorities. That is certainly the view of the former Commissions as expressed in their (statutory) Codes of Practice.

4.32 It would inevitably mean a reduction in the scope of the disability and sex discrimination legislation to seek to apply the single equality duty only to some public authorities and/or to

disapply it to hybrid bodies. For employees and prospective employees of authorities and bodies taken out of the scope of the legislation this would amount to a step backwards.

4.33 Two alternative approaches have emerged from the consultation:

4.33.1 first, that sufficient certainty could be achieved by eschewing the list approach in favour of the Human Rights Act 1998 definition of public authority. To assist hybrid bodies to decide whether they are likely to be covered by the legislation a harmonised Code of Practice could set out the principles (as is currently the case with the Disability and Gender Codes of Practice – albeit that they are currently worded slightly differently from each other); or

4.33.2 secondly, that sufficient certainty can only be achieved with a list approach, adopted for all three strands. Where a public authority is to be added to the list, the CEHR should engage with that authority as to the reasons why that authority is being added and what it is hoped will be achieved by its inclusion on the list. The public authority would have a right to challenge its inclusion on the list. This would be particularly relevant if specific duties are retained. The list might include pure public authorities and also hybrid or functional bodies for example "train operating companies."

Extending The Coverage Of The Duty (Paragraph 5.72)

4.34 At paragraph 5.72 of the Consultation Paper the Government asks:

4.34.1 whether we think that a single public sector equality duty should be extended to cover age, sexual orientation and/or religion or belief;

4.34.2 for reasons, including examples of the types of disadvantage we believe is experienced by people because of their age, sexual orientation or religion or belief which could be addressed effectively through such a duty;

4.34.3 whether there might be disadvantages in extending the duty to any of these groups and if so we are asked to provide examples.

4.35 In the employment sphere, public authorities are of course, covered by obligations not to discriminate against job applicants, employees and former employees on the grounds of sexual orientation, religion or belief and age. The point of a general duty however, is that it seeks to achieve equality not by providing rights for individuals but by requiring active steps towards the promotion of equality.

4.36 In ELA's view the single equality duty should include all six strands of discrimination. There seems no compelling reason not to include all strands. To fail to do so would create two tiers of equality rights and priorities and imply that the top tier was more important than the second tier.

4.37 Existing legislation including, for example, section 404 of the Greater London Authority Act 1999, already contains an all encompassing general duty. Similarly, the Welsh Assembly Government has a unique statutory duty (under sections 120 and 48 of the Government of Wales Act 1998 and now section 77 of the Government of Wales Act 2006) to "make appropriate arrangements with a view to securing that its functions are exercised with due regard to the principle that there should be equality of opportunity for all people". ELA is not aware of any evidence to suggest that either of these provisions has proved to be problematic in practice.

Implementing A Single Equality Duty (Paragraph 5.74)

4.38 At paragraph 5.74 of the Consultation Paper the Government asks:

4.38.1 over what timescale do we think a single public sector duty and any extensions to it should be implemented to ensure we have learned as much as possible from the recently introduced duties on disability and gender;

4.38.2 whether we think public authorities should be given the option to implement any new approach in advance of it becoming a legal requirement, enabling those authorities who have already taken an integrated approach to build on existing work.

4.39 In ELA's view it would be worthwhile to delay implementation until the first three-yearly review point following implementation of the gender equality duty. Given that the gender and disability duties have really only just been introduced a delay would allow authorities to concentrate on implementation for a few years rather than on getting to grips with new legislation. Public authorities have invested time and money in trying to understand and implement the current duties and the purpose of the legislation as a whole could be undermined if authorities feel that their work to date has been wasted because the legislation has been changed.

4.40 ELA is less convinced by the suggestion of running the existing legislation in parallel with a new single equality duty. There is scope for confusion, possible resource issues for the CEHR trying to monitor and enforce compliance with two different systems, less opportunity to allow the existing duties to bed in and to take lessons learnt from the existing duties and apply them in the form of specific duties supporting a new single equality duty.

Enforcement Of A Single Public Sector Equality Duty (Paragraph 5.83)

4.41 At paragraph 5.83 of the Consultation Paper the Government asks whether we think there should be a single enforcement mechanism for the proposed single equality duty enabling the CEHR to issue a compliance notice with or without an assessment as appropriate in the circumstances, enforceable in the county court or Sheriff's court in Scotland (we are asked to provide reasons).

4.42 This question is premised on the basis that the current distinction between general and specific duties will be removed: in crude terms, as ELA understands it, that the specific duties will be abolished. In ELA's view the current distinction should be retained for reasons given above. If the current distinction is retained then the current enforcement system should, in ELA's view also be retained.

Role Of The Public Service Inspectorates (Paragraph 5.90)

4.43 At paragraph 5.90 of the Consultation Paper the Government asks what we think should be the role of the public service inspectorates in assessing compliance with public sector equality duties.

4.44 In ELA's view the priority here is to avoid duplication and make the best use of resources. The CEHR will have insufficient resources to monitor compliance on its own and will therefore be reliant upon other pubic service inspectorates to monitor equality performance at the same time as monitoring other performance targets.

4.45 ELA is sceptical that the proposed move away from tangible specific duties to rather vague principles will assist the monitoring process. The "transparency principle" will not assist authorities to know what to produce and inspectorates are therefore likely to receive wildly different types and volumes of information, hampering their role as inspectors.

Public Sector Procurement (Paragraph 5.100)

4.46 At paragraph 5.100 of the Consultation Paper the Government asks what issues we would like to see included in practical guidance on how public sector procurement can be used to achieve equality outcomes in the delivery of public services by the private sector, while ensuring that the guidance works well for business.

4.47 Taking the CRE guide, *Race Equality and Public Procurement: a guide for public authorities and contractors,* as a starting point, in ELA's view the guidance would be more successful if it was linked a little better to procurement law. For example, it is not until Chapter 8 page 52 that the guide happens to mention that it is based generally on the two-stage restricted procedure. No explanation is given of the nature of the procedure. No mention is made of the open, negotiated and competitive dialogue procedures.

4.48 An end-to-end practical example of a procurement would also be helpful, showing at what stage equality issues could be used to select out bidders and to tie the successful bidder into equality outcomes through the contract.

4.49 In addition it would be useful to include reference to the guidance relating to certain public authorities, i.e. The Cabinet Office Statement of Practice 2000 and, with reference to Local Authorities, the ODPM Circular 03/03, in a practical example. An impact assessment on measures proposed by the transferees in respect of both transferring staff and new joiners could be included, as well as reference to the ongoing obligation upon the transferring authority to monitor the contract and enforce the obligations set out in the Code of Practice on Workforce Matters in Local Authority Service Contracts (Annexe D to the ODPM Circular 03/03).

5 CHAPTER 6: "Promoting Good Equality Practice In The Private Sector"

Developing a light touch "equality check tool"(Paragraphs 6.2(a) and 6.7 to 6.10)

5.1 The Green Paper proposes to "develop a 'light-touch equality check tool' for employers to use and consider introducing a voluntary equality standard scheme for businesses, which could be an independently assessed accredited standard or a non-accredited good practice and compliance tool." (paragraph 6.2(a) and 6.7 to 6.10)

5.2 ELA does not propose to comment on whether the "light touch" equality check tool would meet its stated aims. Indeed, the Green Paper gives very little detail about what it might entail. However, ELA considers that the proposals throw up the issue of what impact, if any, such a scheme may have on both the current approach to the burden of proof in discrimination cases and an employer's liability for any discrimination that is found to have taken place, with reference to the "reasonable steps" defence.

5.3 Under section 41 of the Sex Discrimination Act 1975 where the act or acts complained of have been done by an employee it is a defence for the employer to prove that he took such steps as are reasonably practicable to prevent the employee from doing that act or acts. This is mirrored in other discrimination legislation.

5.4 It is difficult to make more than an initial comment regarding how an "equality check tool" would affect this defence as the term is not defined in the Consultation Paper. The value of an equality check tool would be that Claimants and Respondents could use compliance (or the lack of) to demonstrate whether all reasonably practicable steps had been taken. However, it is ELA's view that it would be essential for any equality check tool to have some form of external accreditation to be potentially of any real value. Without some form of independent accreditation it would be difficult for a Tribunal to assess compliance and in ELA's view it would therefore in most cases be unlikely to be regarded as significant by an Employment Tribunal and would not materially affect the determination of whether all reasonably practicable steps had been taken. However, an accredited scheme may be of assistance in the way that Codes of Practice are currently utilised.

5.5 It is also considered that compliance with an accredited scheme may provide for greater transparency between employers and employees particularly in the often contentious areas of appraisals and bonuses.

5.6 Equally, there is no statutory limitation on what can form the basis for an inference of discrimination being drawn. It is likely that any failure to use the equality check tool would form the basis of an argument that an inference of discrimination should be drawn.

6 CHAPTER 7: "Effective Dispute Resolution"

Multiple Discrimination Claims (Paragraphs 7.31 to 7.34)

6.1 The Green Paper seeks views on whether more needs to be done to improve the treatment of multiple discrimination claims when resolving disputes. (paragraph 7.5(e) and 7.31 to 7.34)

6.2 In summary, ELA suggests that the law would be simpler and do greater justice if the formal requirement for a comparator were removed and "overlapping" claims were permitted.

6.3 There has been almost universal support for the concept of a single equalities commission as it was believed that this would provide a unified approach to various discrimination strands and allow for the pooling of expertise and specialist knowledge. It was also hoped that individuals who suffered discrimination on more than one ground would, finally, be able to obtain proper representation. It is disappointing, therefore, that the current Government position, as expressed in the consultation document, is that it is not proposed to legislate in this area.

6.4 It is widely accepted by all special interest groups that individuals who fall into more than one category may face a more pernicious form of discrimination. Often the further an individual differs from the perceived norm, the greater the level of disadvantage suffered (crudely put by one employer as 'the three strikes and you're out' rule). Thus, the DRC has highlighted the greater inequalities for elderly disabled persons, the EOC has published research showing particular disadvantages suffered by Black minority ethnic women and organisations such as Stonewall have highlighted problems facing individuals who are gay and HIV positive and/or Black. The difficulty for such individuals and organisations is adapting the current legal straight jacket to fit factual permutations which are increasingly obvious in the workplace. This poses a problem not simply for the Claimant but also for the employer who may find themselves facing multiple, complex and expensive claims based on the same factual issues.

6.5 A Black Muslim woman who is dismissed may now bring claims of unfair dismissal, direct sex, race and religious discrimination and possibly indirect discrimination and victimisation (based on race, sex or religion) depending on her circumstances. Her legal advisers would be negligent not to consider all of these options. It may be difficult, if not impossible, to identify (when proceedings are issued) clear evidence which points more tellingly to one discrimination strand rather than the other two. The likely outcome is that she will either pursue all of the options above or possibly limit her claim to just one strand. When the evidence emerges at trial it may be that the operative prejudice could well be one of the other two strands. This is Hobson's choice as she will probably lose her claim either because the Tribunal considers the various allegations to be too complex and diffuse or because, for tactical reasons, she opts for the wrong strand. The employer may be faced with a 5 to 10 day hearing with very complex legal issues to defend. A similar analysis will apply for any combination of strands – the elderly disabled, the gay man of Muslim/Christian faith. The discrimination any of these individuals is experiencing may be aggravated because of the additional prejudice caused by their other attributes: the intersection of two or more strands of discrimination needs to be recognised and catered for in the legislation.

6.6 The Court of Appeal decision in *Bahl v Law Society [2004] IRLR 799* shows the limitations of the current legislative framework. Ms. Bahl sought to argue that she was being discriminated against because she was female and Asian and the Tribunal at first instance stated that she could compare herself with a 'white man'. This approach was criticised by the EAT and the Court of Appeal who stated that the strands must be disaggregated and a proper comparator constructed in relation to each strand of discrimination. The need to have a separate comparator for each limb of the claim makes it impossible to mount a multiple

discrimination claim with any prospect of success. An employer is thus faced with claims under different pieces of legislation with differing tests, exceptions and varying burdens of proof. None of this complexity meets the justice of the situation for either party.

6.7 Two relatively simple changes would assist: allowing Claimants to bring overlapping claims on more than one ground (as in Canada) and dispensing with the need for identification of different comparators for each limb of the claim. See our comments above on paragraph 1.3(a). At present, in relation to pregnancy discrimination there is no need for a comparator: the Tribunal simply focuses on the reason why the treatment occurred. This approach works perfectly well. There would be no disadvantage to the employer but rather a simpler and more streamlined claim which would probably be less expensive to defend and easier to understand.

7 CHAPTER 8 – "The Grounds Of Discrimination"

Simplify operation of definition of disability (Paragraph 8.2(a))

7.1 At paragraph 8.2(a) of the Consultation Paper the Government states that it proposes to simplify how the definition of disability operates in relation to "normal day-to-day activities" by removing the list of capacities. At paragraph 8.6 we are then asked whether we have any comments on this proposal.

7.2 An impairment is to be taken to affect the ability of a person to carry out normal day-to-day activities *only* if it affects one of the broad categories of capacity listed in Schedule 1 paragraph 4(1) to the DDA 1995. This provision therefore potentially prevents a person qualifying as disabled if his or her impairment does not affect one the capacities listed. The point is made in the consultation document that some claimants with mental impairments have struggled to point to a category of capacity affected by their impairment.

7.3 The solution to this problem is either to remove the list as suggested or expand the list of capacities to include, for example (as was suggested by the Joint Scrutiny Committee on the draft Disability Discrimination Bill in 2005):

7.3.1 ability to care for oneself;

7.3.2 ability to communicate and interact with others;

7.3.3 perception of reality.

7.4 In ELA's view the list of capacities serves no useful purpose and should be removed rather than expanded. The key issue in determining whether a person is disabled is currently whether their impairment has a substantial and long-term adverse affect on their ability to carry out day-to-day activities. The list of capacities is not a list of day-to-day activities nor does it assist with the question of whether the effect of the impairment is substantial or long-term. In any event our view is that it should be left to the Tribunal to determine whether in any individual case day-to-day activities are impaired.

Approach to parents and carers (Paragraph 8.2(b))

7.5 The Green Paper proposes to "continue to deal with issues relating to parents and carers through targeted provisions and specific measures rather than broad anti-discrimination provision." (paragraph 8.2(b) and 8.7 to 8.20)

7.6 In summary, ELA agrees that targeted measures should be continued but notes that it is arguable that there is a current mismatch in rights between male and female employees.

7.7 In ELA's view the current state of the law as it applies to carers in employment is inconsistent in its application and difficult for both employer and employees to understand. The Green Paper cites current protection for carers in the form of the Flexible Working Regulations, the Part-Time Workers Regulations, and the Sex Discrimination Act (chiefly the provisions on indirect discrimination).

7.8 The Flexible Working Legislation, including changes in April 2007 to cover those caring for dependant adult relatives and co-habitees, does not prevent less favourable treatment per se and a flexible working request can be refused provided the employer follows the procedure and cites one of the prescribed grounds. This is a purely procedural right with a very low cap on compensation.

7.9 At paragraph 8.13 (second bullet point) the Green Paper states that "many carers who want to work reduced hours may have protection under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000". In ELA's view this incorrectly states the law and is misleading as to the impact of those Regulations on carers. First, it is only those who already work part-time who would have protection of any kind under the Part-Time Workers Regulations, not those who wish to do so. Secondly, a part-time worker with caring responsibilities who wanted a further adjustment to their working patterns, or who suffered less favourable treatment as a result of those responsibilities (for example, if he or she refused to change shifts at short notice and was given a disciplinary warning) would have no redress under the Regulations. The Regulations only apply if the reason for the less favourable treatment is the worker's part-time status and no other reason (*Gibson v Scottish Ambulance Service*, unreported, EATS/0052/04).

7.10 The way in which the indirect sex discrimination provisions work, on the other hand, gives women with caring responsibilities, in effect, the right not to be discriminated against on ground of their carer status, and the right to have any request to change their working pattern to accommodate their caring responsibilities granted, unless the employer can objectively justify its actions. The employee first has the burden of proving that the employer is operating a "provision, criterion or practice" that would have a disproportionate impact on women. It is well recognised that women bear the greater burden of caring responsibilities in society (whether for children or adults). The indirect discrimination claim is thus, by its very nature, only available to women. With the changing role of men and women in the home and at work, ELA notes that it is arguable that this distinction is no longer appropriate. Furthermore, if it is factually correct (as suggested at paragraph 8.8 of the Green Paper) that the role of fathers is changing, then this may create a practical problem for both mothers and fathers alike under the current law. Indirect sex discrimination is based on the premise that there is a disproportionate effect on one sex. In the event that there is little or no difference between two sexes there would be no disparate impact and accordingly, neither sex would be able to make a claim for indirect discrimination.

7.11 It is true, as the Green Paper notes at paragraph 8.8, that male carers may be able to claim direct sex discrimination if they are treated less favourably than a female employee is or would have been treated in similar circumstances. This right has in some cases been used to create a right for a man with caring responsibilities to change his working pattern (see *Walkingshaw v John Martin Group S/401126/00*, Employment Tribunal, unreported). However, in the *Walkingshaw* case, the claimant was able to point to actual female comparators who had had their requests treated more favourably. In cases where the employer argues that it would also have refused a woman's request (even where that may have resulted in an indirect discrimination claim) the male employee would be left without a remedy. ELA is unaware of any successful claims in these circumstances.

7.12 We note that this issue is also related to the question of "associative discrimination" under the Disability Discrimination Act 1995. As already noted in discussion of that question above, a reference to the ECJ is pending in *Coleman v Attridge Law [2007] IRLR 88* on the construction of the Equal Treatment Framework Directive regarding discrimination by association with a disabled person. The ECJ reference in *Coleman* was made in December 2006 and therefore it may be a number of years before a determination is made. However, if the ECJ rules in the claimant's favour, this will provide another route by which carers may establish anti-discrimination rights under UK law.

Specific protection for married people and civil partners (Paragraph 8.2(c))

7.13 At paragraph 8.2(c) of the Consultation Paper the Government asks whether the protection for married persons and civil partners is still necessary given that we no longer have a 'marriage bar' in employment.

7.14 In our experience, it is rare for employers to impose a "marriage bar" or bar based on civil partnership status. However, given the relatively recent introduction of protection for civil partners, we think it is premature to remove this protection before the Government is able to assess whether it is necessary.

Approach to genetic predisposition discrimination (Paragraph 8.2(d))

7.15 At paragraph 8.2(d) of the Consultation Paper the Government asks whether we should continue with the current non-legislative approach to genetic predisposition discrimination.

7.16 This is essentially a political issue which ELA cannot directly comment on. However, we do observe that the current non-legislative approach provides no protection for those who may be discriminated against on the grounds of a genetic predisposition to a condition/illness. We would also note that there may be an issue surrounding the protection of those who take preventative action to protect themselves from developing an illness (for example women at high risk of cancer having mastectomies) rather than an issue surrounding employers having access to genetic data.

7.17 Again, this is a political decision.

8 CHAPTER 14: "Harassment"

Harassment at work (Paragraphs 14.8 to 14.10)

8.1 We welcome the Government's stated objective in these paragraphs that the law relating to harassment should be as consistent as possible. It is true that at present some groups are protected from harassment and some are not in the sense that specific equality laws extend only to the relevant protected groups. But the law relating to harassment is no longer really so limited in its application because of the advent of the Protection from Harassment Act 1997 ("PHA"). The consultation paper says that this Act has been primarily aimed at stalking but it is plain that it is not so limited and that it applies in the employment context. Parliament and the Courts have made this clear so referring to stalking as if it limits the ambit of the law is no longer relevant.

8.2 We welcome, however, the objective of the Government to make the law as consistent as possible. In the workplace the co-existence of the equality regimes and the PHA means that there is no consistency at present. The definitions applied are different, the sanctions are different, the limitation periods are different and the courts having jurisdiction are different. In particular we believe that the best venue to resolve employment disputes is the Employment Tribunal and not the criminal or civil courts.

8.3 The present situation is an unfortunate mess and the advent of the Single Equality Bill an excellent opportunity to clean it up and obtain some coherence. We also wish to make it clear that whilst we support a positive commitment to achieve the objective of consistency this is on the basis that should be no substantive dilution of existing rights.

8.4 Our experience as legal advisors of dealing with employment issues for employers and employees on a collective and individual basis leaves us in no doubt that extending and making consistent the existing statutory protections against harassment would address a real problem. Nothing we propose would be a limitation on free speech or prevent honestly held opinions. In the workplace the issue is appropriate and respectful conduct. The issue facing advisors is the complexity of enforcement created by the differences identified above.

8.5 ELA agrees the proposal that the freestanding statutory protection against harassment at work should be extended to harassment on the grounds of colour and nationality.

8.6 ELA makes no specific recommendations in relation to harassment outside the workplace other than to point out that existing case law is inconsistent when determining what activities are and are not "in the course of employment".

The definition (Paragraphs 14.20 to 14.25)

8.7 ELA agrees that the existing disjunctive definition used in the British definition of harassment should be retained as should the "reasonable consideration" test.

8.8 We believe that the suggested open/closed environments test is inappropriate and would only encourage the developments of a licence for inappropriate behaviour which is bound to have an impact on employees and workers within those establishments. If one allowed a no go area for the law in these environments it is difficult to see how those who worked in them would be protected and in the case of pubs and clubs, for example, considerable difficulty would arise in those circumstances when it is alleged that attendance there was "in the course of employment".

8.9 We do not believe that there should be a separate more stringent test for discrimination on the ground of religion or belief. We see no reason to afford religion and belief a lower status in law than other protected areas which in a sense can all be regarded as “minorities”.

8.10 With regard to harassment of employees by customers and clients ELA sees no logical reason to confine protection here to the ground of sex discrimination. It is already the case that any such harassment by third parties, taking place with the knowledge of the employer, creates a theoretical liability under Health and Safety laws but enforcement in this area is so notoriously ineffective that the law is brought into disrepute by its ineffectiveness.

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